

Words and Phrases Legally Defined

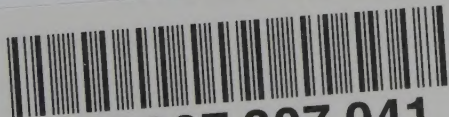
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Preface

This supplement contains a further selection of definitions from case law and statute.

The law as indicated is that existing at 30 September 2017.

This is the ninth Supplement to the Fourth Edition to be published. Editorial notes have been revised, particularly reference to Halsbury's Laws of England where volumes have been reissued, or issued for the Fifth Edition.

The style follows that used in the main volumes, which should be consulted first. Notes of statutory repeals or amendments and any other editorial comments are shown in square brackets.

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October 2017

A

ABANDONMENT

Of distress

[The common law right to distrain for arrears of rent was abolished as from 6 April 2014: see the Tribunals, Courts and Enforcement Act 2007, s 71; Tribunals, Courts and Enforcement Act 2007 (Commencement No 11) Order 2014, SI 2017/768. See 62 Halsbury's Laws of England (5th Edn) (2016) para 282.]

Of goods

[For 35 Halsbury's Laws of England (4th Edn) (Reissue) para 1225 see now 80 Halsbury's Laws of England (5th Edn) (2013) para 848.]

ABATEMENT

Of legacy

[For 17(2) Halsbury's Laws of England (4th Edn) (Reissue) para 506 see now 103 Halsbury's Laws of England (5th Edn) (2010) para 1086.]

Of nuisance

[For 34 Halsbury's Laws of England (4th Edn) (Reissue) para 74 see now 78 Halsbury's Laws of England (5th Edn) (2010) para 214.]

ABEYANCE

Of peerage

[For 35 Halsbury's Laws of England (4th Edn) (Reissue) para 940 see now 79 Halsbury's Laws of England (5th Edn) (2014) para 832.]

ABSOLUTE INTEREST

[For the Income and Corporation Taxes Act 1988, s 701(2) see now the Income Tax (Trading and Other Income) Act 2005, s 650(1) and the Corporation Tax Act 2009, s 935(1).]

ABSTRACT OF TITLE

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 141 see now 23 Halsbury's Laws of England (5th Edn) (2016) para 113.]

ABUSE OF LAW

'[4] ... VAT is an EU tax imposed pursuant to successive Directives of the European Union, at the relevant time the Sixth Directive. The Directives are subject to the principle of abuse of law. By virtue of s 2(1) of the European Communities Act 1972 the same principle must apply to domestic legislation implementing the Directives.

'[5] Abuse of law is a concept derived from civil law jurisprudence, which is unknown to English common law but has been adopted by the law of the European Union. In its simplest form, it confines the exercise of legal rights to the purpose for which they exist, and precludes their use for a collateral purpose. For present purposes, the expression *détournement de droit* adopted by some French writers is probably a better description of its content. The application of the principle to tax avoidance schemes calls for a difficult balance to be drawn. It is traditional, at any rate in this jurisdiction, to distinguish between avoidance, which involves the lawful arrangement of a taxpayer's affairs so as to minimise his tax bill, and evasion, which is an unlawful failure to account for tax due, generally by suppressing or falsifying information. Sophisticated avoidance schemes do not so much undermine this distinction as challenge its usefulness. By artificially reclassifying transactions so as to produce a more favourable tax outcome than commercially comparable "normal" transactions, they frustrate the objective of the taxing provision without necessarily falling foul of its language. The result is arbitrarily to depress tax receipts, producing inequity between taxpayers and potentially distorting competition between firms who are otherwise similarly placed. This gives rise to social costs which are significant and increasingly controversial. On the other hand, legal certainty is an important principle of both English and EU law,

particularly when it comes to justifying the financial demands of the state. Artificiality, if it is to be deployed as a workable legal concept, has to be tested against some standard of transactional normality, and the search for such a standard is far from straightforward. Taxpayers faced with a choice between alternative ways of achieving some commercial objective are in principle entitled to select the one with the more tax-efficient statutory outcome. In particular, they are entitled to choose between exempt and taxable transactions in their own financial interest. Like any other tax, VAT is due only in so far as its imposition is authorised by statute. It follows that although the courts may examine the commercial reality of transactions without being unduly hidebound by labels, they do not as a general rule enlarge the scope of a taxing provision by reference to considerations which affect neither the construction of its language nor the characterisation of transactions to which it is said to apply. These dilemmas are particularly acute in the United Kingdom, where the drafting of tax legislation has traditionally depended not on the formulation of general principles but on the definition of taxable occasions with a high degree of specificity.

[6] The main task of any court seeking to apply a principle of abuse of law is to reconcile these competing considerations. ...

[10] Two main difficulties arise where the principle of abuse of law is applied to tax avoidance schemes.

[11] The first arises from the assumption made by the Court of Justice in *Halifax* [*Halifax plc v Customs and Excise Comrs* (Case C-255/02) [2006] STC 919, [2006] ECR I-1609] that the principle will not apply to what it called "normal commercial operations" (para 69). Subsequent case law has established that this means those that are normal in the context of the relevant line of business, not necessarily normal for the particular taxpayer: *Revenue and Customs Comrs v Weald Leasing Ltd* (Case C-103/09) [2011] STC 596, [2010] ECR I-13589. I do not think that the court can have intended to set up a third distinct test, in addition to the two which are set out in paras 74–75 and repeated in its order. The "normality" of a transaction is relevant to the question posed in the court's first test, about the "purpose" of the relevant provision of the VAT Directives. "Normal commercial operations" will not as a general rule be regarded as contrary to the purpose of the Directives, since these must be assumed to have been designed to accommodate them. Thus in *Weald Leasing* the

taxpayer's decision to take equipment on lease from an intermediate company rather than buy it outright was an ordinary commercial transaction. It was not abusive even though it was unusual for the taxpayer in question and was designed to obtain a tax advantage by spreading the liability to tax over a longer period. The choice between leasing and outright purchase was a choice accommodated by the scheme of the VAT legislation. The tax treatment of lease payments being a facility available under the legislation itself, resort to it could not be regarded as contrary to its purpose. For the same reason, a transaction is not abusive merely because it falls within an exception or derogation from ordinary principles of EU law governing the incidence of VAT, such as the right enshrined in the Sixth Directive to deduct input tax generated by transactions in another member state. It follows that the sourcing of goods or services from a country in which the VAT regime is more favourable is not in itself abusive, even though the object and effect is to allow the deduction of input tax without the payment of output tax (*Revenue and Customs Comrs v RBS Deutschland Holdings GmbH* (Case C-277/09) [2011] STC 345, [2010] ECR I-13805). The reason, as the court explained in that case at paras 51–52, is that this is a choice inherent in a scheme of taxation that is designed to be fiscally neutral as between different member states while allowing for some differences between their implementing laws. Likewise, the conduct of a genuine business activity through a subsidiary incorporated in another member state is not abusive, although the sole reason for the choice is that it has a lower rate of corporation tax: *Cadbury Schweppes plc v IRC* (Case C-196/04) [2007] All ER (EC) 153, [2006] ECR I-7995. Precisely the same considerations must apply to a decision to source goods or services from outside the European Union, an option which is inherent in the territorial limits of the EU VAT regime and the assignment of economic relations with third countries to other policies of the Union.

[12] The second difficulty which arises from the application of the principle of abuse of law to tax avoidance is that of concurrent purposes. Tax avoidance schemes are rarely directed exclusively to tax avoidance. It is difficult to conceive of a scheme, other than a fraudulent one, which achieved absolutely nothing but a tax advantage. They are usually directed to achieving a commercial purpose, such as the provision of the call centres in *Halifax*, in a way which avoids a tax liability that would otherwise be associated with it. The

potential for abuse consists in the method chosen to achieve the commercial purpose. In *Ministero dell'Economia e delle Finanze v Part Service Srl* (Case C-425/06) [2008] STC 3132, [2008] ECR I-897, the consideration payable by the lessee under a leasing transaction was artificially split between two contracts, one with the lessor and the other with an associated company of the lessor. The latter contract was structured so as to qualify as an exempt financial contract under Italian law, so as to reduce the amount chargeable to VAT. The transactions had a legitimate commercial purpose, namely the leasing of the cars, but the method of achieving that purpose was held to be open to challenge if “the accrual of a tax advantage constitutes the principal aim of the transaction or transactions at issue” (para 45). This conclusion seems to me to do no more than make explicit something which is implicit in the *Halifax* tests. Identifying the “essential aim” in a case of concurrent fiscal and commercial purposes depends on an objective analysis of the method used to achieve the commercial purpose. As Advocate General Maduro observed in a passage from para 89 of his opinion which was in terms approved by the court (para 75), the taxpayer’s choices must be “at least to some extent, accounted for by ordinary business aims”. The question is therefore whether the commercial objective is enough to explain the particular features of the contractual arrangements which produce the tax advantage.

[13] These considerations effectively answer a question which is likely to arise in most cases involving prearranged sequences of transactions. Is the relevant “aim” that of the scheme as a whole or of its component parts? The answer is that it may be either or both. Because the principle of abuse of law is, in this context, directed mainly to the method by which a commercial purpose is achieved, it is necessary to analyse each transaction by which it is achieved. Because the purpose of each step will generally be to contribute to the working of the whole scheme, the effect of the whole scheme has also to be considered. In *WHA Ltd v Revenue and Customs Comrs* [2007] EWCA Civ 728, [2007] STC 1695 (at [22]), Lord Neuberger, delivering the leading judgment in the Court of Appeal, rejected the submission that the court was confined to considering the artificiality or purpose of each individual step, since these will commonly be individually unassailable but designed to produce the tax advantage in combination. I agree with this observation.’ *Pendragon plc v Revenue and*

Customs Commissioners [2015] UKSC 37, [2015] 3 All ER 919 at [4]–[6], [10]–[13], per Lord Sumption

ACCEPTANCE

Of bill of exchange

[For 4(1) Halsbury’s Laws of England (4th Edn) (2002 Reissue) paras 352–359 see now 49 Halsbury’s Laws of England (5th Edn) (2015) paras 235–248.]

Of offer

[For 9(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 650 see now 22 Halsbury’s Laws of England (5th Edn) (2012) para 251.]

ACCESSION

[For 35 Halsbury’s Laws of England (4th Edn) (Reissue) para 1238 see now 80 Halsbury’s Laws of England (5th Edn) (2013) para 823.]

ACCIDENT

Canada ‘43. “Accident” is defined in the first policy as:

“Accident” includes continuous or repeated exposure to conditions which result in property damage neither expected nor intended from the standpoint of the Insured.

As indicated before, essentially the same definition applies to “occurrence” which is used in later versions of the policies.

‘44. Progressive again relies on the plain meaning of the definition of accident. It argues that “accident” includes the negligent act that caused damage that was neither expected nor intended by Progressive.

‘45. Lombard disagrees. Lombard argues that when a building is constructed in a defective manner, the end result is a defective building, not an accident. ...

‘49. “Accident” should be given the plain meaning prescribed to it in the policies and should apply when an event causes property damage neither expected nor intended by the insured. According to the definition, the accident need not be a sudden event. An accident can result from continuous or repeated exposure to conditions.’ *Progressive Homes Ltd*

v Lombard General Insurance Co of Canada
2010 SCC 33, [2010] 2 SCR 245 at
paras 43–45, 49, per Rothstein J

Air accident

[Montreal Convention 1999 (as set out in the Carriage by Air Act 1961, Sch 1B), art 17.1. Claimant, a passenger on board an aircraft belonging to the defendant, when taking her seat for an international flight slipped on a plastic strip running under the seats covering the seat fix tracking, which was a standard fitment on the aircraft and which was secured to the floor of the aircraft, and suffered injury.] '[2] The appellant's claim could only prevail if it fell within the terms of art 17(1) of the Montreal Convention 1999, which provides: "The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking". Article 17(1) has the force of law in England by virtue of Sch 1B to the Carriage by Air Act 1961. It provides an exclusive remedy: see *Sidhu v British Airways plc*, *Abnett (known as Sykes) v British Airways plc* [1997] 1 All ER 193, [1997] AC 430 and *El Al Airlines Ltd v Tsui Yuan Tseng* (1999) 525 US 155. Its predecessor was art 17 of the Warsaw Convention 1929 as amended (as set out in Sch 1 to the 1961 Act), whose terms were in material respects to the same effect as those of art 17(1) of the Montreal Convention. I should note, however, that the Warsaw Convention was concluded in French. An English translation appeared in the Carriage by Air Act 1932, which gave the convention the force of law in England. The result was that in relation to international carriage by air, the French text was to prevail in the case of difference. The Montreal Convention, however, was drafted in English.

'[3] The question in this case was, and is, whether the injuries sustained by the claimant were caused by an accident within the meaning of art 17(1). The learned recorder, after much citation of learning in this jurisdiction and the United States, held that they were not.

...
'[10] It is convenient at this stage to identify precisely the issue we have to decide. As I have indicated, the appellant must show that her injuries were caused by an accident within the meaning of art 17(1). Thus the scope of the term "accident" is critical. It is clear ... that proof of fault on the part of the carrier is not required.

But "accident" cannot mean *any* occurrence on the aircraft which causes injury. So much at least is clear from *Air France v Saks* [(1985) 470 US 392, US Supreme Court 1981]. To elucidate its scope in a thumbnail sketch, we may postulate three situations. (1) A member of the cabin staff loses his footing in the gangway and spills hot coffee, burning a passenger's hand. Plainly there is an accident; in the language of the *Saks* decision, "an unexpected or unusual event or happening that is external to the passenger". (2) A passenger suffers a heart attack unprompted by any event in the aircraft. As Mr Menzies accepted, plainly there is no accident; there is no event which might qualify as such. This situation is not far from the actual facts in *Chaudhari v British Airways plc* [1997] CA Transcript 590, (1997) Times, 7 May, to which I will refer. (3) The third situation is this present case. On the one hand, there is no event entirely unconnected with the passenger, such as the crew member losing his footing in situation (1). On the other, the injury is not caused by an autonomous collapse in the passenger's health with which the aircraft environment had nothing to do, as in situation (2). Mr Menzies' case is that there was an accident causative of his client's injury—her slipping on the plastic strip. Mr Lawson for the respondent submits by contrast that there was no accident—the slip was not an untoward event external to the passenger: the plastic strip was inert in its ordinary condition; nothing happened save for the appellant's coming into contact with it. The issue in the appeal can accordingly be stated in this way: where injury is caused by an event (here the slip) constituted by some contact or interaction between the passenger and the aeroplane in its normal state, is such an event an "accident" within art 17(1)?

'[11] In order to decide which submission is correct, it is necessary to look at further authority.

...
'[30] At para [10] I formulated the issue in the appeal as follows. Where injury is caused by an event (here the slip) constituted by some contact or interaction between the passenger and the aeroplane in its normal state, is such an event an "accident" within art 17(1)? This formulation is intended to distinguish the case from two others—examples (1) and (2) in para [10]—where the position seems to be clear. In (1) there is plainly an accident which occurs, so to speak, without any help from the passenger; it is entirely "external" to him or her. In (2), just as plainly, there is no accident at all. But (3)—this case—is less clear; and it might be

said that the formulation in *Air France v Saks* (1985) 470 US 392 at 405, “an unexpected or unusual event or happening that is external to the passenger”, does not conclude the question. As I have indicated Mr Menzies says that his client’s slipping on the plastic strip was indeed such an event, and thus an accident. Mr Lawson submits that it was not; it was not an event which was “external” to the passenger.

‘[31] Mr Menzies was at pains to underline the propositions (a) that in construing art 17 the starting point is to consider the natural meaning of the language used, and (b) that “judicial formulation[s] of the characteristics of an art 17 accident should [never]... be treated as a substitute for the language used in the convention” (see [2006] 1 All ER 786 at [12]). In support of the latter submission he drew attention to this observation of Kay LJ in *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2004] 1 All ER 445, [2004] QB 234 in the Court of Appeal:

“[86] Some of the decisions to which we have been referred suggest that courts have taken as their starting point other decisions on the application of the article rather than, as I believe is inevitably correct, an initial consideration of the language of the article itself. The result is a gradual journey so far away from the source that the origins can no longer be clearly seen ...”

Mr Menzies’ argument thus places no little weight on the ordinary meaning of “accident”. He submits that what caused his client’s injuries was obviously an accident. He submits also that we should not be distracted from this plain reality by the refinements of judicial discussion in the authorities to which our attention was invited.

‘[32] On the face of it these points possess considerable force. But Mr Menzies’ reliance on the ordinary sense of the term “accident” is, as I have foreshadowed, to some extent undercut by the legal fact that “the basic concepts [the convention] employs to achieve its purpose are autonomous concepts” (see per Lord Steyn in *Morris v KLM Royal Dutch Airlines* [2002] 2 All ER 565 at [16] ...: see further Lord Hobhouse (at [147]) ...). As for the submission that we should not be led away from the convention text by the gloss of authority, I can see that if, for example, the argument were made to turn on what the Supreme Court meant by “external” in its judgment in *Air France v Saks*, it would be set on a wrong course; we should be interpreting an interpretation. But in

deciding the issue before us we must obviously deploy binding authority as “a guide to the application of the convention language to facts of a type similar to those of the case in question” (per Lord Scott in *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2006] 1 All ER 786 at [12] ...).

‘[33] On the substantive merits of his case Mr Menzies faces a further difficulty. He accepts, as he must, the correctness of the decision in *Chaudhari v British Airways plc*, and thus the proposition that where injury is caused by an autonomous collapse in the passenger’s health with which the aircraft environment had nothing to do, there is no accident: situation (2) in my set of three examples. But this tends to undermine his position on the facts of this case—situation (3). In the course of argument Thomas LJ suggested to Mr Menzies that a passenger might slip just as his client did, and be injured as a result; but the slip might be occasioned as readily by some pre-existing internal condition of the passenger as by anything to do with the aircraft. If it were so occasioned, Mr Menzies would not assert liability under art 17(1) (if he did, any distinction of substance between situations (2) and (3) collapses). But there is the same *slip* whether it happens because of the passenger’s health or the aircraft’s condition. How then can the slip be the accident for the purposes of situation (3)? If not the slip, what else? Perhaps the accident is merely the lack of friction on the plastic strip; but that, surely, is hardly an event, or happening, at all.

‘[34] These are formidable difficulties. However rather than allow their weight alone to conclude the case against the appellant, I think we should look at the problem from a more strategic point of view. I have cited authority concerning the balance struck by the convention. If the appellant’s case is good, then art 17(1) would appear to impose liability for a very wide range of injuries suffered on board aircraft. Any slip or fall resulting merely from contact with an inert piece of equipment, installed and operating as intended, would constitute an accident. Indeed, it is hard to see how *any* injury, save only one caused by an autonomous collapse or deterioration in the passenger’s state of health having nothing to do with conditions on the aircraft, would be excluded: there would presumably always be some event causing the injury, which could be categorised as an “accident” just as Mr Menzies has sought to categorise his client’s slip. But even if that goes too far, the multitude of instances where on Mr Menzies’ case there

would certainly be an “accident” discloses, in my judgment, a scenario which is far distant from the careful balance of interests struck by the convention, as it has been described in particular by Lord Steyn, Lord Hope and Lord Hobhouse in *Morris v KLM Royal Dutch Airlines*.

[35] I conclude that art 17(1) contemplates, by the term “accident”, a distinct event, not being any part of the usual, normal and expected operation of the aircraft, which happens independently of anything done or omitted by the passenger. This gives the term a reasonable scope which sits easily in the balance the convention strikes. It is, I conceive, in line with all the leading authorities from *Air France v Saks* onwards which, save only, with respect, for Lady Hale’s opinion in *Re Deep Vein Thrombosis and Air Travel Group Litigation*, uniformly emphasise the importance of the causative event’s being “external” to the passenger. There are some particular formulations in the cases which (without picking over the texts to the last comma, a fruitless and inappropriate exercise) especially point, as it seems to me, towards this approach. I have already cited Lord Phillips MR’s judgment in *Re Deep Vein Thrombosis and Air Travel Group Litigation* [2006] 1 All ER 786 at [21], where he referred to “an untoward event which impacts on the body”. This suggests to my mind the happening of an event which is anterior to and separate from any involvement of the passenger. So also Lord Steyn’s observation (at [33]) that “[i]t is an integral part of the test of what amounts to an accident that it must have a cause external to the passenger”. Assistance is also to be had from O’Connor J’s observation at 406 of *Air France v Saks* itself: “[W]hen the injury indisputably results from the passenger’s own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply.” This was the passage which, it may be recalled, Mr Menzies submitted was “not part of the *Saks* definition”. I do not agree. This statement is part and parcel of the Supreme Court’s exegesis of the convention.

[36] In all these circumstances I cannot accept Mr Menzies’ submissions. There was no accident here that was external to the appellant, no event which happened independently of anything done or omitted by her. All that happened was that the appellant’s foot came into contact with the inert strip and she fell. It was an instance, to use Leggatt LJ’s words in *Chaudhari v British Airways plc* [1997] CA

Transcript 590, (1997) Times, 7 May, of “the passenger’s particular, personal or peculiar reaction to the normal operation of the aircraft”. *Barclay v British Airways plc* [2008] EWCA Civ 1419, [2009] 1 All ER 871 at [2]–[3], [10]–[11], [30]–[36], per Laws LJ

Australia [Civil Aviation (Carriers’ Liability) Act 1959 (Cth), s 28; Warsaw Convention, art 17. Passenger alleged injuries sustained resulting from an accident occurring in the course of embarking aircraft.] [20] It was common ground below that liability arose under Pt IV of the Civil Aviation (Carriers’ Liability) Act or not at all. In summary, Jetstar contends that her Honour has allowed concepts of common law negligence to influence her characterisation of the alleged unsafe state of the stairs as an unusual, external event and the cause of the injury and thus an “accident” within the meaning of that term in s 28 of the Civil Aviation (Carriers’ Liability) Act.

... [33] In the circumstances of Mr Brannock’s claim the word “accident” in s 28 may be accepted as having the same meaning as in Art 17. “Accident” is employed in the same sequence of phrases in s 28 as in Art 17. While Pt IV of the Civil Aviation (Carriers’ Liability) Act does not carry any international convention directly into domestic law, it is accepted that Pt IV extends principles relating to international air carriage into domestic law. In *Povey [Povey v Qantas Airways Ltd]* (2005) 223 CLR 189; 216 ALR 427; [2005] HCA 33, the High Court observed that, in construing Pt IIIC of the Civil Aviation (Carriers’ Liability) Act (which applies the provisions of the Montreal No 4 Convention), “international treaties should be interpreted uniformly by contracting states”, adding that:

[t]he ultimate questions are, and must remain: what does the relevant treaty provide, and how is that international obligation carried into effect in Australian municipal law?

[34] *Povey* required consideration of the expression “accident” as it appears in s 28. The parties in *Povey* accepted the correctness of certain decisions of the United States Supreme Court and *Sidhu [Sidhu v British Airways Plc]* [1997] AC 430; [1997] 1 All ER 193, a decision of the House of Lords, which established certain propositions about the construction of the Warsaw Convention. Similarly, Mr Grant-Taylor SC for Mr Brannock,

accepted that the correct approach to s 28 may be derived from those decisions.

[35] The starting point for a discussion about what is meant by “accident” in s 28 is *Saks* [*Air France v Saks* (1985) 470 US 392]. That case involved international travel and fell to be decided under Art 17 of the Warsaw Convention. The respondent/passenger felt extreme pressure and pain in her left ear as the plane in which she was travelling descended to land in Los Angeles on a trip from Paris. As a consequence she became permanently deaf in that ear. She filed a suit alleging that her hearing loss was caused by the negligent maintenance and operation of the jet liner’s pressurised system. The opinion of the court was delivered by O’Connor J. Her Honour noted that the provision concerning liability for the loss of baggage employed the word “occurrence” not “accident” which implied that the drafters of the convention understood the word “accident” to mean something different from the word “occurrence”. Otherwise, logically, the drafters would have used the same word in each article. Her Honour particularly noted that the text of Art 17 referred to an accident which caused the passenger’s injury, and not an accident which is the passenger’s injury. Since the word “accident” can be used in many senses this distinction was significant. Her Honour quoted the observation of Lord Lindley in *Fenton v J Thorley & Co Ltd* [[1903] AC 443 at 453, HL]:

The word “accident” is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word “accident” is also often used to denote both the cause and the effect, no attempt being made to discriminate between them.

... [52] The accumulation of circumstances as pleaded by Mr Brannock which her Honour likened to the “chain of causes” mentioned in *Saks* cannot, either individually or collectively, create an event external to the passenger. The stairs were an ordinary feature of embarkation. Mr Brannock’s approach to embarking and using the stairs was peculiar to him. Mr Brannock’s pleaded case is no different from the

tripping and slipping cases where recovery has been denied. The primary judge erred when she concluded that the question of whether the stairs were an “event” external to the passenger was answered by the proposition “whether the stairs were unsafe and whether their unsafe design caused Mr Brannock’s fall are questions of fact for a trial”. *Brannock v Jetstar Airways Pty Ltd* (ABN 33 069 720 243) [2010] QCA 218, (2010) 273 ALR 391 at [20], [33]–[35], [52], per White JA

[For 33 Halsbury’s Laws of England (4th Edn) (Reissue) para 601 et seq see now 78 Halsbury’s Laws of England (5th Edn) (2010) para 1.]

In insurance policy

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 569 see now 60 Halsbury’s Laws of England (5th Edn) (2011) para 545.]

ACCOMMODATION BILL

[For 4(1) Halsbury’s Laws of England (4th Edn) (2002 Reissue) para 383 see now 49 Halsbury’s Laws of England (5th Edn) (2015) para 266.]

ACCORD AND SATISFACTION

[For 9(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 1043 see now 22 Halsbury’s Laws of England (5th Edn) (2012) para 605.]

[For 45(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 386 see now 97 Halsbury’s Laws of England (5th Edn) (2015) para 485.]

ACCOUNTING DATE

[For the Income and Corporation Taxes Act 1988, s 834(1) see now the Income Tax (Trading and Other Income) Act 2005, s 197(1) and the Corporation Tax Act 2010, s 1119.]

ACCOUNTS RECEIVABLE

New Zealand [Whether the Commissioner of Inland Revenue was entitled to all or any of a sum held by the liquidators depended on whether those funds constituted ‘accounts receivable’ under the Companies Act 1993, Sch 7, cl 2(1), the phrase having the same meaning as the Personal Property Securities Act 1999.] [42] The term “account receivable” is defined in s 16 of the PPSA as:

a monetary obligation that is not evidenced by chattel paper, an investment security, or by a negotiable instrument, whether or not that obligation has been earned by performance.

‘[43] Associate Judge Gendall concluded that the term “accounts receivable” was not limited to book debts. He first discussed the position under the PPSA, then considered the relevant legislative history and the High Court decision in *Commissioner of Inland Revenue v Northshore Taverns Ltd (in liq)* [(2008) 23 NZTC 22–074], where Associate Judge Hole held that “accounts receivable” was limited to “book debts”, before turning to analyse the expression itself in the context of well-established principles of statutory interpretation and the submissions for the parties.

‘[46] We recognise, as Associate Judge Gendall did, that the meaning of “accounts receivable” depends on the text of the relevant provisions read in light of their purpose, the objects of the legislation and their context, interpreted in a realistic and practical manner in order to enable them to work. The latter requirement is particularly important in the context of this legislation which must be applied by busy receivers and liquidators. We therefore start with the text of the relevant provisions before considering their purpose and legislative history and the decisions and principles of statutory interpretation relied on by Mr Tingey.

‘[82] Accordingly, in our view, the term “accounts receivable” in sch 7, cl 2(1) of the Companies Act has the same meaning as given in s 16 of the PPSA, namely “a monetary obligation that is not evidenced by chattel paper, an investment security, or by a negotiable instrument, whether or not that obligation has been earned by performance”.

‘[83] Under this definition any “monetary obligation” that is not expressly excluded is included. In this context a “monetary obligation” is an existing legal obligation on another party to pay an identifiable monetary sum to the company on an ascertainable date. The obligation must be legally enforceable by the company (at the date of the receivership or liquidation) on the basis that the other party has an existing liability to make the payment.

‘[84] The definition includes, but is not limited to, debts or “book debts”. Also included are other legally enforceable rights under deeds, statutes and court judgments whether or not earned by performance. Money held in a bank

account will be an “account receivable” because the bank will be under a legally enforceable obligation to pay the money to the account holder.⁹⁷

‘[85] A mere right to claim will not be included within the definition until it is converted into a legally enforceable obligation by a judgment of a court.’ *Strategic Finance Ltd (in rec & in liq) v Bridgman* [2013] NZCA 357, [2013] NZCCLR 19 at [42]–[43], [46], [82]–[85], per White J

ACCRETION

[For 49(2) Halsbury’s Laws of England (4th Edn) (2004 Reissue) para 23 see now 100 Halsbury’s Laws of England (2009) (5th Edn) para 39.]

ACCUSED (PERSON)

[Extradition Act 2003, s 70. Whether a person who was currently unfit to plead was ‘an accused’ for the purposes of s 70(4)(a), if he was being extradited in circumstances where he might remain unfit to plead.] ‘[34] Issues of fitness to plead are, in our judgment, issues that arise in the course of criminal proceedings which have been instituted with a view to prosecution, to determining guilt and, where guilt is established, to imposing punishment. The potential application of procedures for examining whether a person is mentally unfit to stand trial and, if so, whether it is established that he did the acts alleged against him in the criminal charge, does not mean that a criminal prosecution and subsequent trial is not sought at the point of extradition. Nor does such an eventuality create some new substituted and impermissible purpose for the request for the person’s return.

‘[35] The fact that part of criminal proceedings may be concerned with investigation of issues of unfitness and collateral questions of whether acts were done does not determine whether a person is accused of the commission of an offence for the purpose of s 70 of the 2003 Act or whether he is requested for the purposes of a criminal prosecution. Nor does the fact that the resolution of such issues is not itself the determination of a criminal charge with the higher standards of fairness which are expected in that context.

‘[36] To construe the Act so that a request for return successively fell in and out of the statutory scheme according to the state of medical evidence as to present unfitness and

future prospects would be contrary to the purposive reading of the section in accordance with *Re Ismail* [[1998] 3 All ER 1007, [1999] 1 AC 320, HL] principles. The proper place for protecting the interests of the requested person are the other parts of the Act providing the accused with a basis to resist return if his human rights were to be breached (no longer in issue in this case) or more broadly whether return would be oppressive ...

‘[37] In our judgment therefore the risk that on return and due inquiry a person might be found to continue to be unfit to stand trial does not mean that he is not an accused person or that the request for his return is made for any purpose other than that of being prosecuted for the offence. Nor does the fact that he may presently be unfit have that consequence, provided that there is a real prospect that the unfitness is not permanent. We consider, as envisaged in *Re Ismail*, that in each case there must be an intense focus on the facts to determine the purpose for which the requested person is being extradited.’ *Government of the Republic of South Africa v Dewani* [2014] EWHC 153 (Admin), [2014] 3 All ER 266 at [34]–[37], per Lord Thomas CJ

ACQUIRED FOR THE PURPOSE OF RE-SALE

Australia [By the Local Government Act 1993 (NSW) s 188(1), a council may not acquire land by compulsory process without the approval of the owner of the land if it is being acquired ‘for the purpose of re-sale’.] ‘[93] The expression “acquired for the purpose of re-sale”, when used in s 188(1), identifies a class of acquisitions of land that a council may not effect by compulsory process without the approval of the owner of the land. It identifies that class by focusing attention upon whether the purpose of the acquisition was a specific purpose — “re-sale” — rather than whether the purpose can be described as being an exercise of the council’s functions, the question posed by s 186(1). As noted earlier, it was accepted that the acquisitions of the appellants’ land was for the purpose of exercising the council’s function of carrying the public-private partnership into effect. To ask which function or functions of the council would be being exercised if the council acquired either the Fazzolari land or the Mac’s land does not assist in deciding whether, under s 188(1), the acquisition was for the purpose of re-sale.

‘[94] It is not necessary in these cases to

decide whether “the purpose” spoken of in s 188(1) is to be defined more precisely: whether as the *sole* purpose, or the *dominant* purpose, or in some other way. That is not necessary because the proposed acquisition of both the Fazzolari land and the Mac’s land is for only one purpose: the purpose of re-sale of the appellants’ land to Grocon.

‘[95] The purpose of the acquisition can be expressed at different levels of generality and abstraction. So, for example, it can be described as being for the purpose of the Civic Place development, or for the purpose of fulfilling the development agreement, or for the purpose of the council performing its obligations under that agreement. Perhaps there are other expressions of the purpose that could be adopted. But whatever level of generality or abstraction is chosen when identifying the purpose of the acquisition, closer examination of that purpose will always reveal that, upon the land being acquired, the council is to declare itself trustee of the land in return for Grocon’s provision of money and money’s worth. For that is the means that is stipulated in the development agreement as the means of achieving whatever more general or abstract statement of purpose is adopted.

...

‘[97] The steps which the development agreement requires to be taken, of the council declaring itself trustee of the Trust Land (including the Fazzolari land and the Mac’s land) on the terms stipulated, in return for Grocon providing the agreed consideration, are properly described as a “re-sale” of the land. Of course the word “re-sale” suggests the need to identify a prior sale to the council. But it is important to recognise that “re-sale” is used in the context of acquisition by compulsory process. The compulsory acquisition of the land by the council is an acquisition for which the council must pay monetary compensation. The disposition of the land by the council to Grocon is a disposition in return for the money and money’s worth which the development agreement obliges Grocon to provide. That disposition is properly called a “re-sale”.

‘[98] It may be observed that the provisions of the development agreement which stipulate the parties’ obligations are more elaborate than a simple agreement to buy an identified piece of land for a stated price. But neither the elaboration of the agreement, nor the attachment to it of the descriptive title of “financial structure”, denies that the development agreement provides for the council to first acquire the

Fazzolari land and the Mac's land by compulsory process, and then to dispose of the land to Grocon in return for money and money's worth. Neither the elaboration of the terms nor the identification of the arrangement as providing a financial structure detracts from the conclusion that the disposition to Grocon is a "re-sale" of the land.

'[99] For these reasons it follows that Biscoe J was right to hold that the purpose of the acquisitions, in these cases, was to transfer the land to Grocon for the stipulated consideration. That is, the land was to be acquired for the purpose of re-sale.' *R & R Fazzolari Pty Ltd v Parramatta City Council (Matter No S384/2008)* [2009] HCA 12, (2009) 254 ALR 1 at [93]–[95], [97]–[99], per Gummow, Hayne, Heydon and Kiefel JJ

ACT OF GOD

[For 9(1) Halsbury's Laws of England (4th Edn) (Reissue) para 907 see now 22 Halsbury's Laws of England (5th Edn) (2012) para 478.]

[For 45(2) Halsbury's Laws of England (4th Edn) (Reissue) para 363 see now 97 Halsbury's Laws of England (5th Edn) (2015) para 469.]

ACT OF STATE

'[199] The act of state doctrine comprises two principles. The first can conveniently be called "Crown act of state" and does not arise in the present cases. It is that in an action based on a tort committed abroad, it is in some circumstances a defence that it was done on the orders or with the subsequent approval of the Crown in the course of its relations with a foreign state. The second, commonly called "foreign act of state", is that the courts will not adjudicate upon the lawfulness or validity of certain sovereign acts of foreign states. For this purpose a sovereign act means the same as it does in the law of state immunity. It is an act done *jure imperii*, as opposed to a commercial transaction or other act of a private law character. These are distinct principles, although they are based on certain common law instincts.

'[200] Unlike state immunity, act of state is not a personal but a subject matter immunity. It proceeds from the same premise as state immunity, namely mutual respect for the equality of sovereign states. But it is wholly the creation of the common law. Although international law requires states to respect the immunity of other states from their domestic jurisdiction, it does not require them to apply

any particular limitation on their subject matter jurisdiction in litigation to which foreign states are not parties and in which they are not indirectly impleaded. The foreign act of state doctrine is at best permitted by international law. It is not based upon it: see Carreau and Marrella *Droit International* (11th edn, 2012) p 701; Weil "Le controle par les tribunaux nationaux de la licéité des actes des gouvernements étrangers" *Annuaire français de droit international*, 23 (1977), 16, 30.' *Belhaj v Straw; Rahmatullah v Ministry of Defence (No 2)* [2017] UKSC 3, [2017] 3 All ER 337 at [199]–[200], per Lord Sumption

ACTION

Australia [Environment Protection and Biodiversity Conservation Act 1999 (Cth), s 523.] '[23] The effect of ss 18 and 19 (which are contained in Pt 3 of Ch 2) is that unless a person holds an approval under Pt 9 from the Federal Minister, he or she is not permitted to take an *action* that has, or will have, a significant impact on a listed threatened species. ...

... '[26] "Action" is defined in s 523(1) of the EPBC Act as follows:

"523 *Actions*

- (1) Subject to this Subdivision, *action* includes:
 - (a) a project; and
 - (b) a development; and
 - (c) an undertaking; and
 - (d) an activity or series of activities; and
 - (e) an alteration of any of the things mentioned in paragraph (a), (b), (c) or (d).'

'[27] Plainly constructing the infrastructure works on the Heritage Estates would be a "development" within this definition. As we later explain, the actions of a State Minister to amend a zoning rule are not.

'[28] The content of "action" is reduced, however, by s 524 which carves out from its scope certain governmental decisions. ...

'[108] In our opinion, to the extent that this decision purported to refuse permission to the State Minister to make an amendment of the Plan it was *ultra vires*. Such an approval was not needed because amending a plan is not an "action" within the meaning of s 523 of the EPBC Act. Put another way, since approval was not needed for the rezoning the Federal Minister

had no power either to give or refuse it. We have set out s 133(1) of the EPBC Act above at [30] (which confers the power on the Federal Minister to grant approval). It is clear that it is only enlivened by the presence of “controlled action” and, hence, for the reasons already given, on the presence of “action” within the meaning of s 523.

‘[109] The situation then is that a rezoning by the State Minister amending a local environmental plan under s 523 is not an “action” under s 523. ...’ *Espósito v Commonwealth* [2015] FCAFC 160, (2016) 328 ALR 600 at [23], [26]–[28], [108]–[109], per Allsop CJ, Flick and Perram JJ

ACTION (LEGAL)

[For 37 Halsbury’s Laws of England (4th Edn) (Reissue) para 15 see now 11 Halsbury’s Laws of England (5th Edn) (2015) para 117.]

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

ACTION FOR DAMAGES

Canada [Convention for the Unification of Certain Rules for International Carriage by Air (‘Montreal Convention’), art 29. Claim for damages under the Official Languages Act (‘OLA’), s 22 for airline’s failure to meet obligations to supply services in French.] ‘14. The *Montreal Convention*, which is part of Canadian federal law by virtue of the *Carriage by Air Act*, restricts the types and the amount of claims for damages that may be made against international air carriers. It permits claims for death or bodily injury, destruction, damage or loss of baggage and cargo and for delay: Articles 17 to 19. It bars all other actions for damages, however founded, in the carriage of passengers, baggage and cargo: Article 29. The Thibodeaus’ claims for damages under the *OLA* are clearly not within the types of permitted claims for death or bodily injury, destruction, damage or loss of baggage and cargo or for delay. The Thibodeaus submit, however, that their claims are not barred by the *Montreal Convention*.

...

‘60. I have already discussed the breadth of the language that is used in Article 29 to describe the basis of the claims that are subject to the *Montreal Convention*’s limitations. The limitation applies to “any action” in the carriage of passengers, baggage or cargo, “for damages,

however founded, whether under this Convention or in contract or in tort or otherwise”. There is no hint in this language that there is any intention to exempt any “action for damages” in the carriage of passengers, baggage or cargo depending on its legal foundation, such as when a plaintiff brings forward a statutory monetary claim of a public law nature based on the breach of quasi-constitutional rights. As Dr. Chassot [*Les sources de la responsabilité du transporteur aérien international: entre conflit et complémentarité* (2012)] has said, both the terms “action” and “damages” must be understood in a broad sense; to do otherwise would unduly limit the ambit of the *Montreal Convention* in a way that was not intended: see pp 176–77.

‘61. The Thibodeaus’ claims are an “action for damages” within the meaning of Article 29, as they claim damages for injuries suffered in the course of an international flight. This is clear from the way in which the claims were asserted and from the application judge’s reasons.

‘62. The Thibodeaus referred in their pleading to what they were claiming as damages. Their claims for damages, as set out in Part III (a) and (b) of their notice of application, filed with the Federal Court, included \$25,000 in damages and \$250,000 in punitive and exemplary damages for each of them. In response to these claims, the Federal Court awarded damages to compensate the Thibodeaus for the injury flowing from the breaches of their language rights. As the judge at first instance put it, “the applicants’ language rights are clearly very important to them and the violation of their rights caused them a moral prejudice, pain and suffering and loss of enjoyment of their vacation”: para. 88 (emphasis added). (Although the judge decided against awarding punitive or exemplary damages in this case, I note in passing that such damages are excluded by the concluding words of Article 29, even in actions that are otherwise permitted under the *Montreal Convention*.)

‘63. In short, damages for moral prejudice, pain and suffering and loss of enjoyment of their vacation are what the Thibodeaus sought in their court proceeding and such damages are what the judge awarded.

‘64. Permitting an action in damages to compensate for “moral prejudice, pain and suffering and loss of enjoyment of [a passenger’s] vacation” that does not otherwise fulfill the conditions of Article 17 of the *Montreal Convention* (because the action does not relate to death or bodily injury) would fly in the face of Article 29. It would also undermine one of

the main purposes of the *Montreal Convention*, which is to bring uniformity across jurisdictions to the types and upper limits of claims for damages that may be made against international carriers for damages sustained in the course of carriage of passengers, baggage and cargo. As the international jurisprudence makes clear, the application of the *Montreal Convention* focuses on the factual circumstances surrounding the monetary claim, not the legal foundation of it. To decide otherwise would be to permit artful pleading to define the scope of the *Montreal Convention*.’ *Thibodeau v Air Canada* [2014] SCJ No 67, [2014] 3 SCR 340 at paras 14, 60–64, per Cromwell J

ADDITIONAL INFORMATION

Australia [Migration Act 1958 (Cth), s 424(2).] ‘[99] The view that “additional information” means “information additional to any information already possessed by the tribunal, whether it came from the invitee or not” is problematic. The written invitation régime would then apply to all information that the tribunal might invite a person to give after the tribunal first became seized of any information at all unless a contrary indication could be found; compare *SZKQC v Minister for Immigration and Citizenship* (2008) 170 FCR 236; 247 ALR 657; 102 ALD 250; [2008] FCAFC 119] at [49]–[51]. Presumably the first time the tribunal becomes seized of information is when the secretary sends documents to the registrar under s 418(3). We suggest that a more limited meaning of “additional information” must be looked for. Again, that which suggests itself is “information additional to information previously given to the tribunal by the invitee”.

‘[100] We construe the expression “additional information” accordingly.’ *SZLPO v Minister for Immigration and Citizenship* (NSD 1227 of 2008) [2009] FCAFC 51, (2009) 255 ALR 407 at [99]–[100], per Lindgren, Stone and Bennett JJ

ADDRESS

Last-known address

Australia [Bankruptcy Regulations 1996 (Cth), reg 16.01(1)(c): service of bankruptcy notice by leaving it at person’s last-known address.] ‘[61] Counsel for the respondent submitted that:

(a) Upon the true interpretation of reg 16.01(1)(c) of the Bankruptcy Regulations, the meaning of the expression “last-known address of the person” is that address which has been made known by the person at the time closest to the date when service is said to have been effected. It is not necessary that that address be made known directly by the debtor to the creditor. It is sufficient if the address comes to the knowledge of the creditor as the last address of the debtor, however that knowledge is obtained. The debtor must be the source of the address, directly or indirectly. In this sense, it is the debtor who must make known the address.

(b) In the present case, the last-known address of the respondent was the Israel address. It was made known by him prior to 21 March 2011 (the date when the envelope with the bankruptcy notice inside was left at the Dianella address for the respondent). The applicant was aware of the Israel address and was also aware that it had been put into the public domain by the respondent.

‘[62] I agree with the submission made on behalf of the respondent as to the correct interpretation of reg 16.01(1)(c) which I have summarised at [61(a)] above. However, for the reasons which I have already explained, I reject the submission which I have summarised at [61(b)] above. In particular, the applicant was not aware of the Israel address as at 21 March 2011 and did not become aware of it until about 24 May 2011 when Mr Gye obtained further documents from ASIC in respect of Bema Gold.

‘[63] In any event, there is no evidence of the nature and extent of the connection between the respondent and the Israel address (if any). If the respondent wished to have the court accept that the Israel address was his last-known address, it was incumbent upon him to adduce such evidence but he did not do so.

‘[64] In *Drake v Stanton* [1999] FCA 1635, Tamberlin J considered the meaning of the expression “last-known address of the person” in reg 16.01(1)(c) of the Bankruptcy Regulations. His Honour observed (at [5]) that, upon the correct interpretation of that expression, it does not matter whether the debtor resides at the particular address or not. I agree. His Honour also said that the expression does not expressly refer to the debtor’s residence or place of abode. I also agree with that observation. At [8], his Honour held that the expression refers to that address which has been made known by the debtor as at the time closest to the date in question. I also agree with that observation

although it must be said that it probably does not fully explain the meaning of the expression.

...
 '[67] *Skalkos* [*Skalkos v T & S Recoveries Pty Ltd* (2004) 141 FCR 107; 213 ALR 311; [2004] FCAFC 321] is not authority for the proposition that a person may have two last-known addresses within the meaning of that expression in reg 16.01(1)(c) of the Bankruptcy Regulations. As presently advised, I do not think that a debtor can have two or more last-known addresses within the meaning of that regulation. Rather, *Skalkos* is authority for the proposition that the last-known address does not necessarily have to be a residential address but may be a business address, including a business address which is not occupied by the debtor personally pursuant to some legal or equitable entitlement. The question may well often be: Does the debtor have such a degree of connection with the premises that they may properly be described as his last-known address?' *Napiat Pty Ltd v Salfinger; Re Salfinger (No 7)* [2011] FCA 1322, (2011) 284 ALR 581 at [61]–[64], [67], per Foster J

ADDUCED IN THE PROCEEDINGS

[Criminal Justice Act 2003, s 78(2). Retrial following acquittal of serious crime 'if there is new and compelling evidence against the acquitted person' in relation to the offence; by s 78(2) evidence is new if it was not adduced in the proceedings in which the person was acquitted.] '[6] The essential argument deployed in writing on behalf of the respondent was that the evidence now under consideration cannot be described as "new" in the context of and for the purposes of s 78(2). It is contended that it was "adduced" in the earlier proceedings when it formed the basis of the trial judge's ruling. The ruling that the evidence should not be admitted before the jury did not mean that it was not adduced in the proceedings. The argument is developed on the basis that the application by the prosecutor in truth constitutes an appeal against the terminating ruling in 1999, at a date when no such proceeding was available or permitted. In essence, the written submission invited us to consider that s 78(2) was not intended to constitute a process of appeal against a trial judge's ruling and, more significantly, that it was not intended by Parliament to apply to evidence available at trial but ruled inadmissible.

Act the word "proceedings" is not defined or explained. Reading these sections as a whole within their own context, it is clear that the word "proceedings" is designed to cover the entire process which resulted in the original acquittal. However, as a matter of statutory construction it does not follow that all evidence which was available to be deployed in the earlier proceedings must fall outside the ambit of the "new" evidence provision on which s 76 applications must, whether in whole or in part, be based. Subject to the interests of justice requirement found in s 79, evidence which was available to be used, but which was not used, may be "new" evidence for the purposes of s 78(2). This provides the context in which to reflect that s 78(2) is concerned with evidence—that is admissible evidence capable of being deployed against a defendant in accordance with the rules of admissibility.

'[9] Evidence sought to be advanced by the Crown at the original trial was undoubtedly available to be considered by the trial judge when he was asked to decide whether the evidence could or could not be adduced in, or should be or should not be excluded from, the evidence to be placed before the jury. Without considering it, he could not provide a proper ruling on the question. However, once the judge ruled that it should not be admitted at the respondent's trial, notwithstanding that it was available for his consideration, and indeed that he considered it, it was not, in our judgment, "adduced" in the proceedings.

'[10] In the present case the judge ruled (wrongly, as the House of Lords found) that crucial admissible evidence should not be admitted. His ruling was wrong. As a result this crucial evidence was not, and could not be, adduced by the Crown in the proceedings against the respondent. In our judgment, the evidence excluded by the judge constitutes new evidence for the purposes of s 78(2) on the basis that it was never adduced in or brought forward for consideration as admissible evidence at the original trial. For present purposes, therefore, all the DNA evidence, whether available at trial or emerging from further investigation of the relevant material, constitutes new evidence.' *R v B* [2012] EWCA Crim 414, [2012] 3 All ER 205 at [6], [8]–[10], per Lord Judge CJ

ADEPTION

[For 25 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 489 see now 60 Halsbury's Laws of England (5th Edn) (2011) para 455.]

...
 '[8] For the purposes of ss 75–79 of the 2003

[For 50 Halsbury's Laws of England (4th Edn) (2005 Reissue) para 445 see now 102 Halsbury's Laws of England (5th Edn) (2010) para 155.]

ADMINISTRATION

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

[For 17(2) Halsbury's Laws of England (4th Edn) (Reissue) para 3 see now 103 Halsbury's Laws of England (5th Edn) (2010) para 607.]

ADMISSION

To benefice

[Note that the Pastoral Measure 1983 is repealed as from 1 July 2012 by the Mission and Pastoral Measure 2011, s 111, Sch 9. The definition of 'admission', in the same terms as before, is now contained in the 2011 Measure, s 106(1), which makes reference to s 104.]

ADMIRALTY

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

ADOPTION

Of child

[For 5(3) Halsbury's Laws of England (4th Edn) (Reissue) para 501 see now 9 Halsbury's Laws of England (5th Edn) (2012) para 361.]

[Immigration Rules (HC Paper 251) paras 6, 309A, 352D. By para 6, 'adoption' unless the contrary intention appears, includes a de facto adoption in accordance with the requirements of para 309A, and 'adopted' and 'adoptive parent' should be construed accordingly.] '[1] This appeal from a determination of the Upper Tribunal promulgated on 23 May 2011 (OA/58702/2009) raises an issue of interpretation of para 352D of the Immigration Rules (HC Paper 395). The issue involves consideration of the interaction (if any) between para 352D, para 6 and para 309A of the Immigration Rules in determining the entitlement to entry clearance of a child seeking entry into the United Kingdom as a de facto adopted child of a sponsor who has previously been granted asylum as a refugee.

confirmed that there was no adoption as such in Islamic law but said that there was a system "akin" to it. He referred to a legal institution known as kafala whereby an individual may become a protégé (as he put it) and be part of the household of an adult. He said that the system only falls short of full adoption in that the individual can have no right of inheritance under Islamic law by reason of the primacy given to blood lineage. There was no formal state mechanism giving effect to kafala but the operative law was essentially a fusion of Somali customary law and Islamic law. He said that force of circumstances prevailing in Somalia make it "all the more likely that the members of a kin group rely on informal mechanisms to adjust their family lives". He further stated his view that improvised mechanisms may extend to adoption "even though it may be frowned upon from the perspective of the religious law of Islam".

'[13] It was common ground before us first that AA's relationship with Mohamed fell within the concept of kafala and second that AA had not been adopted by means of any legal process recognised by the United Kingdom as adoption.

...

'[30] I can see no proper basis for saying there can be some notion of adoption applicable to entry clearance applications under para 352D which can operate separately from and outside the meaning otherwise given to it for the other purposes of the Rules. Indeed, adoption, whether de jure or de facto, is a very serious and sensitive matter. It cannot readily be expected, for some purposes but not others, to be left, in the modern immigration and asylum context, in an undefined state.

'[31] The interpretation to be applied under para 6 to "adoption" (and "adopted" and "adoptive parent") itself expressly brings into play, unless the contrary intention appears, the requirements of para 309A. It is true that para 352D is contained in the Part relating to asylum and itself makes no reference to adoption. But it does refer to the child of a parent: and it is inevitable that one then looks back to the general interpretation provisions of para 6 to see what that connotes—indeed, absent that, it is difficult to see how de facto adopted children could otherwise fall with para 352D at all. In the context of an adoptive parent that therefore connotes either (a) adoption in accordance with a decision taken by the competent administrative authority or court in a country whose adoption order are recognised by the United Kingdom; or (b) de

...

'[12] In the course of his report, Dr Shah

facto adoption in accordance with the requirements of para 309A. That is what it says. There is no other category.

...
[44] ... I think that it is unnecessary further to consider whether in any event (and leaving aside para 309A) cases of kafala, even if established on the facts, can never fall within some broad concept of de facto adoption (as Senior Immigration Judge Grubb seems to have thought: although cf *R v Immigration Appeal Tribunal, ex p Ali* [1988] 2 FLR 523, above); or whether they always will (as perhaps Immigration Judge Hall seems to have thought). Because of the requirements of para 309A the point will, I suspect, arise relatively rarely in a context such as the present. It may in fact perhaps be the case that there is a middle position whereby—depending on the particular facts and circumstances—some cases of kafala could constitute what is said to be de facto adoption and some not (that, I think, perhaps being the view to which each of Mr Gill and Mr Hall ultimately inclined). Possibly, too, expert evidence on this topic will not always take the same form as in the present case, where there was no cross-examination and no exploration of (for example) issues such as the permanence or revocability of kafala arrangements. I prefer, for myself, to express no concluded view on such matters.’ *AA (Somalia) v Entry Clearance Officer (Addis Ababa)* [2012] EWCA Civ 563, [2012] 3 All ER 893 at [1], [12]–[13], [30]–[31], [44], per Davis LJ; affd [2013] UKSC 81, [2014] 1 All ER 774

ADULTERY

[For 29(3) Halsbury’s Laws of England (4th Edn) (Reissue) para 409 see now 72 Halsbury’s Laws of England (5th Edn) (2015) para 399.]

ADVANCEMENT

[For 48 Halsbury’s Laws of England (4th Edn) (2007 Reissue) para 1050 see now 98 Halsbury’s Laws of England (5th Edn) (2013) para 516.]

ADVANTAGEOUS

[Under CPR 36.14(1), costs consequences follow where, upon judgment being entered— (a) a claimant fails to obtain a judgment more advantageous than a defendant’s Part 36 offer; or (b) judgment against the defendant is at least

as advantageous to the claimant as the proposals contained in a claimant’s Part 36 offer.] ‘[38] That raises the question whether the claimant failed to obtain a judgment more advantageous than the enhanced May offer within the meaning of r 36.14(1)(a). Mr Plewman submitted that, if one applies the principles set out in *Carver v BAA plc* [2008] EWCA Civ 412, [2008] 3 All ER 911, [2009] 1 WLR 113, it did.

‘[39] In *Carver’s* case this court considered the terms of r 36.14(1) and concluded that when asking itself whether the judgment was more advantageous to the claimant than the Pt 36 offer the court should take into account all aspects of the case, including emotional stress and financial factors, such as the incurring of unrecoverable costs. It therefore held that the judge below had been right in that case to look at the matter broadly and take into account that an additional £51 obtained after trial was more than offset by the irrecoverable cost incurred by the claimant in continuing to contest the case for as long as she had. He was also entitled to take into account the added stress to her as she waited for the trial and the stress of the trial process itself.

‘[40] The decision in *Carver’s* case has been criticised by many commentators, and most recently by Jackson LJ in his *Review of Civil Litigation Costs: Final Report* (December 2009), on the grounds that it introduces an unwelcome degree of uncertainty into the operation of Pt 36. In my view there is much force in that criticism. Moreover, I do not think that the decision can be confined to cases in which one party has made a Pt 36 offer which is nearly, but not quite, sufficient and the other has rejected it outright, as Jackson J (as he then was) held in *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd (No 3)* [2008] EWHC 2280 (TCC) at [71], (2008) 122 ConLR 88 at [71]. The decision in *Carver’s* case is binding on us, but it should be recognised that what may be more important than the factors to be taken into account is the weight that is to be attached to them, and that remains a matter for the judge in each case. Moreover, when deciding how much weight to attach to any particular factor I think it important to see things from the litigant’s perspective rather than to be too ready to impose the court’s own view of what is and is not to his advantage. That is particularly important when dealing with money claims, both because to recover judgment for more than what was offered is legitimately regarded as success, and because a party faced with a Pt 36 offer ought to be entitled to evaluate it by reference to a rational assessment of his own

case (including the risk of incurring unrecoverable costs if he presses on). He should not have to make a significant allowance for the court's view of factors that are inherently difficult to value, such as the amount of unrecoverable costs and (even more so) the stress likely to be generated by pursuing the case to judgment. In a case where the offer has been beaten by a very small amount and there is clear evidence that the successful party has suffered serious adverse consequences as a result of pursuing the case to judgment those factors may be sufficient to outweigh success in pure financial terms, but in my view such cases are likely to be rare. In most cases obtaining judgment for an amount greater than the offer is likely to outweigh all other factors.' *Gibbon v Manchester City Council*; *LG Blower Specialist Bricklayer Ltd v Reeves* [2010] EWCA Civ 726, [2011] 2 All ER 258 at [38]–[40], per Moore-Bick LJ

ADVERSE

Adverse possession

[For 28 Halsbury's Laws of England (4th Edn) (Reissue) para 977 see now 68 Halsbury's Laws of England (5th Edn) (2016) para 1076.]

Canada '17. Adverse possession is a long-standing common law device by which the right of the prior possessor of land, typically the holder of registered title and therefore sometimes referred to as the "true owner", may be displaced by a trespasser whose possession of the land goes unchallenged for a prescribed period of time. From as early as *The Limitation Act 1623* (Eng), 21 Jas 1, c 16, the prior possessor's right to recover possession was curtailed by limitation periods. This rule allowing for the later possessor acquiring ownership of land after the passage of a certain time was codified in English law by the *Real Property Limitation Act 1833* (UK), 3 & 4 Will 4, c 27, which was received into the law of British Columbia on November 19, 1858 by operation of what is now s 2 of the *Law and Equity Act*, RSBC 1996, c 253. Since then, British Columbia's successive limitation statutes, including the provisions which I have already canvassed and which govern the Mowatts' claim, have effectively reproduced the 1833 English statutory codification of adverse possession. Under those statutes, the limitation period began to run at the point in time at which the true owner's right to recover possession first

arose: the date of dispossession or discontinuance of possession (see for example s 17 of the *Statute of Limitations* (1924)), as determined by the test for adverse possession.

'18. As to that test, the elements of adverse possession, all of which must be present to trigger the running of the limitation period against the "true owner", are explained by Professor Ziff in *Principles of Property Law* (6th ed 2014), at p 146. In brief, the act of possession must be "open and notorious, adverse, exclusive, peaceful (not by force), actual (generally), and continuous" (*ibid* (footnote omitted)). Significantly for this case, the adverse possessor who successfully obtains title need not always be the same person whose adverse possession triggered the running of the limitation period; successive adverse possessors can "tack" on to the original adverse possession, provided that the possession is continuous in the sense that there is always someone for the true owner to sue (*Anger & Honsberger Law of Real Property* (3rd ed (loose-leaf)), by A W La Forest, ed, at s 28:50).

'19. To these elements of adverse possession the City would add: that the possessor's or possessors' use of the disputed lot must have been inconsistent with the "true owner's" present or future enjoyment of the land. Alternatively put, possession, to be truly adverse, must entail a use of the property that is inconsistent with the true owner's intended use of the land. ...

'21. In my view, the question properly before this Court is not whether the inconsistent use requirement is necessary or desirable; we have received no submissions, for example, on whether it should continue to apply to claims based on adverse possession in Ontario. Rather, the question properly before us is whether it forms part of the law of British Columbia and therefore ought to have been applied by the courts below. I am of the opinion that the City cannot demonstrate that it does.' *Nelson (City) v Mowatt* [2017] SCJ No 8, 2017 SCC 8 at paras 17–19, 21, per Brown J

Adverse witness

[For 17(1) Halsbury's Laws of England (4th Edn) (Reissue) para 1029 see now 12 Halsbury's Laws of England (5th Edn) (2015) para 851.]

AFFECTS

Adversely affects

Australia [Independent Commission Against Corruption Act 1988 (NSW), s 8.] '[1] This is an application for special leave to appeal from a decision of the New South Wales Court of Appeal. The principal question for determination is what is meant by the expression "adversely affects, or that could adversely affect... the exercise of official functions by any public official" in the definition of "corrupt conduct" in s 8(2) of the Independent Commission Against Corruption Act 1988 (NSW) (the ICAC Act).

'[2] "Adversely affect"' is a protean expression. In this context, however, there are only two possibilities. Either it means adversely affect or could adversely affect the *probability* of the exercise of an official function by a public official, or it means adversely affect or could adversely affect the *efficacy* of the exercise of an official function by a public official in the sense that the official could exercise the function in a different manner or make a different decision from that which would otherwise be the case.

'[3] The former meaning accords with the ordinary understanding of corruption in public administration and consequently with the principal objects of the ICAC Act as set out in s 2A. The latter would result in the inclusion in "corrupt conduct" of a broad array of criminal offences and other unlawful conduct having nothing to do with the ordinary understanding of corruption in public administration or the principal objects of the ICAC Act. It would also enable the Independent Commission Against Corruption (ICAC) to exercise its extraordinary coercive powers (with consequent abrogation of fundamental rights and privileges) in areas ranging well beyond the ordinary understanding of corruption in public administration and the principal objects of the ICAC Act. For those reasons, and the reasons which follow, the former meaning is to be preferred.

...
'[36] The question remains whether s 8(2) should be seen as limited to "corruption in public administration" in the sense of something which has or could have an effect upon the probability of public administration, or whether it comprehends something more.

'[37] Counsel for ICAC contended that "corruption" is a term of such variable content as to be capable of including even mere alteration or marring; and that, in this context,

there is no reason to suppose a statutory intention that it be any more limited than that. For the reasons which follow, that submission must be rejected.

'[38] As Basten JA observed, the ordinary meaning of corruption in public administration implies dishonest or partial exercise of an official function. But to read "adversely affect" in s 8(2) as limited to causing a public official to act dishonestly or partially in the exercise of an official function would be to read s 8(2) as adding nothing to s 8(1); and it would not be right to read s 8(2) in a way that gave it no work to do beyond that already done by s 8(1)(a).

'[39] Equally, however, it would not be right to read the four paragraphs of s 8(1) and the provision made by s 8(2) as if they were mutually exclusive. Rather, s 8(1) and (2) must be read recognising that s 8 describes "corrupt conduct" as not only misconduct *by* public officials but also misconduct (by *any* person) that does or could affect what public officials do. The provisions must further be read recognising that conduct of a public official that falls within s 8(1)(b) may also be conduct of a kind described in s 8(1)(c) or s 8(1)(d) and that the conduct of a public official may, but need not, be accompanied or preceded by conduct of another person (whether or not a public official) that falls within either or both of s 8(1)(a) and (2). And the provisions must be read recognising that conduct of a person (whether or not a public official) that falls within s 8(1)(a) or s 8(2), or both, may, but need not, be accompanied or followed by conduct of a public official that falls within any of s 8(1)(b)–(d), or within either or both of s 8(1)(a) and (2).

'[40] Hence, when it is said that s 8(2) must be given work to do *beyond* the work done by s 8(1) (and s 8(1)(a) in particular) the concern is to identify additional work done by the provision, not some wholly distinct and separate field of operation.

'[41] At the same time, it is necessary to keep in mind that s 8(1) demonstrates that "corrupt conduct" is not confined to conduct of any person (whether or not a public official) that does, or could, adversely affect the *honest and impartial* exercise of official functions (s 8(1)(a)) or conduct of a public official that constitutes or involves the dishonest or partial exercise of official functions (s 8(1)(b)). "Corrupt conduct" includes conduct by a public official of a kind described in either or both of s 8(1)(c) and (d).

'[42] All of that combines to inform the natural and ordinary meaning of "adversely affect" in s 8(2). In that context, the expression

appears to have the sense of having an injurious effect upon or otherwise detracting from the exercise of an official function by causing it to fall short of or below a set or given standard. Standing alone in s 8(2), that could mean either to adversely affect something about the manner in which the official function is exercised or to adversely affect the results of the exercise of the official function; or possibly both. Viewed in the context of s 8(1)(b)–(d), however, and the interrelationship between s 8(1)(b)–(d) and (2), it will be seen that what was intended is an adverse effect upon the exercise of an official function by a public official such that the exercise constitutes or involves conduct of the kind identified in s 8(1)(b)–(d).

[43] As Basten JA appreciated, the key to the interrelationship between s 8(1)(b)–(d) and (2) is what it is that was sought to be achieved by the omission of “honest or impartial” from s 8(2). Logically, it appears to have been designed to expand the scope of s 8(1) in two respects: by extending the reach of s 8(1)(c) and (d) from public officials (and former public officials) to persons who are not public officials; and by including in the definition of “corrupt conduct” conduct which could adversely affect the exercise of official functions by any public official in either of the respects identified in s 8(1)(c) and (d).

[44] Accordingly, the effect of s 8(1) and (2) is to mark out two distinct kinds of conduct as corrupt conduct, as follows:

- (1) conduct of a public official that:
 - (i) constitutes or involves the dishonest or partial exercise of an official power (s 8(1)(b)); or
 - (ii) constitutes or involves a breach of public trust (s 8(1)(c)); or
 - (iii) involves the misuse of information or material acquired in the course of the public official’s official functions (s 8(1)(d)); and
- (2) conduct of any person, whether a public official or not, which could “adversely affect” the exercise of official functions by any public official in one of the following ways:
 - (i) if the conduct could “adversely affect” the honest or impartial exercise of the official function (s 8(1)(a)); or
 - (ii) if the conduct could otherwise “adversely affect” the exercise of the official function and the conduct could involve one of the matters mentioned in s 8(2)(a)–(y).

[45] The symmetry of that structure implies that the expression “adversely affect” in s 8(2)

means to adversely affect the exercise of an official function by a public official in such a way that the exercise constitutes or involves conduct of the kind identified in s 8(1)(b)–(d).

[46] More precisely, paras (b)–(d) of s 8(1) limit the range of “corrupt conduct” which may be committed by a public official in the exercise of an official power to the three kinds of misconduct delineated in paras (b)–(d). Those three categories of misconduct thereby define the nature of improbity of public officials in the exercise of official functions which the ICAC Act conceives to be anathema to integrity in public administration. Section 8(2) is directed at conduct which adversely affects the exercise of an official function by a public official. Given that paras (b)–(d) of s 8(1) define the extent of improbity of public officials at which the ICAC Act is directed, it is inherently improbable that s 8(2) is directed at any broader range of improbity in the exercise of official functions than is covered by s 8(1)(b)–(d). It is more logical and textually symmetrical to read “adversely affect” in s 8(2) as confined to having an injurious effect upon or otherwise detracting from the probity of the exercise of the official function in any of the senses defined by s 8(1)(b)–(d). That construction is also more consonant with the language of ss 2A and 9 in that it embraces offences which could affect the integrity of public administration and excludes those which could not.’ *Independent Commission Against Corruption v Cunneen* [2015] HCA 14 (2015) 318 ALR 391 at [1]–[3], [36]–[46], per French CJ, Hayne, Kiefel and Nettle JJ

ADVOWSON

[For 14 Halsbury’s Laws of England (4th Edn) para 776 see now 34 Halsbury’s Laws of England (5th Edn) (2011) para 550.]

AFTER

After a period of imprisonment or other detention

[Magistrates’ Courts Act 1980, 79(2): where, ‘after a period of imprisonment or other detention’ has been imposed on any person in default of payment, payment is made of part of the sum, the period of detention is to be reduced.] [2] The issue in the case is whether the words “the said sum ... as was due at the time the period of detention was imposed” in s 79(2) of the Magistrates’ Courts Act 1980

(“MCA”) should be construed in the case of confiscation orders made under the Drug Trafficking Act 1994 (“DTA”) as meaning either:

- (i) the sum due when the default term was fixed by the Crown Court judge (the appellant’s case); or
- (ii) the sum due when the default term was activated by the magistrates’ court (the respondent’s case).

‘[3] The answer has a potential for impact on the number of days that an offender is entitled to have remitted against the default term as a result of payments made against the order. The differing contentions dispute whether interest accruing on an unpaid order under the DTA is to be added to the original sum ordered, thus affecting the amount of time in custody to be remitted since any repayment made will be credited in terms of time to be served by reference to a formula which will diminish the value of a repayment if interest is to be added to the original amount ordered.

‘[45] Thus, when one considers s 79(2) of the MCA, the reference at the start of sub-s (2) to “after a period of imprisonment or other detention has been imposed on any person in default of payment of any sum” and the reference at the end of the sub-s (2) to “the said sum ... as was due at the time the period of detention was imposed” should be construed as references to the imposition of the default term by the magistrates’ court rather than by the Crown Court.

‘[51] I am satisfied that, approaching the matter with due caution, the three identified conditions are met in this case. In the circumstances, as Mr Stanbury conceded in argument was possible whilst urging us not to do so, I would interpret the opening words of s 79(2) of the MCA as if they read “where, before or after a period of imprisonment or other detention has been imposed ...”. This has the result of giving effect to the clear intention of Parliament. The draftsman’s failure to recognise the difficulty now identified clearly arises from the technique of drafting by reference without a consideration of all potential ramifications, as opposed to drafting from a blank sheet of paper. I consider the court justified in taking this course in circumstances where the appellant’s construction is the one which in practice would be unworkable, not least because one consequence would be that notwithstanding the clearest indications by Parliament to the contrary, an offender could

secure his release no matter how much interest had accrued prior to the default term being imposed simply by paying the original sum ordered in full.’ *R (on the application of Gibson) v Secretary of State for Justice* [2015] EWCA Civ 1148, [2016] 4 All ER 244 at [2]–[3], [45], [51], per Treacy LJ

AGENT—AGENCY

[For 2(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 1 see now 1 Halsbury’s Laws of England (5th Edn) (2008) para 1.]

Agent and principal

[Prevention of Corruption Act 1906, s 1.] ‘[43] The key element of the 1906 Act offence is corrupt conduct of an “agent” in connection with the affairs of his “principal”. Unlike the 1889 Act [the Public Bodies Corrupt Practices Act 1889], the 1906 Act covered corruption in public and private sectors. Section 1(1) created three “agent” offences: the first concerning the “agent” himself; the second concerning the person engaged in a corrupt transaction with the “agent”; and the third concerning any deception of the “principal” by his “agent”.

‘[44] Against that background, the starting point is to consider the plain, ordinary, natural meaning of the words “agent” and “principal” in the 1906 Act. In our judgment, the meaning of these words is clear: absent other indications, the words include both foreign and domestic persons or organisations.

‘[45] In that regard, the expressions “agent” and “principal” are well understood and have long been in common usage. In common parlance, they denote a relationship in which the former acts for and/or represents the latter in business or other contexts. At common law, an agent has the power to change the legal relations of his principal. The expressions “agent” and “principal” are neutral in terms of nationality, location or territory.

‘[50] Thus, the fundamental problem facing the respondents is that, unlike the 1889 Act which expressly limits the meaning of “public body” to UK public bodies (s 7), the 1906 Act contains no similar wording which limits the meaning of “agent” or “principal” to UK persons. The various sophisticated arguments on construction advanced by the respondents are all designed to get round this difficulty. In our judgment, however, none of the respondents’

arguments provide an answer to the straightforward construction of the plain words of the 1906 Act. If Parliament had intended to exclude foreign principals from the scope of the 1906 Act, it would have done so.

‘[65] For the above set out reasons, we are satisfied that prior to the coming into force of the Anti-terrorism, Crime and Security Act 2001, it was an offence under s 1 of the Prevention of Corruption Act 1906 to corrupt an agent of a foreign principal or a foreign body.’ *R v AIL (a company)* [2016] EWCA Crim 2, [2017] 1 All ER 268 at [43]–[45], [50], [65], per Sir Brian Leveson P

Agency or instrumentality

See also SEPARATE ENTITY

Australia [Airlines claimed immunity against proceedings alleging price-fixing under the Foreign States Immunities Act 1985 (Cth), s 9, which applied by force of s 22 to a “separate entity”. A “separate entity” is defined in s 3(1) as “an agency or instrumentality of the foreign State”.] ‘[34] Justice Rares has suggested that the words “agency” and “instrumentality” are “largely synonymous” and he has referred to the Macquarie and Oxford English dictionaries.

‘[35] With respect to his Honour, we do not think, at least for the purposes of this Act for the reasons we have given, that the words can be treated as largely synonymous. We think the Foreign States Immunities Act assumes an agency and an instrumentality to be different creations. In considering whether a person or corporation is a separate entity, the definition first requires a determination as to whether that person or corporation is an agency or instrumentality of the state.

‘[36] We think the difference is in their constitution. An instrumentality is a body created by the state as an instrumentality for the purpose of performing a function for the state. Clearly, because of the definition of separate entity, the state can create a natural person as an instrumentality. We think the definition does assume that a natural person can be an instrumentality because it speaks of a natural person or a [corporation] “who or that: ...”. However, that does not deny the proposition that the state creates the natural person or the corporation as the instrumentality of the state. An instrumentality of the state cannot be created by an organ other than the state. A natural person or a corporation cannot create an

instrumentality and certainly not an instrumentality of the state.

‘[37] An instrumentality is created by the state for the purpose of carrying out functions on behalf of the state and is not available to carry out any functions for any other state, person or corporation. An instrumentality is an instrumentality of the state which creates it and can not be the instrumentality of any other state, person or corporation. So much is recognised by s 3(2) which does not recognise the possibility of an instrumentality being an instrumentality of more than one foreign state.

‘[38] An instrumentality is not necessarily an agency of the state because it may be invested by the state with powers which allow it to function separately and apart from the state and indeed outside of any direct control of the state or its executive.

‘[39] An agency may have the same characteristics as an instrumentality, but not necessarily so. An agency of the state, in our opinion, does not necessarily have to have been created by the state itself. It may be, but need not be. A natural person or a corporation may create a body which may be adopted by the state as an agency. A natural person or corporation becomes an agency of the state upon creation if the state itself creates it as such. If it is otherwise created, it becomes an agency of the state when the state adopts the person or corporation as an agency of the state. The state might adopt the person or corporation exclusively or it might create a shared agency with some other state, person or corporation. The difference between an agency or instrumentality is recognised in s 3(2).

‘[40] A state may appoint a natural person or corporation as an agency or agent. The relationship between the state and the appointed agency may be contractual. An agency of a foreign state in the context of this definition and in the context of the Foreign States Immunities Act as a whole must be an agency of the foreign state for the purpose of carrying out the foreign state’s purposes.

‘[41] The purpose of an instrumentality is to serve the state’s purposes: *Electricity Trust* at 139–40; *Re Anti-Cancer Council of Victoria; Ex parte State Public Services Federation* (1992) 175 CLR 442 at 448; 109 ALR 240 at 242–3. Whether a person or corporation is an agency or an instrumentality, they must both have the same purpose which is, while not being departments or organs of the executive government of the foreign state, to serve some governmental purpose which may be commercial in nature. For an instrumentality its sole

purpose must be to perform functions on behalf of the state. For an agency its purpose must be to perform within the terms of its agency functions on behalf of the state which has created the agency.

‘[42] The most relevant factor in determining whether a natural person or a corporation is an agency or instrumentality is whether that body is carrying out the foreign state’s functions or purposes.

‘[43] Ordinarily, if the natural person or the corporation is not then it is unlikely that the natural person or corporation will be an agency or instrumentality of the foreign state.

‘[44] Ownership must be determinative of the question whether a person or corporation is an agency or instrumentality of a foreign state. A natural person will not have an owner. Australian law does not countenance ownership of a person. An instrumentality will usually be created by legislation. It may have “an owner”. In many cases it will not have “an owner” but will simply be a creation of statute. An agency may or may not be owned by the state. If it is then it is more likely to be found to be an agency of the state. But if it is not owned by the state that is not determinative of the question whether the person or corporation is an agency of the state. The agency might exist as a result of a contractual relationship between the state and the person or corporation. It follows that ownership cannot be the sole criteria in determining whether a natural person or a corporation is an agency or instrumentality of a foreign state.

‘[45] Nor does the Act contemplate that a natural person or a corporation must be controlled by a foreign state to be an agency or instrumentality of the state. For the reasons already given, an instrumentality need not be controlled by the state even if the executive of the state has the right to appoint the directors of the organisation. An agency may or may not be controlled by the state but the absence of control would not necessarily mean that the person or corporation is not an agency of the state. Section 3(2) contemplates that a person or corporation may be a separate entity where it is the agency of more than one foreign state. Where a natural person or corporation is an agency of that kind it would be difficult for each of the foreign states to exercise control at the same time.

‘[46] Like Rares J, we do not, with respect, agree with the primary judge that the test whether a natural person or a corporation of the kind referred to in the definition is to be determined by reference to whether the foreign

state has the day-to-day management control of the agency or instrumentality. We think, as we have said, such a holding is inconsistent with s 3(2), which contemplates that a separate entity may be the agency of more than one foreign state and, indeed, numerous foreign states, not all of which presumably would have the actual day-to-day control of that foreign entity.

‘[47] Ownership and control will be important in determining whether a natural person or a corporation is an agency or instrumentality of a foreign state. However neither, in our opinion, can be determinative factors.

‘[48] We agree with Rares J that it will be a matter of fact in each case to determine whether a natural person or corporation is an agency or instrumentality of a foreign state and in determining that question regard will have to be had to ownership, control, the functions which the natural person or corporation perform, the foreign state’s purposes in supporting the natural person or corporation and the manner in which the natural person or corporation conducts itself or its business.’ *PT Garuda Indonesia Ltd (ARBN 000 861 165) v Australian Competition and Consumer Commission (NSD 667/2010)* [2011] FCAFC 52, (2011) 277 ALR 67 at [34]–[48], per Lander and Greenwood JJ

General agent

[For 2(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 11 see now 1 Halsbury’s Laws of England (5th Edn) (2008) para 11.]

Of necessity

[For 2(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 39 see now 1 Halsbury’s Laws of England (5th Edn) (2008) para 24.]

Special agent

[For 2(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 11 see now 1 Halsbury’s Laws of England (5th Edn) (2008) para 11.]

AGISTMENT

[For 2(1) Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 512 see now 2 Halsbury’s Laws of England (5th Edn) (2017) para 18.]

AGREEMENT

New Zealand [New Zealand Air Line Pilots' Association Inc (ALPA) Collective Employment Agreement (CEA), cl 24.2: during the term of the CEA any agreement entered into by the company with any other pilot employee group which was more favourable than provided for in the CEA was to be passed on to pilots covered by the CEA on the written request of ALPA.] '[41] The words "any agreement" are common words. Synonyms of "agreement" include contract, settlement and bargain.

'[42] It is really no different in the law. For example, *Black's Law Dictionary* defines "agreement" thus:

A mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons.

The parties' actual bargain as found in their language or by implication from other circumstances, including course of dealing, usage of trade, and course of performance.

'[43] Chapter 3 of *Law of Contract in New Zealand* is headed "Agreement". Emerging quickly from the discussion in this chapter is "The idea of bargain, fundamental to the English concept of contract".

'[44] And *Treitel: The Law of Contract* [Edwin Peel (ed) *Treitel: The Law of Contract* (14th ed, Sweet & Maxwell, London, 2015) at [2-001]] states:

The first requisite of a contract is that the parties should have reached agreement. Generally speaking, an agreement is made when one party accepts an offer made by the other. ...

'[45] Chief Judge Colgan correctly identified the meaning of "agreement" at the end of this paragraph of his judgment:

[65] Nor do I agree with the Authority's conclusion that "the word 'agreement' in the context of an employment relationship is a term of art." Even if it were, its true meaning is not a collective agreement (which may be a term of art) or certainly not the totality of a collective agreement. "Agreements" referred to in the Act may take many forms and are not confined to collective agreements as are defined by it. "*Agreement*" means a consensual arrangement or accord in the context of

employment and I concluded [sic] was intended so to mean. [Emphasis added.]

'[46] Mr Miles submitted that "agreement", defined in terms of the last sentence of that paragraph, "would not encompass a constituent part of the agreement". That is because an "accord" would not mean just part of the accord, nor "a consensual arrangement" just part of that arrangement.

'[47] We agree. Fundamentally, an "agreement" is an exchange of promises. At a minimum, it must include all the promises made by the parties relevant to the particular topic. Having correctly identified the meaning of "agreement", the Employment Court did not apply that meaning. The final sentence of [65] of its judgment is inconsistent with the conclusion it reached at [72] ...

... '[50] ... Essentially, the Chief Judge concluded that "any agreement" could include just one part of an agreement, indeed, just one part of one part of an agreement. That is, one benefit without any of its related burdens. That is simply wrong.

... '[57] To summarise, we do not see much in cl 24.2 that assists in construing the words "any agreement". But what few aids there are support interpreting "any agreement" as meaning the whole of any agreement, again in the sense described in [47] above.

... '[76] Although the Employment Court began by accurately stating contractual interpretation principles, it did not correctly apply those principles.

'[77] In particular, insofar as the Employment Court considered the natural and ordinary meaning of the words "any agreement" in cl 24.2, it gave that meaning no force. It erred in failing to identify the "agreement" to be passed on, and upheld ALPA's request to have part only of an agreement passed on — a benefit without the corresponding burdens. In doing that, it reached a conclusion inconsistent with the natural and ordinary meaning of the words "any agreement".

'[78] The Court found, elsewhere in cl 24.2 and in the background circumstances in which cl 24.2 was first agreed between the parties, reasons for departing from the ordinary and natural meaning of the words "any agreement". We consider there were no such reasons.' *Air New Zealand Ltd v New Zealand Air Line Pilots' Association Inc* [2016] NZCA 131,

[2016] 2 NZLR 829 at [41]–[47], [50], [57], [76]–[78], per Wild J

AGRICULTURAL HOLDING

[For 1(2) Halsbury's Laws of England (4th Edn) (2007 Reissue) para 149 see now 1 Halsbury's Laws of England (5th Edn) (2008) para 323.]

AID AND ABET

[For 11(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 42 see now 25 Halsbury's Laws of England (5th Edn) (2016) para 53.]

AIRCRAFT

[Carriage by Air Acts (Application of Provisions) Order 1967, SI 1967/480, Sch 1 Pt III arts 1, 17, 24(1), 29 (the whole order revoked by the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899 art 9, Sch 4, as from 6 August 2004). The claimant brought a claim against the defendant company seeking damages for personal injury caused whilst participating in a hot-air balloon flight organised by the defendant. A preliminary issue to be determined was whether the claim was governed by the 1967 Order, which involved *inter alia* determining whether a hot-air balloon should be categorised as an aircraft.] '[34] I shall turn first to consider the issue of whether the hot-air balloon should be categorised as an "aircraft". Although there is no direct authority on this question in English case law or in that of any of the signatories, it can be addressed as a matter of principle.

'[35] In the case of *Disley v Levine* [2001] EWCA Civ 1087, [2002] 1 WLR 785, the Court of Appeal was considering a tandem paraglider in the context of the non-international rules and held that it was not an "aircraft". A distinction was drawn between air transport and recreation. Ms Disley was being carried not for the purpose of transport but for the purpose of instructing her in the operation of a paraglider for purposes of recreation. Although [counsel] has focused upon this distinction, and sought to draw a parallel in the present case, it is important to analyse the nature of the activity being carried on. While it is true that Mr Laroche was being carried for purposes of leisure on 20 August 2003, that does not in itself mean that he was not being carried as a passenger or that he was not being carried in an "aircraft". People very

often fly in aeroplanes or helicopters for leisure purposes. The important distinction being drawn in Disley's case related to the use to which the particular piece of equipment was put.

'[36] [Counsel] for the defendant, calls attention to the fact that paragliders are exempt from the regulatory controls imposed upon commercial aircraft which are used for public transport by the Air Navigation Order 2000, SI 2000/1562 [revoked and replaced by the Air Navigation Order 2005, SI 2005/1970]. One does not require an air operator's certificate or a certificate of airworthiness. Moreover, when it comes to giving a purposive construction to the Warsaw Convention or to the 1967 Order, it would be unreal to conclude that anyone would have had in mind a paraglider as a potential means of international air transport.

'[37] By contrast, a hot-air balloon such as that used by the defendant is designed to be used for carrying passengers. As I have already recorded, it is agreed that there were compartments within the basket for accommodating those carried.

'[38] Moreover, the 2000 Order classifies a balloon as a lighter than air non-power driven aircraft (whereas gliders are classified as heavier than air non-power driven aircraft): see art 129(4) and Sch 2.

'[39] It is also provided in arts 129(1) and 130 that (subject to certain irrelevant exceptions) an aircraft flies for the purposes of public transport if a valuable consideration is given or promised for the carriage of passengers in the aircraft. Although there can be no doubt that art 129 refers expressly to balloons, there is no question of an exemption for them when used for public transport purposes from certain requirements, such as the need to be registered and to be flown in accordance with an air operator's certificate granted to the operator. There also has to be a valid certificate of airworthiness.

'[40] Against this legislative background, I can see no logical basis for excluding a hot-air balloon from the classification of "aircraft".' *Laroche v Spirit of Adventure (UK) Ltd* [2008] EWHC 788 (QB) [2008] 4 All ER 494 at [34]–[40], per Eady J

'[41] Mr Davey submits a hot-air balloon is not an "aircraft" within the meaning of art 1 of Sch 1. There is no definition of "aircraft" in the convention or the 1967 Order. Mr Davey submits that, in the absence of such definition, the ordinary meaning of "aircraft" should be applied. The *Oxford English Dictionary* definition is "a machine capable of flight, especially

an aeroplane or helicopter". A "machine" is defined as "an apparatus using or applying mechanical power, having several parts each with a definite function and together performing certain kinds of work". The *Oxford English Dictionary* defines a "hot-air balloon" as "a balloon consisting of a bag in which air is heated by burners located below it, causing it to rise".

[42] He submits that the judge was wrong to find support in the Air Navigation Order 2000, SI 2000/1562 for his conclusion that a hot-air balloon is an "aircraft". The judge noted that the 2000 Order classifies a balloon as a lighter than air aircraft: see art 129(4) and Sch 2. The 2000 Order does not assist because (i) it postdates the 1967 Order by more than 30 years and (ii) Sch 2 of the 2000 Order classifies gliders and kites as "heavier than air aircraft". It is true that gliders are exempt from the registration requirements of the 2000 Order, but they are nevertheless classified as "aircraft" by the 2000 Order. Since gliders are not aircraft within the meaning of Sch 1 of the 1967 Order, the fact that the 2000 Order also classifies hot-air balloons as "aircraft" does not advance the argument.

[43] Mr Davey also submits that an "aircraft" must be capable of performing a contract of international carriage, ie a contract of carriage between an agreed starting point and an agreed destination in different countries. It is only such a contract of carriage that was intended to be the subject of the convention. To adopt the language of Buxton LJ in *Disley v Levine* [2002] 1 WLR 785, hot-air balloons could not sensibly be used as a means, and certainly not as a regular means, of international air transport. Further, whilst it may be possible to have an agreed starting point for a journey by hot-air balloon, it is not possible to agree its destination in advance.

[44] In support of his argument that a hot-air balloon is inherently unsuitable for a contract of international carriage, Mr Davey relies on the provisions of the CAP 611 *Air Operators' Certificates: Operation of Balloons* which inter alia prohibit an air balloon being operated more than one nautical mile from the mainland of the United Kingdom (Ch 2, para 10.1).

[45] I cannot accept these submissions largely for the reasons given by Mr Lawson. In my judgment, the natural and ordinary meaning of the word "aircraft" is wide enough to include a passenger-carrying hot-air balloon. Mr Davey has cited one dictionary definition of "aircraft". The *Pocket Oxford Dictionary* defines "aircraft" as "aeroplane(s), airships(s) and balloon(s)".

The word "craft" is defined in the same dictionary as including "vessels of any kind for carriage by water or air". The hot-air balloon which is the subject of these proceedings was a craft designed to be used and was in fact used to carry persons by air. In my judgment, as a matter of plain and ordinary language it is difficult to see why the hot-air balloon which carried the claimant on 20 August 2003 should not be regarded as an "aircraft".

[46] I accept, however, that the plain and ordinary meaning of the word "aircraft" is not necessarily determinative. But it is an important starting point. I agree with what Buxton LJ said at [61] in *Disley v Levine* that it is necessary to adopt a purposive interpretation. In particular, it is necessary to bear in mind that the convention was originally applied only to international transport. It is common ground that both the convention and Sch 1 do not apply to machines which could not realistically be used as a means of international transport.

[47] Hot-air balloons are undoubtedly capable of being used as a means of international transport. Before the invention of the aeroplane, they were *the* means of transport by air, sometimes across borders. In the modern era, they are capable of flying considerable distances. Most countries have land borders. Paragraph 10.1 of Ch 2 of CAP 611 does not bear the weight that Mr Davey seeks to place on it. First, it does not prohibit flights more than one nautical mile from the mainland of the United Kingdom. It merely describes the range or operation normally permitted by an air operators' certificate for balloons. As paras 10.2 and 5.6 of Ch 2 make clear, an extension can be applied for if there is evidence that operations in an extended area can be conducted safely. Secondly, flying over water involves special considerations. Hot-air balloons that take off close to borders with other countries frequently cross those borders. They are undoubtedly *capable* of doing so.

[48] A hot-air balloon is designed for, and capable of, carrying passengers from one place to another. I agree with the judge that the 2000 Order provides some support for the view that a hot-air balloon is an aircraft. Subject to certain immaterial exceptions, it provides that an aircraft in flight shall be deemed to fly "for the purposes of public transport: (a) if valuable consideration is given or promised for the carriage of passengers or cargo in the aircraft on that flight": arts 129(1) and 130(2). It does not exempt a balloon used for public transport from (i) the need to be registered (art 3 and Sch 3); (ii) the need to be flown under and in

accordance with an air operator's certificate granted to the operator (art 6); and (iii) the need to hold a valid certificate of airworthiness (art 8 and Sch 3). The 2000 Order, therefore, subjects passenger-carrying hot-air balloons to basic regulatory controls imposed on commercial aircraft used for public transport, in the same way as aeroplanes and helicopters. That being so, on a purposive construction of the 1967 Order, it is reasonable to suppose that Parliament intended such balloons to be subject to Sch 1. As Mr Lawson points out, it is difficult to see why Parliament should have intended otherwise, given that by the terms of art 3 of the 1967 Order, the 1967 Order was intended to apply to "all" carriage by air not being carriage to which the convention applied.

'[49] Mr Davey's criticisms of the reliance placed by the judge on the 2000 Order are misplaced. The relevance of the 2000 Order is that it shows that hot-air balloons used for flights where valuable consideration is given or promised for the carriage of passengers is subject to the United Kingdom regulatory requirements affecting air transport aircraft. In other words, the 2000 Order shows a legislative understanding that hot-air balloons can be used for these purposes. It follows that the significance of the 2000 Order does not lose its force because it also includes other things such as kites and gliders and other unmanned aircraft as "aircraft" for some purposes apart from the regulatory requirements it imposes in respect of public transport.

'[50] As the judge found, the hot-air balloon used in this case was designed for the carriage of passengers. The defendant conducted hot-air balloon flights as part of its business and the flight was for reward. In consequence, the flight was for the purposes of public transport within the meaning of the 2000 Order and was therefore subject to the regulatory requirements of the 2000 Order. In my view, the judge was right to hold at [40] that there was no logical basis for excluding a hot-air balloon designed for the carriage of passengers from the classification of "aircraft".

'[51] I see no reason, therefore, why a hot-air balloon should not be regarded as an "aircraft". For the reasons I have given, the fact that it is being used for recreational purposes is immaterial to whether it is an "aircraft". Nor do I consider that the fact that it is not a regular or obvious means of international transport means that it is not an "aircraft". The important point is that it is capable of being used for international transport and is so used from time to time. It can equally be said that helicopters are not a regular

or obvious means of international transport, but they too are capable of being and are so used from time to time. It does not appear even to have been argued in *Fellowes (or Herd) v Clyde Helicopters Ltd* [1997] 1 All ER 775, [1997] AC 534 that a helicopter is not an "aircraft" within the meaning of Sch 1: it was clearly accepted that it is.' *Laroche v Spirit of Adventure (UK) Ltd* [2009] EWCA Civ 12, [2009] 2 All ER 175 at [41]–[51], per Dyson LJ

New Zealand [Whether a hang-glider was an 'aircraft' as defined in the Civil Aviation Act 1990, s 2.] '[2] The Civil Aviation Act 1990 (the Act) is concerned with the operation of the New Zealand Civil Aviation system. For present purposes, the key definition in s 2 is that of the term "aircraft". That provides:

Aircraft means any machine that can derive support in the atmosphere from the reactions of the air otherwise than by the reactions of the air against the surface of the earth ...

'[3] The applicant's primary submission is that a hang-glider is not an aircraft as defined. That is the first question which must be answered.

'[4] It is not disputed by the applicant that a hang-glider can derive support in the atmosphere from the reactions of the air. It is also not in dispute that it does so otherwise than by the reactions of the air against the surface of the earth. The sole question then is whether a hang-glider is a "machine". Counsel for the appellant submits that it is not a machine because it contains no moving part and is controlled by the controller's body; that it is used by a human to perform an activity but is entirely passive in that the human controls the flight by shifting body position. The respondents submit that a hang-glider is an aircraft.

...

'[9] The conclusion that the ordinary dictionary definition of the word "machine", in at least one of its meanings, is sufficient to include a hang-glider is consistent with the scheme and purpose of the Act. The Act is concerned with civil aviation and aviation safety. It is consistent with that purpose to include within the ambit of the Act any object capable of flight, and in particular any object capable of carrying a human being into flight where the safety of any person or persons may be at risk as a consequence of their being carried aloft by that object. Mr Anderson submits that a finding that hang-gliders are not aircraft would not remove the ability of the Act to regulate

their operation. He submits that their interaction with and possible effect on aircraft and aviation facilities would come within the powers conferred by the Act. That may be so, but the purposes of the Act suggest that the Act is intended to apply to objects which might, through flight, pose a danger to human safety, by the imposition of controls on them in their own right, and not merely in respect of their interaction with other aviation elements.

‘[10] The adoption of a meaning such as is urged by counsel for the applicant would also involve the making of fine distinctions between different objects capable of flight, depending upon whether any alteration in the application of the forces to the object was achieved by the operator moving a part of the object or by moving his body relative to the object. The purposes of the Act do not suggest that fine distinctions of that sort, turning on the nature of the object, are intended in deciding what is an aircraft.

‘[11] New Zealand’s obligations under international aviation agreements are an important aspect of the Act, as the long title makes clear. The view of the definition of “aircraft” which I have expressed is consistent with international practice, so far as that is apparent from the evidence before me. The definition of “aircraft” in the Act is the same as that in the international standards contained in the Convention on International Civil Aviation. The classification of aircraft in those international standards includes a glider among the categories of non-power-driven heavier-than-air aircraft. It makes no distinction such as that urged by counsel for the plaintiff.’

‘[12] For these reasons I hold that a hang-glider is an aircraft within the meaning of the Act.’ *Smith v Attorney-General* [2009] 1 NZLR 535 at [2]–[4], [9]–[12], per MacKenzie J

AIRPORT RUNWAY

New Zealand [Right to deduct amounts for depreciation on the footing that runway end safety area (RESA) was an ‘airport runway’ in terms of the Income Tax Act 2007.] ‘[50] Against that background we turn to the critical interpretation of “airport runway”. In the absence of any definition of this term in the ITA, we first consider the natural and ordinary meaning of that expression. We are satisfied that, in ordinary parlance, an airport runway is understood to mean that part of an airport upon which aircraft take off and land. The main

runway at Queenstown Airport has a bituminous surface upon which aircraft take off and land. In contrast the RESAs are grassed areas beyond the paved runway not used for take-offs and landings except in an emergency when an aircraft may overrun or undershoot the runway.

...
‘[64] For the reasons given we agree with the Judge that neither the eastern RESA nor the supporting embankment at the Queenstown Airport falls within the term “airport runway” in Sch 13. Although we have adopted a slightly different approach to the interpretation issue, we are satisfied the Judge considered all material matters and did not err in his conclusions. In summary, the natural and ordinary meaning of airport runway is the area used for the take-off and landing of aircraft. That interpretation is supported by the definition of runway in the Civil Aviation Rules. On the evidence the runway may reasonably be expected to decline in value while used or available for use within a five-to 10-year design life and its surface will require complete replacement within that period.

‘[65] In contrast, the eastern RESA does not form part of the runway either in its natural meaning or under the Civil Aviation Rules. Nor is it intended or available for use by aircraft taking off or landing other than for use for safety reasons in an emergency. Unlike the airport runway, its overall design life is at least 120 years, after which one of its components (the Geogrids) is likely to require major work at or after that time.’ *Queenstown Airport Corp Ltd v Commissioner of Inland Revenue* [2017] NZCA 20, [2017] 2 NZLR 811 at [50], [64]–[65], per Randerson J

ALIEN

[For 4(2) Halsbury’s Laws of England (4th Edn) (2002 Reissue) para 13 see now 4 Halsbury’s Laws of England (5th Edn) (2011) para 411.]

Alien enemy

[For 49(1) Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 575 see now 3 Halsbury’s Laws of England (5th Edn) (2011) para 195.]

ALLEGIANCE

[For 8(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 29 see now 20 Halsbury’s Laws of England (5th Edn) (2014) para 37.]

ALLOTMENT

Garden

[For 2(1) Halsbury's Laws of England (4th Edn) (2003 Reissue) para 301 see now 1 Halsbury's Laws of England (5th Edn) (2008) para 510.]

Of shares

[For 7(1) Halsbury's Laws of England (4th Edn) (2004 Reissue) para 532 see now 15A Halsbury's Laws of England (5th Edn) (2016) para 1279.]

[For the Companies Act 1985, s 738(1) see now the Companies Act 2006, s 558, where the definition is slightly altered.]

ALLUREMENT

Australia [63] Both the RTA and Mr Dederer in this court addressed the concept of "allurement" in their submissions. But this is a concept that is more likely to mislead than to assist. Even when the term had determinative legal significance, Barrowclough CJ was able to say in *Napier v Ryan* [[1954] NZLR 1234 at 1240] that the word "has been given a sanctity which I think it scarcely deserves". One can well agree with that sentiment today, especially as the former technical use of that term in occupiers' liability cases has long since been superseded by the decision in *Zaluzna [Australasian Safeway Stores Pty Ltd v Zaluzna]* (1987) 162 CLR 479, 69 ALR 615].

[64] The continued use of the term "allurement" as a factual epithet tends to conceal more than it reveals. First, "allurement" might be used to indicate no more than that many people have encountered the risk, thus leading to a conclusion one way or another about the probability of that risk eventuating. Secondly, the term might focus attention on the responsibility of the defendant for creating the risk, or for encouraging or enticing people into a dangerous situation. However, in the present case the RTA did not create the risk of shallow water of variable depth, nor did it exhort or encourage young people to dive from the bridge. Thirdly, the term might simply indicate the factual proposition that the particular location or activity was attractive to certain kinds of people. Such an observation is of no legal consequence.' *Roads and Traffic Authority of New South Wales v Dederer* [2007] HCA 42, (2007) 238 ALR 761 at [63]–[64], per Gummow J

ALLUVION

[For 12(1) Halsbury's Laws of England (4th Edn) (Reissue) para 263 see now 29 Halsbury's Laws of England (5th Edn) (2014) para 177.]

ALMSHOUSE

[For the Income and Corporation Taxes Act 1988, s 505(1)(a) see now the Income Tax Act 2007, ss 521, 522.]

ALTERNATIVE DISPUTE RESOLUTION

[For 2(3) Halsbury's Laws of England (4th Edn) (Reissue) para 4 see now 2 Halsbury's Laws of England (5th Edn) (2017) para 504.]

AMALGAMATION

Of companies

[For 7(2) Halsbury's Laws of England (4th Edn) (2004 Reissue) para 1482 see now 15A Halsbury's Laws of England (5th Edn) (2016) para 1615.]

[For the Companies Act 1985, s 527 see now the Companies Act 2006, s 900.]

Qualifying amalgamation

Canada [Income Tax Act, RSC 1985, c 1 (5 Supp), s. 87.] '7 Under the *ITA*, there are two types of amalgamations. "Qualifying amalgamations" are those that meet the requirements in s. 87 of the *ITA*. Once the s. 87 requirements are met, the *ITA* provides for the flow-through of various tax attributes while deeming a new taxation year and prohibiting the flow-through of other tax attributes. All other amalgamations, which are sometimes called "statutory amalgamations" or "non-qualifying amalgamations", are outside the scope of s. 87. The tax consequences of non-qualifying amalgamations are not specified in the *ITA* and therefore must be determined using the other provisions of the *ITA*, where relevant, other relevant statutes and the common law.

'8 A qualifying amalgamation under s. 87 of the *ITA* has three basic requirements:

- (a) all of the property of the predecessor corporations immediately before the merger must become property of the amalgamated corporation (sometimes called "Amalco") by virtue of the merger;

- (b) all of the liabilities of the predecessor corporations immediately before the merger must become liabilities of Amalco by virtue of the merger; and
- (c) all of the shareholders, who owned shares of the capital stock of any predecessor corporation immediately before the merger, must receive shares of the capital stock of Amalco because of the merger.'

Envision Credit Union v Canada 2013 SCC 48, [2013] SCJ No 48 at paras 7–8, per Rothstein J

AMBIGUITY

Latent ambiguity

[For 50 Halsbury's Laws of England (4th Edn) (2005 Reissue) para 508 see now 102 Halsbury's Laws of England (5th Edn) (2010) para 209.]

Patent ambiguity

[For 50 Halsbury's Laws of England (4th Edn) (2005 Reissue) para 508 see now 102 Halsbury's Laws of England (5th Edn) (2010) para 209.]

AMOTION

[For 9(2) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 1163 see now 24 Halsbury's Laws of England (5th Edn) (2010) para 364.]

ANIMAL

[For 2(1) Halsbury's Laws of England (4th Edn) (2003 Reissue) paras 502, 508, 510 see now 2 Halsbury's Laws of England (5th Edn) (2017) paras 1, 5, 7.]

Domestic animal

[For 2(1) Halsbury's Laws of England (4th Edn) (2003 Reissue) paras 502, 508, 510, 541–547 see now 2 Halsbury's Laws of England (5th Edn) (2017) paras 1, 5, 7, 35 et seq.]

ANNATES

[For 14 Halsbury's Laws of England (4th Edn) para 1223 see now 34 Halsbury's Laws of England (5th Edn) (2011) para 988.]

ANNUAL PAYMENT

[For the Income and Corporation Taxes Act 1988, s 18 see now the Income Tax (Trading and Other Income) Act 2005, s 683.]

ANNUITY

[For 39(2) Halsbury's Laws of England (4th Edn) (Reissue) para 762 see now 80 Halsbury's Laws of England (5th Edn) (2013) para 675.]

[For 23(1) Halsbury's Laws of England (4th Edn) (Reissue) paras 477, 486 see now 58 Halsbury's Laws of England (5th Edn) (2014) paras 549, 557.]

Life annuity

[For the Income and Corporation Taxes Act 1988, s 657(1) see now the Income Tax (Trading and Other Income) Act 2005 s 473(2).]

Purchased life annuity

[For the Income and Corporation Taxes Act 1988, s 657(1) see now the Income Tax (Trading and Other Income) Act 2005 s 423(1).]

ANOTHER PERSON

Australia [Trade Practices Act 1974 (Cth), s 47(6).] '[57] Section 47(6) provides that there is exclusive dealing where the offer is on condition that the customer will acquire goods or services from "another person". This has raised for consideration three alternatives:

- Does "another person" mean a single other person or does it include the plural other persons?
- Does the expression refer to any other person or persons, or does it mean a specified person or persons?
- Does the expression encompass a person who is part of a specified panel?

'[58] The respondents emphasise that s 47 is a penal or quasi-penal provision and that these are proceedings for penalties. CIT submits that on one hand this means that there is no justification for departing from the words of the section: *Castlemaine Tooheys Ltd v Williams and Hodgson Transport Pty Ltd* (1986) 162 CLR 395 at 401; 68 ALR 376 at 380 (*Castlemaine Tooheys*) per Gibbs CJ, with whom Wilson and Dawson JJ agreed. On the other hand, that the interpretation of the section must be informed by the purpose of the Act and its provisions, which may require a departure from the

ordinary literal meaning of the words used: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; 153 ALR 490; [1998] HCA 28 at [71] and [78] (*Project Blue Sky*) per McHugh, Gummow, Kirby and Hayne JJ. It is not a question of departing from the words of the section, but of construing the meaning of the term “another person” in context.

...
 ‘[80] In my view, the text of s 47(6) and its context in s 47 and Pt IV of the Act leads to the conclusion that “another person” is not restricted to a single person and may extend to acquisition of goods or services from another person who (or which) is part of a panel. However, it does not extend to any other, unknown or unspecified, third party. It is not sufficient that the customer be required to acquire particular goods or services. It has to be from another person. Taking account of the quasi-penal nature of the provisions of Pt IV of the Act, that construction is consistent with a reading of the section, in context, that gives “the fullest relief which the fair meaning of its language will allow”: *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 at 44; 99 ALR 275 at 283 per Mason CJ.’ *Australian Competition and Consumer Commission v Link Solutions Pty Ltd* (ACN 126 049 214) (No 2) [2010] FCA 919, (2010) 272 ALR 280 at [57]–[58], [80], per Bennett J

ANY

Any person who has held office as a judge

Canada [Federal Courts Act, s 10(1.1).] ‘17. Read literally, the phrase “any person who has held office as a judge” in subsection 10(1.1) of the *Federal Courts Act* is broad enough to include any person who was once a judge. However, Mr Felipa argued in the Federal Court and in this Court that, based on subsection 99(2) of the *Constitution Act, 1867* or subsection 8(2) of the *Federal Courts Act* or both, the phrase “any person who has held office as a judge” necessarily excludes a person who is over the age of 75. The Chief Justice rejected that argument. He concluded, for reasons that are well and fully explained, that a person who is a former judge of a superior court over the age of 75 may be appointed a deputy judge of the Federal Court.

...
 ‘19. The Chief Justice concluded that a deputy judge of the Federal Court does not

“hold office” as a judge of the Federal Court, and therefore cannot “cease to hold office” under a mandatory retirement provision that requires a judge to “cease to hold office” upon attaining the age of 75. Two such provisions are subsection 8(2) of the *Federal Courts Act* and subsection 99(2) of the *Constitution Act, 1867*...

‘22. We conclude that the proper question to be asked in disposing of Mr Felipa’s motion is whether subsection 10(1.1) authorizes the Chief Justice to ask a person who is 75 years of age or older to “act as a judge of the Federal Court”. More particularly, should the phrase “any person who has held office as a judge” in subsection 10(1.1) of the *Federal Courts Act* be interpreted by necessary implication to exclude persons who are 75 years of age or older?

...
 ‘34. No limit is placed upon the phrases “any person who has held office as a judge of a superior, county or district court in Canada” and “les juges, actuels ou anciens, d’une cour supérieure, de comté ou de district” found in subsection 10(1.1). In the absence of any words of limitation, the text is broad enough to permit a former superior, county or district court judge to act as a deputy judge of the Federal Court, irrespective of his or her age.

‘35. However, as explained above, statutory interpretation requires in every case an examination of statutory context. “Words that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context” (*Montréal (City) v 2952–1366 Québec Inc* [2005 SCC 62, [2005] 3 SCR 141, 258 DLR (4th) 595], at paragraph 10). This point is well illustrated by considering section 5.3 [as enacted by SC 2002, c 8, s 16] of the *Federal Courts Act*, which states the qualifications for the appointment of a person as a judge of the Federal Court or the Federal Court of Appeal.

...
 ‘36. A literal reading of section 5.3 of the *Federal Courts Act*, in isolation from its statutory context, could suggest that a person over the age of 75 is eligible to be appointed a judge of the Federal Court if the person meets the statutory conditions in paragraphs 5.3(a), (b) or (c). But that is not a plausible interpretation of section 5.3. Why not? Because it is abundantly clear from subsection 8(2) of the *Federal Courts Act* that a person over the age of 75 is not eligible to be appointed a judge of the Federal Court.

‘37. For similar reasons, the literal meaning of the text of subsection 10(1.1) of the *Federal Courts Act* does not fully convey its meaning.

As explained in more detail below, the statutory context suggests that only persons under the age of 75 may be requested to act as deputy judges. As this is an interpretation that the text of subsection 10(1.1) is capable of bearing, it is the interpretation that we would adopt.

...
'66. Reading subsection 10(1.1) of the *Federal Courts Act* in its statutory context, it is our view that despite the broad language used in subsection 10(1.1), it must be understood to be subject to the implied limitation that persons 75 years of age or older should not serve as deputy judges. The contrary interpretation would violate the manifest legislative policy of Parliament that a person should not be permitted to perform judicial duties after attaining the age of 75. It defies common sense to conclude that a judge of the Federal Court on turning 75 years of age ceases to hold office and yet, at the request of the Chief Justice of the Federal Court, may continue to perform the same judicial duties as a deputy judge. It is equally illogical to conclude that a judge of the superior court of a province may cease to hold office on attaining age 75 and then assume judicial duties acting as a deputy judge of the Federal Court.' *Felipa v Canada (Citizenship and Immigration)* [2011] FCJ No 1355, [2012] 1 FCR 3 at paras 17, 19, 22, 34–37, 66, per Sharlow and Dawson JJA

ANYONE

Australia [Trade Practices Act 1974 (Cth), s 44H(f).] '[83] There are a number of points to be made in relation to this passage from *Sydney Airports (No 1)* [*Re Sydney International Airport*] [2000] ACompT 1. First, as to whether "anyone" in s 44H(4)(b) should include the incumbent owner of the facility to which access is sought, we prefer the view reached by the tribunal itself in *Sydney Airports (No 1)* at [201] that "anyone" does *not* include the incumbent owner, that being "more consistent with the underlying policy of Pt IIIA and economic and commercial commonsense". [Emphasis added.] On this view the problem identified by the tribunal in *Sydney Airports (No 1)* at [205] with the private profitability test does not arise. Second, that the "narrow view" will not apply to resource allocation in every imaginable case does not mean that the "narrow view" is so unreasonable that it cannot be attributed to the legislature. Reference to the contextual documents to which we have referred above shows that at least some of those responsible for

propounding Pt IIIA were indeed concerned with facilities which "a competitor could not duplicate economically". Third, the circumstance that the tribunal in this case was disposed to depart from the full-blown "social benefits" test serves to dispel any inclination which this court might otherwise have had, by reason of the importance of "consistency" referred to in s 44AA(b), to adhere to an interpretation of s 44H(4)(b) settled by the course of decisions in the tribunal.

'[84] The tribunal was influenced by the consideration reflected in the evidence of some economists that to give the phrase "uneconomical for anyone" its natural meaning of "any individual who can be identified" would be to countenance the possibility that an individual might be willing to subsidise the cost of developing another facility by subsidising the cost of that development from the profits of the sales of iron ore rather than sole reliance on the profits of providing the service: reasons at [833]. That argument may commend itself to some (though not all) economists; but nothing in the language of s 44H(4) or the extraneous materials to which we have referred suggests that the legislature regarded that possibility as one which was not to be countenanced.' *Pilbara Infrastructure Pty Ltd (ACN 103 096 340) v Australian Competition Tribunal (VID 616 of 2010)* [2011] FCAFC 58; (2011) 277 ALR 28 at [83]–[84], per Keane CJ, Mansfield and Middleton JJ

APOTHECARY

[For 30(1) Halsbury's Laws of England (4th Edn) (Reissue) paras 935–936 see now 74 Halsbury's Laws of England (5th Edn) (2011) para 5.]

APPARENT

[For 50 Halsbury's Laws of England (4th Edn) (2005 Reissue) para 374 see now 102 Halsbury's Laws of England (5th Edn) (2010) para 82.]

APPEAL

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

See also UNFETTERED DISCRETION

[CPR 52.3: requirement of permission to appeal.] '[10] MWP's case is that its application

to this court seeking to have Burton J's order refusing permission to appeal set aside is not an "appeal" within the meaning of CPR 52.3 at all, and that therefore no permission is required to make such an application, which can be made as of right. Therefore, the court has no jurisdiction to deal with the matter on paper at all, let alone treat the application as if it were an application for permission to appeal, refuse permission and declare the application to be totally without merit and thus not fit for an oral hearing.

...
 '[13] The initial difficulty with Mr Lavender's submission is to ascertain the source of the Court of Appeal's jurisdiction to hear MWP's application, if (as he says) it is not an appeal. The Court of Appeal is a creature of statute and its jurisdiction is derived from ss 15–18 of the Senior Courts Act 1981, of which ss 16–18 are material for present purposes. ...

...
 '[18] The fact therefore remains that the residual jurisdiction derives from s 16(1) of the 1981 Act and that the "right of appeal" referred to in s 54(1) of the 1999 Act [Access to Justice Act 1999] is a right to invoke the jurisdiction conferred on this court by s 16(1) of the 1981 Act. The fact that sub-ss 54(5) and (6) of the 1999 Act add two further categories of rights of appeal does not have any relevance when the residual jurisdiction relied on is already included in the right of appeal referred to in s 54(1). Mr Lavender's ingenious submissions therefore fall away and MWP's application falls within CPR 52.3. It requires permission and that permission may, in an appropriate case, be refused on the grounds that the application is totally without merit. To put the matter more broadly, the only avenue to this court from the High Court is by way of an appeal to which CPR 52.3 applies.' *Michael Wilson & Partners Ltd v Emmott* [2015] EWCA Civ 1285, [2016] 4 All ER 484 at [10], [13], [18], per Moore-Bick LJ

Australia [Criminal Code 1899 (Qld), s 669A.]. '[1] By s 669A(1) of the Criminal Code (Qld) the Attorney-General of Queensland may appeal to the Court of Appeal of the Supreme Court of Queensland against any sentence imposed by a trial court or a court of summary jurisdiction dealing with an indictable offence. The court hearing such an appeal "may in its unfettered discretion vary the sentence and impose such sentence as to the court seems proper".

...
 '[56] Ascertainment of the statutory purpose

is to be based on the words of s 669A(1) and, in particular, the word "appeal", which encompasses the jurisdiction conferred by the subsection. An appeal is a creature of statute and, subject to constitutional limitations, the precise nature of appellate jurisdiction will be expressed in the statute creating the jurisdiction or inferred from the statutory context. The purpose of s 669A(1) is to create an appellate jurisdiction exercisable upon the application of the Attorney-General and coupled with a wide remedial power. The question is what kind of jurisdiction does it create?

'[57] Appeals being creatures of statute, no taxonomy is likely to be exhaustive. Subject to that caveat, relevant classes of appeal for present purposes are:

- (1) Appeal in the strict sense—in which the court has jurisdiction to determine whether the decision under appeal was or was not erroneous on the evidence and the law as it stood when the original decision was given. Unless the matter is remitted for rehearing, a court hearing an appeal in the strict sense can only give the decision which should have been given at first instance.
- (2) Appeal de novo—where the court hears the matter afresh, may hear it on fresh material and may overturn the decision appealed from regardless of error.
- (3) Appeal by way of rehearing—where the court conducts a rehearing on the materials before the primary judge in which it is authorised to determine whether the order that is the subject of the appeal is the result of some legal, factual or discretionary error. In some cases in an appeal by way of rehearing there will be a power to receive additional evidence. In some cases there will be a statutory indication that the powers may be exercised whether or not there was error at first instance.

'[58] Where the court is confined to the materials before the judge at first instance, that is ordinarily indicative of an appeal by way of rehearing, which would require demonstration of some error on the part of the primary judge before the powers of the court to set aside the primary judge's decision were enlivened.

...
 '[94] The fourth consideration concerns the word "appeal". The appellant submitted that the selection of the word "appeal" in s 669A(1) indicated that the process was one involving the correction of error in the relevant sense. The submission assumes that all procedures described in legislation as "appeals" must

involve the correction of error in the relevant sense. That assumption is unsound. The construction of “unfettered discretion” adopted by the Court of Appeal majority is not antithetical to the word “appeal” in s 669A(1). The legislature is at liberty to fashion what particular types of appeal it wishes to create. The word “appeal” covers a variety of processes, and the list of them is not closed. The potential reach of the expression in any particular enactment is confined only by any limit to the fertility of parliament.’ *Lacey v Attorney-General (Qld)* [2011] HCA 10, (2011) 275 ALR 646 at [1], [56]–[58], [94], per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ

Proceedings in the nature of an appeal

[Whether the opportunity to commence judicial review proceedings against a qualifications body constitutes ‘proceedings in the nature of an appeal’ for the purposes of the Equality Act 2010 s 120(7).] ‘[33] Section 120(1) of the EA 2010 describes the jurisdiction of the ET [employment tribunal] to determine a complaint under Pt 5 EA 2010. Section 120(7) EA 2010 provides that sub-s (1)(a) does not apply to a contravention of s 53 in so far as the act complained of may, by virtue of an enactment, be subject to an appeal or proceedings in the nature of an appeal. Where there is a defined statutory route of appeal for actions upon a medical practitioner’s registration, such as that described in ss 38 and 40 EA 2010, the jurisdiction of the ET under s 53 is precluded. *Khan* [*Khan v General Medical Council* [1994] IRLR 646, [1996] ICR 1032, CA] remains authority for that proposition.

‘[34] In any consideration of whether there is a route of appeal, a broad interpretation is permitted consistent with the purpose identified which is to reserve decision-making, including on any review or appeal, in certain professional matters that touch upon registration, to the specialist professional body. Accordingly, an internal review or appeal may be sufficient even if a statutory appeal to the High Court is absent. That would equally oust the jurisdiction of the ET as in *Khan*. For those cases, the ultimate remedy of judicial review is available as an effective safeguard.

‘[35] That leaves the circumstance that exists in the present case where no statutory appeal to the High Court or internal review or appeal is provided for. Is judicial review within the contemplation of Parliament as “proceedings in the nature of an appeal” such that its availability

ousts the jurisdiction of the ET to consider s 53 claims? In my judgment there are significant objections to that construction. Although judicial review is undoubtedly a remedy of last resort, it is not an appeal on the merits that provides a determination of the unlawful treatment complained of. Section 31 of the Senior Courts Act 1981 sets out the modern jurisdiction ...

‘[36] By s 31(5) the High Court can quash a decision of the GMC but cannot make an award of damages without other relief. Although the High Court can grant a declaration it would not ordinarily make a finding on contested evidence and cannot issue a recommendation in respect of the unlawful treatment alleged, namely discrimination, harassment or victimisation. Furthermore, because the GMC is not a tribunal or court for the purposes of s 31(5A), the High Court cannot substitute its own decision for the decision in question. The GMC is not empowered to make a decision in respect of a s 53 complaint with the consequence that although a decision infected with unlawful treatment can be set aside, the claimant cannot obtain any other effective remedy for it.

‘[37] Just as the purpose of s 120(7) EA 2010 is to ensure that the most specialist body hears the complaint, where a complaint is focused not on the specialist medical or other professional knowledge of the qualifications body but on unlawful treatment of the nature prohibited by s 53, the ET rather than the administrative court in its judicial review jurisdiction is the specialist tribunal charged by Parliament to make decisions of that kind. To submit in that circumstance that the ET’s jurisdiction is ousted by the availability of judicial review flies in the face of long-established authority. ...

‘[43] In *Jooste* [*Jooste v General Medical Council* (2012) UKEAT/0093/12, [2012] EqLR 1048], Judge McMullen considered that his conclusion that judicial review was caught by s 120(7) EA 2010 was reinforced by Hoffmann LJ’s judgment in *Khan*. He concluded [1994] IRLR 646 at 650, [1996] ICR 1032 at 1043 of *Khan* that Hoffmann LJ “made clear that there was an effective remedy by way of judicial review”. It is important to note that while Hoffmann LJ does refer to judicial review in this part of his judgment in *Khan*, he is referring to it as being a safeguard in respect of the decisions of the review board of the GMC from which no statutory appeal to the High Court lay. He is, therefore, considering judicial

review as a mechanism by which the internal appeal decision might be reviewed rather than as an effective appeal of a GMC decision in and of itself.

‘[44] Accordingly, I have come to the conclusion that there is force in Mr Edis’s submission that where a claimant seeks to show that a decision involves unlawful discrimination but does not seek any of the discretionary remedies available in judicial review under CPR 54.3(1), then on the GMC’s construction of s 120(7) EA 2010 the jurisdiction of the ET would be ousted and there would be no alternative remedy. I also accept Mr Edis’s submission that the ET is set up to deal specifically with discrimination and related issues in employment and work. The process of the ET is designed to further that object and provide assistance in the form of rules on costs, disclosure and evidence, including, where appropriate, the reversal of the burden of proof. The benefit of that process is not available in judicial review.

‘[45] The ET is better equipped to deal with disputed decisions of fact and to examine courses of conduct. It is able to call on witnesses to provide evidence. These matters are important in discrimination claims which turn, in general, on the question of why a claimant was treated in a particular way and whether that treatment points to discrimination in respect of a protected characteristic. Judicial review, on the other hand, is set up to consider procedural unfairness and the lawfulness of a decision. It naturally goes more to the question of how a decision was made rather than why it was made. Judge McMullen identified that distinction at [31] in *Jooste* but then failed to take the argument to its logical conclusion.

‘[46] The existence of judicial review does not preclude the use of the ET because that was never the intention of Parliament and the case law before *Jooste* did not suggest so precisely because judicial review was not contemplated to be and is not a specialist forum for the determination of discrimination and related unlawful conduct. It is of course an ultimate safeguard in that it enables a remedy to be obtained where no other remedy exists, but here, the ET has a sufficient jurisdiction with appropriate remedies which should be used before recourse to judicial review is contemplated.’ *Michalak v General Medical Council* [2016] EWCA Civ 172, [2017] 2 All ER 534 at [33]–[37], [43]–[46], per Ryder LJ

APPLICATION OF A FORCE ... EXTERNAL TO THE HUMAN BODY

New Zealand [Injury Prevention, Rehabilitation, and Compensation Act 2001, s 25(1)(a)(i). Whether cerebral palsy caused during the process of birth was covered by the 2001 Act.] ‘[4] The 2001 Act provides cover to a “person” suffering “personal injury caused by an accident to the person” (s 20(1) and (2)(a)). “Personal injury” is defined, and excludes “personal injury caused wholly or substantially by a gradual process, disease, or infection unless it is personal injury of a kind described in s 20(2)(e) to (h)” (s 26(2)). “Accident” is also defined, and for present purposes the relevant definitions are:

- (a) “a specific event or a series of events, other than a gradual process, that ... involves the application of a force (including gravity), or resistance, external to the human body” (s 25(1)(a)(i)); and
- (b) “any exposure to the elements, or to extremes of temperature or environment” (s 25(1)(e)).

... ‘[43] ... I consider that when a fetus is in utero “the application of a force ... external to the human body” is intended to refer, for the purposes of cover, to a force external to the mother. The fetus, whether viewed as “a person” or not, is still within another human being. On the natural and ordinary words of s 25(1)(a)(i) a force external to the fetus, but still occurring within the mother, is not external to the mother’s human body and so not “external to the human body”. If Parliament had intended this definition of accident to cover forces internal to the mother but external to the fetus then clearer words would have been chosen.

‘[44] But even if I am wrong on that, at best s 25(1)(a)(i) would only apply to the cord-related possible causes. Placental disease and placental separation would need to fall within s 20(1)(e). I acknowledge that the deprivation of oxygen to the fetus could be viewed as making the womb environment extreme for the fetus. However, I do not think the word “womb” can be inserted into the definition. I do not think there is a proper basis, even on a generous and non-niggardly view, to depart from the natural and ordinary meaning of “environment” when read in context with “exposure to the elements, or to extremes of temperature or environment”. That seems to me to contemplate things occurring out in the world and not within a

human body.’ *Sam v Accident Compensation Corporation* [2009] 1 NZLR 132 at [4], [43]–[44], per Mallon J

APPOINTMENT

[For 5(3) Halsbury’s Laws of England (4th Edn) (Reissue) para 80 see now 9 Halsbury’s Laws (5th Edn) (2012) para 80.]

APPRENTICE

[For 16(1A) Halsbury’s Laws of England (4th Edn) (Reissue) para 9 see now 39 Halsbury’s Laws of England (5th Edn) (2009) para 9.]

APPROPRIATE DEVELOPMENT

‘[7] The concept of “appropriate development” is well established in the context of Green Belt policy. It reflects a distinction between two stages of the analysis: whether development is “appropriate” in the Green Belt and how much harm to the Green Belt a particular proposal will do (see eg *Kemnal Manor Memorial Gardens Ltd v First Secretary of State* [2005] EWCA Civ 835 at [28], [2005] JPL 1568 at [28], per Keene LJ). Certain categories of development, such as agricultural buildings, recreational facilities, and cemeteries, have traditionally been regarded as acceptable in principle, subject to other planning considerations. “Inappropriate development”, which includes most forms of residential or commercial development, is unacceptable in principle, and is permitted only in “very special” circumstances.’ *R (on the application of the Heath and Hampstead Society) v Vlachos* [2008] EWCA Civ 193, [2008] 3 All ER 80 at [7], per Carnwath LJ

APPROPRIATELY DEALT WITH

Canada [Human Rights Code, RSBC 1996, c 210, s 27(1).] ‘2. In British Columbia, there is legislation giving the Human Rights Tribunal a discretion to refuse to hear a complaint if the substance of that complaint has already been appropriately dealt with in another proceeding. The issue in this appeal is how that discretion ought to be exercised when another tribunal with concurrent human rights jurisdiction has disposed of the complaint.

...
‘37. Relying on these underlying principles leads to the Tribunal asking itself whether there

was concurrent jurisdiction to decide human rights issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself. All of these questions go to determining whether the substance of a complaint has been “appropriately dealt with”. At the end of the day, it is really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute.

‘38. What I do *not* see s 27(1)(f) as representing is a statutory invitation either to “judicially review” another tribunal’s decision, or to reconsider a legitimately decided issue in order to explore whether it might yield a different outcome. The section is oriented instead towards creating territorial respect among neighbouring tribunals, including respect for their right to have their own vertical lines of review protected from lateral adjudicative poaching. When an adjudicative body decides an issue within its jurisdiction, it and the parties who participated in the process are entitled to assume that, subject to appellate or judicial review, its decision will not only *be* final, it will be treated as such by other adjudicative bodies. The procedural or substantive correctness of the previous proceeding is not meant to be bait for another tribunal with a concurrent mandate.

‘39. I see the discretion in s 27(1)(f), in fact, as being limited, based not only on the language of s 27(1)(f), but also on the character of the other six categories of complaints in s 27(1) in whose company it finds itself. ...

‘40. Each subsection in s 27(1) refers to circumstances that make hearing the complaint presumptively unwarranted: complaints that are not within the Tribunal’s jurisdiction; allege acts or omissions that do not contravene the *Code*; have no reasonable prospect of success; would not be of any benefit to the complainant or further the purposes of the *Code*; or are made for improper motives or in bad faith. These are the statutory companions for s 27(1)(f). The fact that the word “may” is used in the preamble to s 27(1) means that the Tribunal does have an element of discretion in deciding whether to dismiss these complaints. But it strikes me as counterintuitive to think that the legislature intended to give the Tribunal a wide berth to decide, for example, whether or not to dismiss

complaints it has no jurisdiction to hear, are unlikely to succeed, or are motivated by bad faith.

‘41. This is the context in which the words “appropriately dealt with” in s 27(1)(f) should be understood. All of the other provisions with which s 27(1)(f) is surrounded lean towards encouraging dismissal. On its face, there is no principled basis for interpreting s 27(1)(f) idiosyncratically from the rest of s 27(1). I concede that the word “appropriately” is, by itself, easily stretched into many linguistic directions. But our task is not to define the word, it is to define it in its statutory context so that, to the extent reasonably possible, the legislature’s intentions can be respected.

‘42. Nor does the legislative history of s 27(1)(f) support the theory that the legislature intended to give the Tribunal a wide discretion to re-hear complaints decided by other tribunals. Formerly, ss. 25(3) and 27(2) of the *Code* required the Tribunal to consider the subject matter, nature, and available remedies of the earlier proceeding in deciding whether to defer or dismiss a complaint without a hearing. These factors were interpreted by the Human Rights Commission to include the administrative fairness of the earlier proceeding, the expertise of the decision-maker, which forum was more appropriate for discussing the issues, and whether the earlier proceeding could deliver an adequate remedy, factors which provided hurdles to the dismissal of complaints: see D K Lovett and A R Westmacott, “Human Rights Review: A Background Paper” (2001) (online), at pp 100–101.

‘46. This brings us to how the Tribunal exercised its discretion in this case. Because I see s 27(1)(f) as reflecting the principles of the common law doctrines rather than the codification of their technical tenets, I find the Tribunal’s strict adherence to the application of issue estoppel to be an overly formalistic interpretation of the section, particularly of the phrase “appropriately dealt with”. With respect, this had the effect of obstructing rather than implementing the goal of avoiding unnecessary relitigation. In acceding to the complainant’s request for relitigation of the same s 8 issue, the Tribunal was disregarding *Arbour J*’s admonition in *Toronto (City)* [*Toronto (City)* v *CUPE, Local 79*, 2003 SCC 63, [2003] 3 SCR 77] that parties should not try to impeach findings by the “impermissible route of relitigation in a different forum” (para 46).’ *British Columbia (Workers’ Compensation Board)* v *Figliola*

[2011] SCJ No 52, [2011] 3 SCR 422 at paras 2, 37–42, 46, per Abella J

ARBITRAL AWARD

Australia [International Arbitration Act 1974 (Cth); Model Law on International Commercial Arbitration.] ‘[15] The ordinary meaning of “arbitral award” in the IA Act and Model Law is clear, although the term is not defined. It means no more than an award made by an arbitral tribunal in an international commercial arbitration, and it therefore includes both foreign and non-foreign awards. Foreign awards and non-foreign awards are each types of arbitral award covered by the IA Act and Model Law. There is nothing in the Model Law and the IA Act which indicates that the meaning of “arbitral award” does not include both types of award. That the meaning of “arbitral award” includes both foreign and non-foreign awards is apparent from, among other provisions, Arts 35 and 36 of the Model Law and ss 2D, 3(1), 23D(6) and 39 of the Act.’ *Castel Electronics Pty Ltd (ACN 074 561 087)* v *TCL Air Conditioner (Zhongshan) Co Ltd* [2012] FCA 21, (2012) 287 ALR 297 at [15], per Murphy J

ARBITRARY

Canada ‘38. The Reviewer’s principal concern should have been with how Mr McLaughlin was treated and whether that treatment was arbitrary. The Reviewer limited his understanding of arbitrary to an inquiry into whether or not the employer acted with an improper motive. While improper motives fall into the definition of arbitrary, the definition is not limited to motivation. Where a decision is “not based on rationale or established policy ...” it is arbitrary.’ *McLaughlin v Canada (Attorney General)* [2010] FCJ No 457, [2010] ACF No 457 at para 38, per Mandamin J

ARBITRATION

[For 2(3) Halsbury’s Laws of England (4th Edn) (Reissue) para 1 see now 2 Halsbury’s Laws of England (5th Edn) (2017) para 501.]

ARBITRATOR

[For 2(3) Halsbury’s Laws of England (4th Edn) (Reissue) para 24 et seq see now 2 Halsbury’s Laws of England (5th Edn) (2017) para 526 et seq.]

ARCHBISHOP

[For 14 Halsbury's Laws of England (4th Edn) para 430 see now 34 Halsbury's Laws of England (5th Edn) (2011) para 141.]

ARCHDEACON

[For 14 Halsbury's Laws of England (4th Edn) para 496 see now 34 Halsbury's Laws of England (5th Edn) (2011) para 217.]

ARCHITECT

[For 4(3) Halsbury's Laws of England (4th Edn) (Reissue) para 425 see now 6 Halsbury's Laws of England (5th Edn) (2011) para 425.]

AREA

Australia [Native Title Act 1993 (Cth), s 47B.] '[93] The word "area" can be used to signify both the whole geographic expanse the subject of an application for a determination of native title and lesser portions as small as an individual parcel of land or a part of such a parcel. Moreover, this meaning of "area", as capable of applying to an individual parcel or a larger aggregation of parcels, in the sense or senses in which it is used in the Act, is reinforced by s 23(b) of the Acts Interpretation Act. That section provides that "words in the singular number include the plural and words in the plural number include the singular". That said, the use of the word "area" in s 47B is not straightforward, although it is unnecessary to consider the multiple permutations of the provision given the facts of the present case.

'[94] In considering how s 47B(1) operates, it is important to keep in mind that it defines the circumstances in which the preservative effect of s 47B(2) will apply by prescribing two positive and one negative precondition, each of which must be satisfied. The positive preconditions are that, *first*, a claimant application, being defined in s 253 as, relevantly, a native title determination application, "is made in relation to an area" (para (a)) and, *second*, when that application is made, "one or more members of the native title claim group occupy the area" (para (c)). The negative precondition is that when the application is made "*the area is not*" any of the three particular categories specified in s 47B(1)(b).

'[95] Suffice to say that the state's appeal can be determined by our proceeding on the basis of the state's acknowledgment that the

relevant "area" is the land and waters in respect of which it denied s 47B applied, namely here UCL 7, 9 and 42. Accordingly, it is not necessary to determine precisely how the word "area" ought be construed in each of its uses in s 47B.

'[96] When a claimant application is made, it usually covers a large geographic expanse of land and waters without the claimant group necessarily being aware of all or, indeed, very much, of the land title tenure details. It would be unlikely that any claimant application would not include some parcel of freehold or leasehold estate referred to in s 47B(1)(b)(i) or land or waters subject to an affectation of the kind referred to in s 47B(1)(b)(ii). In that context, the expression "the area is not" in the chapeau to s 47B(1)(b) could not have been intended to apply to all of the land and waters comprised in the claimant application referred to in s 47B(1)(a). And the expression "covered by" in s 47B(1)(b)(i) and (ii) could not have been intended to refer to a situation in which, if the specified form of land tenure or affectation existed over all or any part of the whole area claimed in the claimant application, s 47B(2) would be incapable of applying to land and waters in that whole claimed area that did not fall within the specification.

'[97] The definition of a claimant application, which incorporates by reference the definition of native title determination application under s 61(1) of the NTA, itself requires that it be made "in relation to an area", so the additional words repeating that expression in s 47B(1)(a) must be used to narrow the focus of each paragraph in s 47B(1)(b), and of s 47B(1)(c), to each particular parcel of land and waters individually covered by the claimant application and to which s 47B is alleged to apply. And, the use of the expression "the whole or a part of the land or waters in the area" in s 47B(1)(b)(ii) reinforces the narrowing effect of "in relation to an area" in s 47B(1)(a).

'[98] In other words, the exclusion from the beneficial operation of s 47B(2) effected by each paragraph in s 47B(1)(b) should be given a narrow reading so that the exclusion will apply only in respect of each particular parcel of land or waters that falls within the express words. Thus, native title will be treated, for the purposes of s 47B, as having been extinguished only in respect of each freehold or leasehold estate, and each particular part of land or waters subject to an affectation referred to in s 47B(1)(b)(ii), and each set of interests referred to in s 47B(1)(b)(iii) and (5)(b), and s 47B(2) will not operate to affect that status.

[99] Accordingly, the exclusion from the general application of s 47B effected by s 47B(1)(b), will apply only to an individual parcel of land or waters that meets one of the precise criteria in subparas (i), (ii) or (iii) that is the subject of a claimant application. And, in the case of a parcel that is affected only in part, as contemplated in s 47B(1)(b)(ii), the exclusion affects only the part meeting the criterion, so that the balance of the land or waters in the area or parcel not within the satisfied criterion, is still subject to the application of s 47B(2).’ *Tucker (on behalf of the Banjima People) v Western Australia (WAD 72 of 2014)* [2015] FCAFC 84, (2015) 322 ALR 199 at [93]–[99], per Mansfield, Kenny, Rares, Jagot and Mortimer JJ

ARISING

Arising under

Australia [Judiciary Act 1903 (Cth), s 39B(1A)(c).] ‘[50] In order to attract jurisdiction under s 39B(1A)(c) the “matter” must be one “arising under” a federal law. This requires that there be a sufficient nexus between the “matter” and the federal law under which it is said to arise. The test for whether a matter arises under a federal law is broad. In *Felton v Mulligan* (1971) 124 CLR 367 at 416; [1972] ALR 33 at 60, Gibbs J (as he then was) held that:

... a matter arises under a law made by the Parliament when a right, title, privilege or immunity is claimed under that law. A right, title, privilege or immunity may be claimed under a law, either because the law is the source of the right, title, privilege or immunity or because the right, title, privilege or immunity can only be enforced by virtue of the law.

Similarly in *Agrack (NT) Pty Ltd v Hatfield* (2005) 223 CLR 251; 218 ALR 677; [2005] HCA 38 at [32] Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ held:

[32] If a party on either side of the record relies upon a right, immunity or defence derived from a federal law, there is a matter arising under s 76(ii) of the Constitution.

[51] TCL argues that the [International Arbitration Act 1974 (Cth)] and Model Law does not deal with enforcement of non-foreign awards, and that the jurisdiction of the court in relation to enforcement does not relate to

Arts 35 and 36. It says that although the Model Law deals with both foreign and non-foreign awards it does not identify or prescribe the “competent court” under Art 35. It contends that the court is not required to determine the parties’ rights, duties or liabilities. For the reasons I have already set out, in my view the Act and Model Law does deal with enforcement of non-foreign awards, and the court is required to determine the parties’ rights and liabilities.

[52] It is also clear that the parties rely upon rights and defences derived from federal law. Castel claims rights derived from Art 35 of the Model Law to enforce the awards. It opposes TCL’s contention that the awards should not be enforced in reliance on Art 36, and it defends TCL’s claim to set aside the awards aside in reliance on Art 34. TCL defends the application to enforce the awards in reliance on Art 36, and seeks that the awards be set aside in reliance on Art 34. These articles have force as federal law by virtue of s 16 of the Act.

[53] It is also important to note that it is uncontroversial that this court has been specifically vested with jurisdiction by s 18(3) of the Act to determine TCL’s application to set aside the awards. That application relates to part of the underlying justiciable controversy. It is established that once vested with federal jurisdiction to determine part of a controversy or matter, the court can determine the whole matter: *Fencott* [*Fencott v Muller* (1983) 152 CLR 570; 46 ALR 41] at CLR 603–4 and 606–10; ALR 63–4 and 66–9; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 292–4; 49 ALR 193 at 214–15; 1 IPR 193 at 212–14.

[54] I find that this court has jurisdiction to enforce both non-foreign and foreign awards made under the IA Act and Model law.’ *Castel Electronics Pty Ltd (ACN 074 561 087) v TCL Air Conditioner (Zhongshan) Co Ltd* [2012] FCA 21, (2012) 287 ALR 297 at [50]–[54], per Murphy J

ARMS

Court of Chivalry

[For 35 Halsbury’s Laws of England (4th Edn) (Reissue) para 916 see now 79 Halsbury’s Laws of England (5th Edn) (2014) para 884.]

Officers of arms

[For 35 Halsbury’s Laws of England (4th Edn) (Reissue) paras 910–914 see now 79 Halsbury’s

Laws of England (5th Edn) (2014) paras 878–882.]

ARRANGEMENT

[The Proceeds of Crime Act 2002, s 328 provides that a person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person.] ‘[18] Mr Robertson’s submissions raise two important questions, each of which concerns one aspect of the *actus reus* of the offence created by s 328(1): first, whether it is necessary for the property which is the subject of the arrangement to be criminal property at the time when the arrangement attaches to it; second, whether it is permissible for these purposes to separate out different aspects of the arrangement so that its implementation can be treated as both criminalising the property and then as facilitating its retention, use or control in its newly acquired criminal character, thus constituting the offence. In due course it will be necessary to consider how these questions impinge on the question of *mens rea*, but since they are both of some importance and were fundamental to Mr Robertson’s argument we must first address them.

‘[19] In our view the natural and ordinary meaning of s 328(1) is that the arrangement to which it refers must be one which relates to property which is criminal property at the time when the arrangement begins to operate on it. To say that it extends to property which was originally legitimate but became criminal only as a result of carrying out the arrangement is to stretch the language of the section beyond its proper limits. An arrangement relating to property which has an independent criminal object may, when carried out, render the subject matter criminal property, but it cannot properly be said that the arrangement applied to property that was already criminal property at the time it began to operate on it. Moreover, we do not accept that an arrangement of the kind under consideration in the present case can be separated into its component parts, each of which is then to be viewed as a separate arrangement. In this case there was but one arrangement, namely, that the appellant would receive money, hold it for a period and return it. To treat the holding and return as separate arrangements relating to property that had previously been received is artificial.

...

‘[36] Part 7 of the 2002 Act, as the heading indicates, is concerned with money laundering and ss 327, 328 and 329 are all directed to dealing with criminal property in one way or another. In each case the natural meaning of the statutory language is that in each case the property in question must have become criminal property as a result of some conduct which occurred prior to the act which is alleged to constitute the offence, whether that be concealing, disguising, converting, transferring or removing it contrary to s 327 or entering into or becoming concerned in an arrangement which facilitates its acquisition, retention, use or control by another contrary to s 328. We think that the same must be true of acquiring, using or having possession of criminal property contrary to s 329(1). Moreover, it follows from what we have said that the only authorities directly in point on the interpretation of ss 327 and 328 support that conclusion.

‘[37] Finally, we should add that we consider it important in the interests of legal certainty that legislation of this kind should be interpreted in accordance with its natural and ordinary meaning. The Crown’s argument in this case involves interpreting s 328(1) in an artificial way in order to encompass conduct to which it does not naturally refer. Even if it is possible by stretching its language to interpret the section in the manner suggested by Mr Robertson, we do not think that it ought to be interpreted in that way in order to extend its ambit to ensure that the appellant’s conviction is upheld.’ *R v Geary* [2010] EWCA Crim 1925, [2011] 2 All ER 198 at [18]–[19], [36]–[37], per Moore-Bick LJ

Canada [Business Corporations Act, RSA 2000, c B-9, s 193.] ‘9. The remaining issue is whether the plan proposed by the Applicant meets the definition of an “arrangement.” The proposed arrangement would see the exchange of units in the Fund for shares of EIFH, and amendments to, *inter alia*, the articles of incorporation of EIFH. Were the primary subject matter of the proposed arrangement the shares of another corporation, there is no question that s 193 would apply. The more interesting issue is the applicability of s 193 to an arrangement involving an income trust. In *Acadian Timber [Re Acadian Timber Income Fund]* [2009] OJ No 5517 (Ont Sup Ct Jus)], Pepall J granted an interim order in largely similar circumstances under the parallel provision of the *Canada Business Corporations Act*, RSC 1985, c C-44 (“CBCA”). In *BFI Canada Income Fund* [2009] OJ No 74 (Ont Sup Ct Jus)] C L Campbell J approved a final plan of

arrangement reorganizing an income fund's trust structure into a corporation under the parallel provision of the Ontario *Business Corporations Act*, RSO 1990 c B-16. This Court has approved arrangements involving trusts (*Re Crescent Point Energy Trust*, Alta QB Action No 0901-07957; *Re Black Diamond Income Fund*, Alta QB Action No 0901-16946; *Re Cathedral Energy Sands Income Trust*, Alta QB Action No 0901-17227; *Re Canadian Oil Sands Trust*, Alta AB Action No 1001-03140;) but to date has issued no written reasons confirming the applicability of s 193 of the ABCA to income trusts.

'10. With the change in tax rules applicable to SIFTs [specified investment flow through trusts], there has emerged a need for an effective mechanism to convert businesses operated by SIFTs to businesses operated by corporations. As the end of the four-year transition period under the SIFT rules approaches, courts are likely to be faced with an increasing number of applications to achieve this result. As the Applicant points out, the securities of many SIFTs are publicly traded and held by residents of the United States, and there are registration exemptions under United States securities laws that depend upon the domestic court having the express jurisdiction to opine upon the fairness of the exchange and issuance of securities.

'11. In *Amoco Acquisition Co v Savage* (1988) 87 AR 321 (CA) the Alberta Court of Appeal rejected a narrow interpretation of the arrangement provision in the ABCA, adopting instead a broad and purposeful approach and noting, at para 5, "The category of 'arrangement' we think exists primarily to deal with proposals that do not quite fit in other categories." In *Acadian Timber*, Pepall J considered s 192 of the CBCA and held, at para 8:

"The word 'arrangement' is to be given its widest character, limited only by the corporation's own by-laws or general legislation. The purpose of an arrangement is to provide a flexible mechanism that can be adapted to the needs of a particular case."

Pepall J looked to the decision in *Re Fairmont Hotels & Resorts* [2006] OJ No 5591 (Ont Sup Ct Jus), where Farley J held, at para 1, "With respect I think it an error to forget the very flexibility of the arrangement provision was designed to allow the solution of difficult and awkward situations".

'12. It is worth noting that s 193(1) of the

ABCA arguably extends greater flexibility to this Court in determining the various transactions falling within the definition of an "arrangement", when compared to s 192 of the CBCA. Whereas s 192 of the CBCA, at issue in *Acadian Timber*, provides that an arrangement includes the various transactions thereafter listed, s 193(1) of the ABCA provides that an arrangement "includes, but is not restricted to" the transactions listed at s 192(1)(a) to (i). Neither section uses the term "means", which is often used in definition sections of legislation.

...

'18. In view of the broad jurisdiction accorded to this Court under s 193(1) of the ABCA and the exceptional circumstances that confront SIFTs, I find that this Court has jurisdiction to approve a plan of arrangement involving an income trust, and jurisdiction to grant the interim order sought here, because the transaction falls within the definition of "arrangement" pursuant to s 193 of the ABCA.' *Re Enbridge Income Fund Holdings Inc* [2010] AJ No 785, 2010 ABQB 274, Alta QB, at paras 9-12, 18, per N C Wittmann CJQB

ARREST

Of ship

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

Upon arrest or detention

Canada [Canadian Charter of Rights and Freedoms, s 10(b).] '19. Section 10(b) of the *Charter* states that upon arrest or detention, a person has the right to "retain and instruct counsel without delay" ("*avoir recours sans délai à l'assistance d'un avocat*").

'20. Mr Sinclair argues that the plain wording of s 10(b) does not restrict the right to retain and instruct counsel to an initial, preliminary consultation. Section 10(b) speaks of a right, upon arrest or detention, to "retain and instruct counsel without delay". Although the wording makes clear that the right arises on detention, there is nothing on its face to indicate when the right is exhausted. It is argued that while the English words, "retain and instruct" can plausibly be read to connote a continuing right, the French version of s 10(b) indicates this even more strongly ("*avoir recours délai à l'assistance d'un avocat*"). It is argued that the word "*assistance*" connotes the right to the ongoing help of a lawyer.

'21. Against these arguments, the Crown submits that the words "on arrest or detention" indicate a point in time, not a continuum. It is true, the Crown concedes, that "retain" and the French "*recours ... à l'assistance*" can be read as suggesting continuity. But against this, the words "without delay" can be read to indicate a discrete period shortly following arrest or detention.

'22. The surrounding text of s 10 does not greatly assist in resolving the debate on whether s 10(b) confers initial or continuing rights. Section 10(a) provides the right on arrest or detention "to be informed promptly of the reasons therefor". This clearly confers a duty to give the detainee information at a discrete point in time; there is no requirement that the police convey this information more than once, unless the reasons themselves change: *R v Evans*, [1991] 1 SCR 869. But the right of *habeas corpus* conferred by s 10(c) is self-evidently a continuing right.

'23. We conclude that the language of s 10(b) does not resolve the issue before us. A deeper purposive analysis is required.

'24. The purpose of s 10(b) is to provide a detainee with an opportunity to obtain legal advice relevant to his legal situation. In the context of a custodial interrogation, chief among the rights that must be understood by the detainee is the right under s 7 of the *Charter* to choose whether to cooperate with the police or not.

...
'32. We conclude that in the context of a custodial interrogation, the purpose of s 10(b) is to support the detainee's right to choose whether to cooperate with the police investigation or not, by giving him access to legal advice on the situation he is facing. This is achieved by requiring that he be informed of the right to consult counsel and, if he so requests, be given an opportunity to consult counsel.

'33. Mr Sinclair submits that s 10(b) entitles a detainee to have a lawyer present, upon request, during the entirety of the interview.

'34. Precedent is against this interpretation of s 10(b). ...

...
'36. This returns us to the purpose of s 10(b). As discussed above, it is to inform the detainee of his or her rights and provide the detainee with an opportunity to get legal advice on how to exercise them. These purposes can be achieved by the right to re-consult counsel where developments make this necessary, as discussed below. They do not demand the

continued presence of counsel throughout the interview process.

...
'42. We conclude that s 10(b) should not be interpreted as conferring a constitutional right to have a lawyer present throughout a police interview. There is of course nothing to prevent counsel from being present at an interrogation where all sides consent, as already occurs. The police remain free to facilitate such an arrangement if they so choose, and the detainee may wish to make counsel's presence a precondition of giving a statement.

...
'44. The "single consultation" interpretation of s 10(b) was forcefully expressed in *R v Logan* (1988), 46 CCC (3d) 354 (Ont CA). After reviewing the authorities, the court stated, at p 381:

The clear implication in the judgment of Lamer J in *Manninen* is that s 10(b) confers the right, upon arrest or detention, to retain, instruct and be instructed by counsel *before* any statements of the accused are elicited. The words "upon arrest or detention" indicate a point in time, not a continuum. They do not deal with a continuing right to be reinstructed before every occasion on which the police obtain a statement from the accused. It is true that "retain" has a connotation of continuity (The Shorter Oxford English Dictionary (1973), p. 1813), but this is with respect to the engagement of services, *i.e.*, the availability and subsequent resort to them when one wants to do so. It does not express a prerequisite to every subsequent elicitation of information. [Underlining added.]

...
'65. We conclude that the principles and case-law do not support the view that a request, without more, is sufficient to retrigger the s 10(b) right to counsel and to be advised thereof. What is required is a change in circumstances that suggests that the choice faced by the accused has been significantly altered, requiring further advice on the new situation, in order to fulfill the purpose of s 10(b) of providing the accused with legal advice relevant to the choice of whether to cooperate with the police investigation or not. Police tactics short of such a change may result in the Crown being unable to prove beyond a reasonable doubt that a subsequent statement was voluntary, rendering it inadmissible. But it does not follow that the procedural rights

granted by s 10(b) have been breached.' *R v Sinclair* 2010 SCC 35, [2010] 2 SCR 310 at paras 19–24, 32–34, 36, 42, 44, 65, per McLachlin CJ and Charron J

ARRESTS, RESTRAINTS AND DETAINMENTS

[For 25 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 339 see now 60 Halsbury's Laws of England (5th Edn) (2011) para 330.]

ARRIVAL TIME

[Articles 2, 5 and 7 of European Parliament and Council Regulation 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights (OJ 2004 L46, p 1); right to compensation in the event of a long delay to a flight.] '12. By its question the referring court asks, in essence, whether Articles 2, 5 and 7 of Regulation No 261/2004 are to be interpreted as meaning that the concept of "arrival time", which is used to determine the length of the delay to which passengers on a flight have been subject, refers to (a) the time at which the aircraft touches down on the runway of the destination airport; (b) the time at which the aircraft reaches its parking position and the parking brakes are engaged or the chocks have been applied; (c) the time at which the aircraft door is opened or (d) a time defined by the parties by common accord.

'13. It must be pointed out at the outset that that regulation envisages two different types of flight delay.

'14. First, in some cases, such as the flight delay described in Article 6 of Regulation No 261/2004, that regulation refers to a flight's being delayed beyond its scheduled departure time.

'15. Secondly, in other cases, such as those referred to in Articles 5 and 7 of that regulation, the regulation refers to the situation where arrival has been delayed. It is apparent from those articles that, in order to establish the length of such a delay, it is necessary to compare the scheduled arrival time of the aircraft with the time at which it actually arrived at its destination.

'16. Regulation No 261/2004 does not define the actual arrival time. That being the case, the need for a uniform application of EU law and the principle of equal treatment require that the terms of a provision of EU law which makes no

express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent interpretation throughout the European Union (see, to that effect, *Ekro*, 327/82, EU:C:1984:11, paragraph 11).

'17. It follows that that concept of "actual arrival time" must be interpreted in such a way as to apply uniformly throughout the European Union.

'18. In those circumstances, one of the possibilities envisaged by the referring court, namely that according to which that concept is defined by the parties concerned on a contractual basis, must, in the absence of any indication to that effect in Regulation No 261/2004, be rejected at the outset.

'19. It must also be noted that the Court has held that when their flights are subject to long delay, that is delay equal to or in excess of three hours, passengers of such flights are entitled to compensation on the basis of Article 7 of Regulation No 261/2004, like those passengers whose original flights have been cancelled and whom an air carrier is not able to offer re-routing in accordance with the conditions laid down in Article 5(1)(c)(iii) of that regulation, given that they also suffer an irreversible loss of time (see, to that effect, *Folkerts*, C-11/11, EU:C:2013:106, paragraph 32 and the case-law cited).

'20. During a flight, passengers remain confined in an enclosed space, under the instructions and control of the air carrier, in which, for technical and safety reasons, their possibilities of communicating with the outside world are considerably restricted. In such circumstances, passengers are unable to carry on, without interruption, their personal, domestic, social or business activities. It is only once the flight has ended that they are able to resume their normal activities.

'21. Although such inconveniences must be regarded as unavoidable as long as a flight does not exceed the scheduled duration, the same is not true if there is a delay, since the time by which, in the circumstances described in the preceding paragraph, the scheduled duration of the flight has been exceeded, represents "lost time" in the light of the fact that the passengers concerned cannot use it to achieve the objectives which led them to go at the desired time to the destinations of their choice.

'22. It follows that the concept of "actual arrival time" must be understood, in the context of Regulation No 261/2004, as corresponding to the time at which the situation described in

paragraph 20 of the present judgment comes to an end.

'23. In that regard, it must be stated that, in principle, the situation of passengers on a flight does not change substantially when their aircraft touches down on the runway at the destination airport, when that aircraft reaches its parking position and the parking brakes are engaged or when the chocks are applied, as the passengers continue to be subject, in the enclosed space in which they are sitting, to various constraints.

'24. It is only when the passengers are permitted to leave the aircraft and the order is given to that effect to open the doors of the aircraft that the passengers may in principle resume their normal activities without being subject to those constraints.

'25. It is apparent from the foregoing considerations that Articles 2, 5 and 7 of Regulation No 261/2004 must be interpreted as meaning that the concept of "arrival time", which is used to determine the length of the delay to which passengers on a flight have been subject, corresponds to the time at which at least one of the doors of the aircraft is opened, the assumption being that, at that moment, the passengers are permitted to leave the aircraft.' *Germanwings GmbH v Henning* Case C-452/13, 4 September 2014, ECJ, at paras 12–25

ARSON

[For 11(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 334 see now 25 Halsbury's Laws of England (5th Edn) (2016) para 392.]

ARTICLES

[For the definition in the Companies Act 1985, s 744 see now the Companies Act 2006, s 18(4): 'References in the Companies Acts to a company's "articles" are to its articles of association'.]

[For the Companies Act 1985, ss 7–9 see now the Companies Act 2006, Pt 3 Ch 2 (ss 18–28). See also the Companies (Model Articles) Regulations 2008, SI 2008/3229.]

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 628 see now 91 Halsbury's Laws of England (5th Edn) (2012) para 529.]

ARTIFICIAL PRICE

Australia [Corporations Act 2001 s 1041A: market manipulation by, inter alia, '(c) creating

an artificial price for trading in financial products on a financial market operated in this jurisdiction'.] '[77] For these reasons, the majority in the Court of Appeal was wrong to conclude that s 1041A should be construed as directed to "market manipulation by conduct of the kind typified by American jurisprudential conceptions of 'cornering' and 'squeezing'". Contrary to the conclusions of the majority in the Court of Appeal, s 1041A is not confined in its application to the creation or maintenance of an artificial price by a dominant market participant exercising that participant's market power. A purchase of listed shares made on the ASX for the sole, or at the least dominant, purpose of ensuring that the price of the shares was not less than the price paid for that purchase is a transaction which has or is likely to have the effect of creating an artificial price for trading in those shares, or maintaining at a level that is artificial a price for trading in those shares.' *Director of Public Prosecutions (Cth) v JM* [2013] HCA 30, (2013) 298 ALR 615 at [77], per French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ

AS A RESULT OF

Australia [Safety, Rehabilitation and Compensation Act 1988 (Cth), ss 5A, 5B.] '[1] This appeal concerns the causal connection required to meet the exclusion from the Safety, Rehabilitation and Compensation Act 1988 (Cth) (the Act) of an injury suffered by an employee "as a result of" reasonable administrative action. The causal connection was met in circumstances where an employee suffered an aggravation of a mental condition in reaction to a perceived consequence of her failure to obtain a promotion.

...

'[43] Within a statutory context which includes ss 5A and 5B, the exclusionary phrase "as a result of" in s 5A(1) is naturally read, not as imposing its own separate and free-standing test of causation, but rather as referring relevantly to the test of causation spelt out in s 5B(1).

'[44] The application of the definition of disease in s 5B(1) means that, to have suffered a disease falling within s 5A(1)(a), the employee must have suffered an ailment or aggravation of an ailment that was contributed to, to a significant degree, by the employee's employment. In excluding from the definition of an injury compensable under the Act a disease that is suffered by an employee "as a result of"

reasonable administrative action taken in a reasonable manner in respect of the employee's employment, s 5A(1) is naturally read as referring to the contribution made to the suffering of the disease by an event in the course of the employee's employment which answers that description of reasonable administrative action.

'[45] When the exclusionary phrase is so read, it becomes apparent that an employee has suffered a disease "as a result of" administrative action if the administrative action is a cause in fact of the disease which the employee has suffered. The administrative action need not be the sole cause. There may be multiple causes, some of which might even be related to other aspects of the employee's employment. What is necessary is that the taking of the administrative action is an event without which the employee's ailment or aggravation would not have been a disease: it would not have been contributed to, to a significant degree, by the employee's employment.'

...
 '[47] Having regard to the text and structure of ss 5A and 5B, and consistently with the statutory purpose of the exclusion in s 5A(1), what is required to meet the causal connection connoted by the exclusionary phrase in s 5A(1) in its application to a disease within s 5A(1)(a) is therefore that the employee would not have suffered that disease, as defined by s 5B(1), if the administrative action had not been taken. That is to say, the causal connection is met if, without the taking of the administrative action, the employee would not have suffered the ailment or aggravation that was contributed to, to a significant degree, by the employee's employment.'

'[48] The causal connection giving rise to the exclusion from the definition of injury is met where the disease suffered by the employee is a mental condition or an aggravation of a mental condition suffered by the employee in reaction to a failure to obtain promotion, including in reaction to a perceived consequence of that failure to obtain promotion. The nature of the perceived consequence—whether personal or professional, direct or indirect, real or imagined—is beside the point.' *Comcare v Martin* [2016] HCA 43, (2016) 339 ALR 1 at [1], [43]–[45], [47]–[48], per French CJ, Bell, Gageler, Keane and Nettle JJ

AS A RESULT OF THE ANALYSIS

Canada [Motor Vehicle Act, RSBC 1996, c 318, s 215.41(3.1): when an approved screening

device ('ASD') is used to collect a roadside sample under the automatic roadside driving prohibition scheme ('ARP regime' or 'ARP scheme'), s 215.41(3.1) requires that when a driver registers a 'Warn' or 'Fail' on the ASD, a peace officer must issue an immediate driving prohibition if the officer has reasonable grounds to believe, 'as a result of the analysis', that the driver's ability to drive is affected by alcohol.] '3. The interpretation of that provision is central to this appeal. The question that arises is this: In assessing whether a peace officer has the requisite grounds to believe that a driver's ability to drive is affected by alcohol, can the officer rely solely on the ASD result?

'4. Mr Wilson says no. He submits that to meet the "reasonable belief" standard, the ASD result must be backed by other evidence indicating that the driver's ability to drive is affected by alcohol. This could include evidence of erratic driving, or other indicators commonly associated with impairment, such as slurred speech, glassy and bloodshot eyes, unsteady gait, and so on.

'5. The Superintendent of Motor Vehicles rejected this argument and upheld a notice of driving prohibition ("Notice") served on Mr Wilson. In his view, the ASD test result was sufficient, on its own, to provide a peace officer with the grounds needed to issue a Notice. On judicial review, the British Columbia Supreme Court set aside the Notice. On appeal from that decision, the British Columbia Court of Appeal reinstated it.

...
 '26. The plain meaning of s 215.41(3.1) supports the adjudicator's interpretation. It explicitly links the officer's belief to the result of the ASD analysis. The provision states that the peace officer must have reasonable grounds to believe, *as a result of the analysis*, that the driver's ability to drive is affected by alcohol. The wording could not be clearer. The ASD analysis is the yardstick against which to measure the reasonableness of the officer's belief.

'27. Mr Wilson submits that the officer's belief must be based not only on the ASD result, but also on confirmatory evidence showing that the driver's ability to drive is affected by alcohol. I would reject this interpretation. It is not supported by the text of the provision, and it requires the court to read in words that are simply not there. ...

'28. Mr Wilson further submits that the adjudicator's interpretation gives no meaning to s 215.41(3.1)(b). He points out that the provision uses mandatory language requiring

peace officers to issue a Notice when there are reasonable grounds to believe an individual's ability to drive is affected by alcohol. He argues that if a "Warn" or a "Fail" result constitutes reasonable grounds on its own, para (b) is superfluous: the legislature could have simply stated that the officer must issue a Notice on the basis of a "Warn" or "Fail" result. For that reason, he contends that the wording of the statute must require something more than merely the ASD result.

'29. In my view, both the Court of Appeal and the Crown respondent provide a convincing answer to this argument. As they point out, there can be situations in which a driver blows a "Warn" or "Fail", but the officer has reason to doubt the accuracy of the result. Two examples come to mind:

- The officer has reason to doubt that the ASD device functioned properly.
- The officer has reason to doubt that the sample was taken properly (i.e., in accordance with the procedures for obtaining reliable readings from ASD devices).

The inclusion of the phrase "as a result of the analysis" precludes an officer from issuing a Notice in such situations. The officer must have an honest belief in the accuracy of the ASD result. Only then will he or she have reasonable grounds to believe "as a result of the analysis" that the individual's ability to drive is affected by alcohol. This interpretation gives meaning to the words used in the statute; it does not read in wording that introduces a new dimension to the provision, as Mr Wilson would have it.

'42. The adjudicator's interpretation is consistent with the text, context, and legislative objectives of the ARP scheme. Mr Wilson's interpretation is not. The provision is unambiguous. The adjudicator's interpretation is the only plausible one.' *Wilson v British Columbia (Superintendent of Motor Vehicles)* [2015] SCJ No 47, [2015] 3 SCR 300 at paras 3–5, 26–29, 42, per Moldaver J

AS OF RIGHT

[For 12(1) Halsbury's Laws of England (4th Edn) (Reissue) para 623 see now 32 Halsbury's Laws of England (5th Edn) (2012) para 23.]

[Commons Act 2006, s 15(4).] '[2] The general issue for the court is whether a piece of open land next to the sea in Redcar ought to have been registered as a town green under s 15. For at least 80 years before 2002 the land in

question (the disputed land) formed part of a golf course in regular use by members of the Cleveland Golf Club, whose trustees were tenants of the course. The inspector who held a public inquiry found as a fact that when local residents using the disputed land for recreation encountered members of the golf club playing golf, the former "deferred" to the latter. In these circumstances the legal issue for the court can be more particularly stated as whether the legal consequence of this deference was that the local residents were not indulging in recreation "as of right" within the meaning of the 2006 Act.

...

'[17] The concept of user "as of right" is found (either in precisely those words or in similar terms) in various statutory provisions dealing with the acquisition by prescription of public or private rights. Section 5 of the Prescription Act 1832 makes it sufficient to plead enjoyment "as of right" (while s 2 refers to a way "actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years"). Section 31 of the Highways Act 1980 refers to use of a way being "actually enjoyed by the public as of right and without interruption for the full period of 20 years". Section 22(1A) of the [Commons Registration Act 1965], as substituted by the [Countryside and Rights of Way Act 2000], refers simply to inhabitants indulging in lawful sports and pastimes "as of right" for at least 20 years.

'[18] Both *Ex p Sunningwell* [1999] 3 All ER 385, [2000] 1 AC 335 and *Beresford's case* [2004] 1 All ER 160, [2004] 1 AC 889 were concerned with the meaning of "as of right" in the 1965 Act. In *Ex p Sunningwell* Lord Hoffmann discussed the rather unprincipled development of the English law of prescription. He explained ([1999] 3 All ER 385 at 391, [2000] 1 AC 335 at 350–351) that by the middle of the nineteenth century the emphasis shifted from fictions—

"to the quality of the 20-year user which would justify recognition of a prescriptive right or customary right. It became established that such user had to be, in the Latin phrase, *nec vi, nec clam, nec precario*: not by force, nor stealth, nor the licence of the owner. (For this requirement in the case of custom, see *Mills v Colchester Corp* (1867) LR 2 CP 476 at 486.) The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to

resist the exercise of the right—in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period.”

Lord Hoffmann pointed out that for the creation of a highway, there was an additional requirement that an intention to dedicate it must be evinced or inferred (as to that aspect see *R (on the application of Godmanchester Town Council) v Secretary of State for Environment, Food and Rural Affairs*, *R (on the application of Drain) v Secretary of State for Environment, Food and Rural Affairs* [2007] UKHL 28, [2007] 4 All ER 273, [2008] 1 AC 221).

[19] In *Ex p Sunningwell* the villagers had used about ten acres of glebe land for dog-walking, children’s games, and similar activities. This use seems to have coincided with the land being let for grazing by horses, but the report gives little detail about this. The inspector (as it happens, Mr Chapman) advised against acceptance of the registration because although the witnesses had said that they thought they had the right to use the glebe, they did not say that they thought the right was confined to villagers (as opposed to the general public). Lord Hoffmann held (and the rest of the Appellate Committee agreed) that this was an error. The decision of the Court of Appeal in *R v Suffolk CC, ex p Steed* [1997] 1 EGLR 131 was overruled. That was the context in which Lord Hoffmann stated in a passage ([1999] 3 All ER 385 at 393, [2000] 1 AC 335 at 352–353) relied on by the respondents:

“My Lords, I pause to observe that Lord Blackburn [in *Mann v Brodie* (1885) 10 App Cas 378 at 386, as to dedication of a highway] does not say that there must have been evidence that individual members of the public using the way believed there had been a dedication. He is concerning himself, as the English theory required, with how the matter would have appeared to the owner of the land. The user by the public must have been, as Parke B said in relation to private rights of way in [*Bright v Walker* (1834) 1 Cr M & R 211 at 219, 149 ER 1057 at 1060], ‘openly and in the manner that a person rightfully entitled would have used it ...’ The presumption arises, as Fry J said of prescription generally in *Dalton v Henry Angus & Co, Comrs of HM Works and Public Buildings*

v Henry Angus & Co (1881) 6 App Cas 740 at 773, [1881–85] All ER Rep 1 at 30, from acquiescence.”

[20] The proposition that “as of right” is sufficiently described by the tripartite test *nec vi, nec clam, nec precario* (not by force, nor stealth, nor the licence of the owner) is established by high authority. The decision of the House of Lords in *Gardner v Hodgson’s Kingston Brewery Co Ltd* [1903] AC 229 is one of the clearest: see 238 and 239 per Lord Davey and Lord Lindley respectively. Other citations are collected in *Gale on Easements* (18th edn, 2008) p 242 (paras 4–80, 4–81). The proposition was described as “clear law” by Lord Bingham of Cornhill in *Beresford’s case* [2004] 1 All ER 160 at [3]. The opinion of Lord Rodger of Earlsferry (at [55]) is to the same effect. So is that of Lord Scott of Foscote (at [34]), though with a cautionary note as to the difference between the acquisition of public and private rights.

[21] The respondents’ case is that although Sullivan J, in his judgment in the *Laing Homes* case [2003] 3 EGLR 70, was indeed the first judge to speak in terms of “deference” shown by local residents, he was not striding into entirely unknown and uncharted territory. Earlier authorities (including those mentioned in the passage of Lord Hoffmann’s opinion in *Ex p Sunningwell* quoted in [19], above) suggest that although the local residents’ private beliefs as to their rights are irrelevant, the same is not true of their outward behaviour on the land in question, as it would appear to a reasonable owner of the land. ...

[36] ... I have no difficulty in accepting that Lord Hoffmann was absolutely right, in *Ex p Sunningwell* [1999] 3 All ER 385 at 393, [2000] 1 AC 335 at 352–353, to say that the English theory of prescription is concerned with “how the matter would have appeared to the owner of the land” (or if there was an absentee owner, to a reasonable owner who was on the spot). But I have great difficulty in seeing how a reasonable owner would have concluded that the residents were not asserting a right to take recreation on the disputed land, simply because they normally showed civility (or, in the inspector’s word, deference) towards members of the golf club who were out playing golf. It is not as if the residents took to their heels and vacated the land whenever they saw a golfer. They simply acted (as all the members of the court agree, in much the same terms) with courtesy and common sense. But courteous and sensible though they

were (with occasional exceptions) the fact remains that they were regularly, in large numbers, crossing the fairways as well as walking on the rough, and often (it seems) failing to clear up after their dogs when they defecated. A reasonably alert owner of the land could not have failed to recognise that this user was the assertion of a right and would mature into an established right unless the owner took action to stop it (as the golf club tried to do, ineffectually, with the notices erected in 1998).

‘[38] ... The inspector’s assessment did in my opinion amount to an error of law. He misdirected himself as to the significance of perfectly natural behaviour by the local residents.’ *R (on the application of Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11, [2010] 2 All ER 613 at [2], [17]–[21], [36], [38], per Lord Walker SCJ

[Commons Act 2006, s 15(2).] ‘[12] The basic issue which the appeal raises is a short one: where land is provided and maintained by a local authority pursuant to s 12(1) of the Housing Act 1985 or its statutory predecessors, is the use of that land by the public for recreational purposes “as of right” within the meaning of s 15(2)(a) of the 2006 Act?

‘[14] The origin of the expression “as of right” in the definition of “town or village green” in s 22(1) of the Commons Registration Act 1965, which is effectively for present purposes the statutory predecessor of s 15(2) of the 2006 Act, was authoritatively discussed by Lord Hoffmann in *R v Oxfordshire CC, ex p Sunningwell Parish Council* [1999] 3 All ER 385 at 390–392, [2000] 1 AC 335 at 349–351. As he said, it originates from the law relating to the acquisition of easements by prescription. Before examining what Lord Hoffmann said, it is, I think, helpful to explain that the legal meaning of the expression “as of right” is, somewhat counterintuitively, almost the converse of “of right” or “by right”. Thus, if a person uses privately owned land “of right” or “by right”, the use will have been permitted by the landowner—hence the use is rightful. However, if the use of such land is “as of right”, it is without the permission of the landowner, and therefore is not “of right” or “by right”, but is actually carried on as if it were by right—hence “as of right”. The significance of the little word “as” is therefore crucial, and renders the expression “as of right” effectively the antithesis of “of right” or “by right”.

‘[20] In the present case, the Council’s argument is that it acquired and has always held

the Field pursuant to s 12(1) of the 1985 Act and its statutory predecessors, so the Field has been held for public recreational purposes; consequently, members of the public have always had the statutory right to use the Field for recreational purposes, and, accordingly, there can be no question of any “inhabitants of the locality” having indulged in “lawful sports and pastimes” “as of right”, as they have done so “of right” or “by right”. In other words, the argument is that members of the public have been using the Field for recreational purposes lawfully or precario, and the 20-year period referred to in s 15(2) of the 2006 Act has not even started to run—and indeed it could not do so unless and until the Council lawfully ceased to hold the Field under s 12(1) of the 1985 Act.

‘[21] In my judgment, this argument is as compelling as it is simple. So long as land is held under a provision such as s 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land “by right” and not as trespassers, so that no question of user “as of right” can arise. In *Sunningwell* [1999] 3 All ER 385 at 393, [2000] 1 AC 335 at 352–353, Lord Hoffmann indicated that whether user was “as of right” should be judged by “how the matter would have appeared to the owner of the land”, a question which must, I should add, be assessed objectively. In the present case, it is, I think, plain that a reasonable local authority in the position of the Council would have regarded the presence of members of the public on the Field, walking with or without dogs, taking part in sports, or letting their children play, as being pursuant to their statutory right to be on the land and to use it for these activities, given that the Field was being held and maintained by the Council for public recreation pursuant to s 12(1) of the 1985 Act and its statutory predecessors. *R (on the application of Barkas) v North Yorkshire County Council* [2014] UKSC 31, [2014] 3 All ER 178 at [12], [14], [20]–[21], per Lord Neuberger P

AS SHE WAS

[Clause 11 of a memorandum of understanding (MOA) for the sale and purchase of a second-hand ship on the Norwegian Saleform 1993 provided that ‘The Vessel shall be delivered and taken over as she was at the time of inspection’. A question arose as to whether this excluded the term as to satisfactory quality implied into the MOA by virtue of the Sale of Goods Act 1979, s 14(2).] ‘[64] In my

judgment, the tribunal was clearly right to conclude that the words “as she was” in the first sentence of cl 11 are a necessary part of a sentence which is recording the obligation to deliver the vessel in the same condition as she was when inspected. In other words, they are part of a temporal obligation which arises because, usually, there will be a period of time of weeks or even months between inspection and delivery. However, those words tell one nothing about what the sellers’ obligations are, either on inspection or delivery, as regards the quality of the vessel. Hence they do not and cannot exclude the implied term as to satisfactory quality under s 14(2) of SOGA.

...
 ‘[67] ... In my judgment, the words “as she was”, in the context of the first sentence of cl 11, are incapable of bearing the same meaning as the free-standing words “as is, where is” in a sale contract, assuming for the purposes of the argument that those words do exclude the statutory implied terms.

‘[68] Even if the sellers were right that a possible meaning of the words “as she was” was to exclude the implied terms, it remains the case that the sellers cannot establish that that was the only meaning the words were intended to have, since plainly the context indicates the temporal purpose of the words, to make it clear that the vessel is to be delivered in the same condition as when inspected. Given the strict approach to construction of terms alleged to exclude the statutory implied terms consistently adopted by the courts, up to and including the decision of Cooke J in *Air Transworld Ltd v Bombardier Inc* [[2012] EWHC 243 (Comm), [2012] 2 All ER (Comm) 60], the fact that even on the sellers’ best case the words must have more than one meaning is fatal to the sellers’ case that these words exclude the statutory implied terms. Furthermore, given that *an* obvious sensible meaning of the words is as part of the temporal obligation to which I have referred, s 55(2) defeats the sellers’ argument, since it cannot be said that the first sentence of cl 11 is inconsistent with the implied term in s 14(2).’
The Union Power [2012] EWHC 3537 (Comm), [2013] 2 All ER 870 at [64], [67]–[68], per Flaux J

ASCERTAIN

Ascertained goods

[For 41 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 112 see now 91 Halsbury’s

Laws of England (5th Edn) (2012) para 303.]

ASSAULT

[For 11(1) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 147 see now 25 Halsbury’s Laws of England (5th Edn) (2016) para 134.]

[For 45(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 427 see now 97 Halsbury’s Laws of England (5th Edn) (2015) para 526.]

ASSERT

Canada [Class Proceedings Act 1992, SO 1992, c 6, s 28.] ‘3. As for s 28 *CPA*, it operates to suspend the limitation period for “a cause of action asserted in a class proceeding” in favour of the members of a class “on the commencement of the class proceeding”.

‘4. At issue in the court below was the meaning of the word “asserted” in s 28 *CPA*. Initially, a panel of three judges of the Court of Appeal ruled unanimously in *Sharma v Timminco Ltd*, 2012 ONCA 107, 109 OR (3d) 569, that the statutory claim for secondary market misrepresentation cannot be “asserted” until a court has granted leave to do so. As a result, the court held that the *CPA* could not operate to suspend the limitation period for class members (including for the representative plaintiff) until leave was obtained.

...
 ‘8. In my opinion, pleading an intention to seek leave in respect of a s 138.3 *OSA* [Ontario Securities Act] claim in a class proceeding together with a common law cause of action amounts to neither the assertion of the statutory cause of action nor the commencement of a class proceeding for that statutory cause of action under s 28 *CPA*. Not only is this interpretation consistent with the fundamental principles and structure of class proceedings in Canada, but it is also the only one that is consistent with the wording of the provisions and the ordinary and grammatical meaning of the words used as well as with the rigorous and exhaustive legislative balancing that produced Part XXIII.1 *OSA*.

...
 ‘51. I also agree with the interpretation of the meaning of the word “assert” in s 28 *CPA* proposed by Goudge JA in *Timminco*. The plaintiffs argue that to trigger the application of s 28 *CPA*, it is sufficient to merely plead the material facts of the claim which are common to the statutory and common law causes of action

together with an intention to seek leave under s 138.8 *OSA*. Although it is true that the definition of “cause of action” is the set of facts that give rise to a legal right of action, I am of the view that the *assertion* of a cause of action must be premised on the existence of a “right of action”. In this sense, the meaning of the word “assert”, plucked and isolated from the context of the provision, is a red herring. In *Méthot v Montreal Transportation Commission* [1972] SCR 387, the relevant limitation provision required that a written notice be provided before an action was commenced. This Court held that “the notice which is required is not simply a procedural step. It is part of the very formation of the right of action” (p 396). The same reasoning applies here with respect to the leave requirement, and I do not share Karakatsanis J’s view that that case dealt with a different issue. Given the clear wording of s 138.3 *OSA*, pleading a factual matrix and an intention to seek leave under s 138.8 *OSA* cannot amount to the assertion of the statutory cause of action.

⁵² Furthermore, as can be seen from the legislative history, the original draft of what is now s 28 *CPA* read “a cause of action advanced in a proceeding” before it was later changed to “a cause of action asserted in a class proceeding” in the final piece of legislation: *Report of the Attorney General’s Advisory Committee on Class Action Reform* (1990), at p 47. In my opinion, this change is evidence that the legislature intended “assert” to represent a more forceful concept than a mere mention or advancement of a cause of action, since the change would otherwise have been unnecessary.

⁵³ Viewing these provisions together, there is no ambiguity to speak of in their interaction. Section 28 *CPA* does not operate to suspend the limitation period applicable to a cause of action until the commencement of a class proceeding in which the cause of action is asserted. This commencement cannot occur under Part XXIII.1 *OSA* until leave is granted. In this sense, the leave requirement of s 138.8 *OSA* is a hurdle which must be cleared before s 28 *CPA* can operate to suspend the limitation period. The necessity of the leave requirement is equally applicable for an individual plaintiff and for a representative plaintiff in a class proceeding. However, in the latter case, once leave has been granted to one plaintiff, the members of the group benefit from it and the limitation period is suspended for all.’ *Canadian Imperial Bank of Commerce v Green* [2015] SCJ No 60, [2015] 3 SCR 801 at paras 3–4, 8, 51–53, per Côté J

ASSESSMENT

Australia [Income Tax Assessment Act 1936 (Cth), s 175.] ‘[75] ... Conduct which purports to be the making of an assessment but which is proved to be not that but instead a deliberate failure not to administer the governing legislation according to its terms results not in an “assessment” any formal defect in the making of which is, by virtue of s 175 of the ITAA, none the less an act of the commissioner within jurisdiction but rather in an administrative act which is not an “assessment” at all. Section 175 has no application to such an act. Like any Commonwealth statute, s 175 of the ITAA36 must be construed subject to the Constitution and to the limits of legislative competence: s 15A of the Acts Interpretation Act 1901 (Cth). The jurisdiction to control by the grant of the remedies for which s 75(v) of the Constitution makes provision is vested by the Constitution in the High Court and may not be removed by parliament (save in compliance with the manner and form permitted by s 128 of the Constitution). One does not therefore adopt a construction of s 175, where another is open, which would exceed that limitation on Commonwealth legislative competence. It is that same jurisdiction which is relevantly vested in this court by s 39B of the Judiciary Act.’ *Denlay v Comr of Taxation* [2010] FCA 1434, (2010) 276 ALR 675 at [75], per Logan J

Canada [Income Tax Act, RSC, 1985 (5th Supp), c 1, s 165(3). Whether the onus of proof with respect to assumptions of fact first made by the Minister of National Revenue at the confirmation stage of a reassessment pursuant to s 165(3) is on the Crown. The Tax Court held that it was, as the confirmation of an assessment is not part of the assessment process, and that it was inappropriate for the taxpayer to have the onus of disproving assumptions made at the confirmation stage. This view was rejected on appeal.] ‘[21] [T]he respondent argues that the case law is clear that the taxpayer bears the onus of proof only with respect to the Minister’s assumptions of fact made at the time of assessment. The term “assessment” refers to the administrative act of fixing tax liability culminating in the issuance of a notice of assessment. It does not include the administrative appeal process which involves the confirmation of the assessment: see respondent’s memorandum of fact and law, at paragraphs 15–17. The respondent relies upon paragraph 49(1)(d) of the *Tax Court of Canada Rules (General Procedure)* requiring every

reply to state “the findings or assumptions of fact made by the Minister when making the assessment”.

...
 [32] [W]hile it is true that assessment, reassessment and confirmation refer to three specific actions by the Minister under the Act in the process of determining the tax liability of a taxpayer, the word “assessment” also refers to the product of that process. Hugessen JA nicely described the two meanings of the word in *Canada v Consumers’ Gas Co* [1987] 2 FC 60 (CA). At page 67 he wrote:

What is put in issue on an appeal to the courts under the *Income Tax Act* is the Minister’s assessment. While the word “assessment” can bear two constructions, as being either the process by which tax is assessed or the product of that assessment, it seems to me clear, from a reading of sections 152 to 177 of the *Income Tax Act*, that the word is there employed in the second sense only. This conclusion flows in particular from subsection 165(1) and from the well established principle that a taxpayer can neither object to nor appeal from a nil assessment.

[33] I agree with the motions Judge that the appeal is not from the confirmation of the assessment. The appeal is, to use the words of Hugessen JA, from the product of that assessment: see also *Parsons*, at page 814, where Cattanaach J held that the “assessment by the Minister, which fixes the quantum and tax liability, is that which is the subject of the appeal.” That product refers to the amount of the tax owing as initially assessed or determined, and subsequently confirmed. From the perspective of the process itself, the assessment pursuant to sections 152 to 165 is not completed by the Minister until, within the time allotted by the Act, the amount of the tax owing is finally determined, whether by way of reconsideration, variation, vacation or confirmation of the initial assessment: see *Parsons*, at page 814.’ *Canada v Anchor Pointe Energy Ltd* [2008] 1 FCR 839, 283 DLR (4th) 434, [2007] FCJ No 687, 2007 FCA 188 at [21], [32]–[33], per Letourneau JA

ASSET

[Standard form freezing order.] [15] The Bank contends, on the assumption that the Loan Agreements create genuine obligations with third party lenders, that there were created relevant “assets” which could only be dealt with

in accordance with the Freezing Order. As to the meaning of “asset” the Bank has alternative cases. Its primary case is that all choses in action, including the respondent’s rights to borrow, fall within the definition of “assets” in the Freezing Order. Its alternative case is that the proceeds of the Loan Agreements were “assets” within the meaning of the extended definition at para 5 of the Freezing Order because the respondent had power “directly or indirectly, to dispose of, or deal with [the proceeds] as if they were his own”. Both those propositions were challenged by the respondent and are now challenged by the advocates to the court. ...

...
 [21] The expression “assets” is capable of having a wide meaning. For example it can include a chose in action. However, like any document, a freezing order must be construed in its context. That includes its historical context. It is for that reason that, in giving the leading judgment in *Solodchenko* [*JSC BTA Bank v Solodchenko* [2011] 2 All ER (Comm) 1063], beginning at para [17] Patten LJ explained the development of the relevant clauses in the standard forms of freezing injunction. He referred first to *Federal Bank of the Middle East Ltd v Hadkinson* [2000] 2 All ER 395, [2000] 1 WLR 1695 in which the Court of Appeal had to decide whether an order in the standard form of freezing order at that time was effective to cover assets which were held in the defendant’s name but which belonged beneficially to third parties. The Court of Appeal held that it was not.

...
 [33] There is force in the Bank’s case that what used to be called the *Mareva* injunction has been extended in many ways since its inception, as for example to permit worldwide orders and to permit orders in respect of trust assets. There is also force in the point that choses in action have come to be regarded as within the ordinary meaning of “assets”.

[34] However, as stated above, context is of particular importance in construing orders such as the Freezing Order in this case. The origin of the *Mareva* jurisdiction was consistent with the enforcement principle. In its historical context the word “asset” was prima facie part of a fund which would be available to the judgment creditor. The cases and legal writings referred to above show that there has over the years been a settled understanding that borrowings were not covered by the standard form of freezing order.

...
 [38] None of the cases relied upon by the

Bank seems to me to support its case in so far as it relies upon the standard form of freezing order. The authorities do not support the proposition that the respondent's right to draw down the loans was an asset within the meaning of the freezing orders as originally drafted. While it would be open to this court to reverse those decisions, I do not think that it would be appropriate to do so. They have stood for many years and have been accepted both by the courts and the legal writers. Clarity is important and so is certainty in the context of penal orders. I would therefore answer the question posed by issue 1 in the statement of facts and issues in the negative. I would hold that the respondent's right to draw down under the Loan Agreements does not qualify as an "asset" within the meaning of the Freezing Order if it is construed without reference to the extended definition in the second sentence of para 5. If that is correct, I do not think that anything the respondent had done amounts to disposing of, dealing with or diminishing the value of "assets" as that word has been construed in the original forms of freezing injunction; that is without reference to the extended definition in the second sentence of para 5. I would therefore also answer the question posed by issue 2 in the negative. It follows that I would dismiss the Bank's appeal on those issues.

'[39] I have however reached a different conclusion on issue 3. The position seems to me to be different in the more recent forms, which were used in this case and in *Solodchenko*. I would hold that the proceeds of the Loan Agreements were "assets" within the meaning of the extended definition in para 5 of the Freezing Order in this case and would allow the appeal on this ground. ...

'[40] The Bank submits that the respondent's right to draw down the loans was an "asset" within the second sentence of para 5 because it was an asset which the respondent had the "power, directly or indirectly, to dispose of, or deal with as if it were [his] own". As I see it, an instruction to the lender to pay the lender's money, which is what it was, to a third party is dealing with the lender's assets as if they were his own.' *JSC BTA Bank v Ablyazov (No 5)* [2015] UKSC 64, [2016] 1 All ER 608 at [15], [21], [33]–[34], [38]–[40], per Lord Clarke SCJ

ASSETS

[For the Income and Corporation Taxes Act 1988, s 779(12) see now the Corporation Tax Act 2010, s 843(5).]

[For 7(1) Halsbury's Laws of England (4th Edn) (2004 Reissue) para 524 see now 17 Halsbury's Laws of England (5th Edn) (2011) para 630.]

ASSIGNMENT

[For 9(1) Halsbury's Laws of England (4th Edn) (Reissue) para 754, note 3 see now 22 Halsbury's Laws of England (5th Edn) (2012) para 333, note 3.]

ASSIST

[The Insolvency Act 1986, s 426(4) makes provision for United Kingdom insolvency courts to 'assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory'. Where a company registered in Jersey obtained a letter of request from the Royal Court of Jersey to the English High Court to assist the Jersey court by appointing administrators and ancillary actions pursuant to the Insolvency Act 1986, the judge dismissed the application on the grounds that the court only had jurisdiction under s 426(4) to 'assist' a foreign court exercising a similar jurisdiction if that court required assistance in its functions as an insolvency court, and in the absence of any insolvency proceedings in Jersey or any intention to commence such proceedings the court had no jurisdiction to make an administration order.] '[37] The first point is that s 426(4) is not by its actual wording applicable (notwithstanding the title to the section) to courts exercising jurisdiction in relating to insolvency law: it is by its wording applicable to courts having jurisdiction, or the corresponding jurisdiction, in insolvency law. I would be prepared to accept that s 426 would not in itself empower the courts to issue or act upon a request in respect of a matter unrelated to insolvency: cf the discussion of Lord Collins in *Rubin's case [Rubin v Eurofinance SA, New Cap Reinsurance Corp Ltd (in liq) v Grant]* [2012] UKSC 46, [2013] 1 All ER 521, [2013] AC 236] at [146]–[154]. But that said, I do not think that the courts should be astute to equate "having" jurisdiction with "exercising" jurisdiction in the sense of connoting a requirement for the existence of some formal insolvency proceedings in the requesting state.

'[38] The second, and linked, point is this. The authorities show that s 426(4) and (5) are to be given a broad interpretation. In my view, the words of s 426(4) are amply sufficient, broadly

read, to enable the English court to “assist” the Jersey court in the way here requested. There is neither linguistic necessity nor purposive compulsion to adopt a narrow and restrictive approach. To the contrary.’ *HSBC Bank plc v Tambrook Jersey Ltd* [2013] EWCA Civ 576, [2013] 3 All ER 850 at [37]–[38], per Davis LJ

ASSISTANCE

Writ of assistance

[Delete the entry. There is no longer a definition in Halsbury’s Laws of England.]

ASSOCIATED OPERATIONS

[For the Income and Corporation Taxes Act 1988, s 741(1) see now the Income Tax Act 2007, s 719(1).]

ASSOCIATION

In association with

Canada [Criminal Code, RSC 1985, c C-46, s 467.12.] ‘52. Section 467.12 of the *Code* provides:

467.12 (1) Every person who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, a criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(2) In a prosecution for an offence under subsection (1), it is not necessary for the prosecutor to prove that the accused knew the identity of any of the persons who constitute the criminal organization.

‘53. The phrase “in association with” should be interpreted in accordance with its plain meaning and statutory context. It is accompanied here by the terms “at the direction of” and “for the benefit of”. These phrases are not mutually exclusive. On the contrary, they have a shared purpose and will often overlap in their application. Their common objective is to suppress organized crime. To this end, they especially target offences that are connected to the activities of criminal organizations and advance their interests.

‘54. Considered in this light, the phrase “in association with” captures offences that

advance, at least to some degree, the interests of a criminal organization—even if they are neither directed by the organization nor committed primarily for its benefit. As noted by Miles Hastie:

The phrase “in association with” should capture, like its siblings, an interest of the criminal organization in the predicate offence. The accused need not carry out the predicate offence exclusively for the criminal organization: the accused may (and, as an organization member, will usually) entertain other selfish motives. But offences committed for wholly selfish purposes should not generate liability. On some level, the offence must only capture actions with and for the criminal organization. [Emphasis added; emphasis in original deleted; footnote omitted.]

(“The Separate Offence of Committing a Crime ‘In Association with’ a Criminal Organization: Gang Symbols and Signs of Constitutional Problems” (2010), 14 *Can Crim L Rev* 79, at p 91)

‘55. The phrase “in association with” requires a connection between the predicate offence and the organization, as opposed to simply an association between the *accused* and the organization: see *R v Drecic* 2011 ONCA 118, 276 OAC 198, at para 3. In *R v Lindsay* (2004) 70 OR (3d) 131 (SCJ), aff’d 2009 ONCA 532, 245 CCC (3d) 301, the trial judge, correctly in my view, interpreted the phrase “in association with” as follows:

The phrase “in association with” is not impermissibly vague. The phrase is intended to apply to those persons who commit criminal offences in linkage with a criminal organization, even though they are not formal members of the group. *The Oxford English Dictionary* (10th ed.) defines the phrase “associate oneself with” to mean, “allow oneself to be connected with or seen to be supportive of”. The phrase “in association with” requires that the accused commit a criminal offence in connection with the criminal organization. Whether the particular connection is sufficient to satisfy the “in association with” requirement will be for a court to determine, based on the facts of the case. [Emphasis added; para 59.]

‘56. As mentioned earlier, an offender may commit an offence “in association with” a criminal organization of which the offender is

not a member. Membership in an organization, however, remains a relevant factor in determining whether the required nexus between the offence and the organization has been made out (see *Drecic*, at para 3).’ *R v Venneri* [2012] SCJ No 33, 2012 SCC 33 at paras 52–56, per Fish J

AT A TIME MORE CONVENIENT THAN THE TIME WHEN THE BROADCAST IS MADE

Australia [Copyright Act 1968 (Cth), s 111.] ‘[78] However, the circumstances of the two users L and J and the facility offered by the TV Now service of being able to view broadcasts “near live” on Apple devices, require further consideration. As the rightholders submitted, there is a tension between “near live” viewing and a purpose of watching the material broadcast “at a time more convenient than the time when the broadcast is made” (s 111(1)).

‘[79] The rightholders accepted in argument that recording technology generally available to individuals now allows a viewer of a television program to record it and, as it is being broadcast, the viewer can pause the live reception of the broadcast while continuing to record it so that he or she can, for example, make a cup of tea or coffee, or do something else in the house. When the viewer returns to where he or she has been watching, he or she will then play the recording from the moment when it was paused and no longer see the “live” program being broadcast. In this way the show may be watched “near live”, because it was a more convenient time to do so, since the viewer had been able to attend to whatever had made him or her pause the previously contemporaneous recording.

‘[80] One feature of the Apple devices is that they permit a person to view a film of a broadcast “near live”. That raises the questions of why would someone want to watch a broadcast, not on a television, but using a mobile device or PC, and not “live” but only “near live”? First, the ability to time-shift creates a choice for a user of the time to view a film of a broadcast. In ordinary experience, the choice of the time a person does something is either because that is when the person wants to do it or he or she cannot do it at another time; that is the choice suits the person’s convenience. The meaning of the expression “a time more convenient than the time when the broadcast is made” in s 111(1) does not preclude watching a film “near live” if the viewer finds that to be

more convenient. The section must be concerned with what the viewer subjectively thinks is a more convenient time for him or her. And, the convenience of a time for a person can be affected by other circumstances.

‘[81] If a person can watch a broadcast “near live”, away from a television, that may enable him or her to do something else. For example, the person may want to finish a task at work in the time it would take to travel home, because he or she knows that, once he or she finishes the task, he or she can view the broadcast “near live” when travelling home late or while still at work. Such a purpose is consistent with the definition of “private and domestic use”. Moreover, the rightholders accepted that pausing the contemporaneous recording of a broadcast to allow a user to do something else, even momentarily, can entail that the recording is made for use immediately after the viewer finishes the distracting event because that is a time more convenient than the time when the broadcast is made.

‘[82] In the circumstances, and in the absence of any other evidence, I infer that users L and J made their films and viewed them “near live” solely for private and domestic purposes by watching them at a more convenient time than that of the live broadcast.

‘[83] I am not persuaded by the rightholders’ argument that the user cannot have made the films in the four formats solely for his or her private and domestic use within the meaning of s 111(1) because he or she did not know that more than one copy would be created. The user is indifferent to the process that creates a film or films that only he or she can gain access to, so long as the TV Now service delivers a streamed film to whatever compatible device he or she chooses to use to watch the recorded film. The protection afforded by s 111(2) to a person who makes a film and satisfies the conditions in s 111(1), operates primarily in respect of the liability for infringement of copyright that would otherwise be created by s 101: compare *Network Ten [Network Ten Pty Ltd v TCN Channel Nine Pty Ltd]* (2004) 218 CLR 273; 205 ALR 1; 59 IPR 1; [2004] HCA 14 at [34]. That is because broadcasts and films are principally dealt with in Pt IV of the Act. Provided that the user satisfies the requirements in s 111(1), each of the films in the four formats that he or she causes some technology or equipment to make, will not infringe copyright by force of s 111(2) unless one of the circumstances in s 111(3) has occurred.

‘[84] I reject the rightholders’ argument about the use of the indefinite article in the

expression “makes a cinematograph film” in s 111(1). The Act does not evince a contrary intention to the presumption of statutory construction that words in the singular number include the plural and vice versa as provided in s 23(b) of the Acts Interpretation Act 1901 (Cth). The exception from infringement provided in s 111 was intended to accommodate the development of technologies and the ordinary ways in which individuals can avail themselves of them. The user need not be confined to using the TV Now service on one type of compatible device. He or she may have access to at least a compatible mobile phone and a PC. The user may also visit a friend and want to see the film with that person on the friend’s compatible device by logging into his or her TV Now subscription.

[85] For these reasons, I am satisfied that, by force of s 111(2), the users referred to in the agreed facts did not infringe copyright in any of the rightholders’ broadcasts or films.’ *Singtel Optus Pty Ltd (ACN 052 833 208) v National Rugby League Investments Pty Ltd (ACN 081 778 538) (No 2)* [2012] FCA 34, (2012) 285 ALR 157 at [78]–[85], per Rares J

AT AND FROM

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 240 see now 60 Halsbury’s Laws of England (5th Edn) (2011) para 249.]

AT SEA

[Wills Act 1837, s 11; Wills (Soldiers and Sailors) Act 1918, s 2.] [54] A privileged will can be made by “any mariner or seaman, being at sea.” The phrase “being at sea” has been construed as extending, not just to persons who have actually boarded the vessel on which they are sailing or about to sail, but to those who are, in the nautical phrase, “under orders” to join their ship. It may be helpful if I set out a few cases from each side of the line.

[55] The case most frequently cited, and which has been followed by the courts of this country, is an Irish decision, *Re Hale’s Goods* [1915] 2 IR 362. The deceased was a typist employed by the Cunard Steamship Company. Her permanent assignment was as a typist on board the *Lusitania* but, when not working on the ship, she worked in the company’s offices in Liverpool. She made her will while working at those offices at a time when, in the view of the judge, she was definitely engaged to go on the next voyage of the vessel. That turned out to be

the fatal voyage on which the *Lusitania* was sunk by a torpedo fired from a German submarine. The deceased was held by Madden J to have been “at sea”.

[56] Then, there are two decisions of Havers J. *Re Newland’s Estate* [1952] 1 All ER 841, [1952] P 71 was a case in which the judge upheld the will of an apprentice in the Merchant Navy while on shore leave (which was, at longest, from 4 July to 1 August 1944) from the troopship on which he was employed. *Re Wilson’s Estate, Wilson v Coleclough* [1952] 1 All ER 852 at 852–853, [1952] P 92 at 93 concerned a chief officer employed by an oil company. He came ashore in England from one vessel on 10 January 1946, and was on leave until 16 April. On 25 April he received instructions to join another ship on 30 April, and on 27 April he made a nuncupative will. Havers J upheld the will, having found that it had been made “in contemplation of sailing in that ship on that particular voyage, and... he was preparing for the voyage”.

[57] A case which went the other way was *Re Rapley’s Estate, Rapley v Rapley* [1983] 3 All ER 248, [1983] 1 WLR 1069. There the deceased was an apprentice with Ellerman City Lines. He was discharged from one ship on 7 October 1960 and joined another of his employer’s ships on 29 November. He attempted to make a privileged will on 22 October when, as was common ground at the trial, he had not yet been notified by the shipping company when and where he was to join his next ship. Judge Finlay QC distinguished the three cases which I have mentioned so far, and held that the deceased was not “at sea” on 22 October.

[58] Mr Cooper drew my attention to two decisions of Horridge J, in which that judge cast doubt on the correctness of *Re Hale’s Goods*. Horridge J’s view was that “at sea” meant being engaged on a voyage or on work connected with the actual navigation of the sea. All that I think that I need say is that this proposition is out of line with the trend of more recent authority, in which I include the judgment in *Re Rapley’s Estate* and that, on the facts of one of the cases before Horridge J, a finding adverse to the alleged will was inevitable, even if the judge had applied the more generous (and, as I think, the correct) test.

[59] If I apply that test to the circumstances in which the 1990 will was made, I am in no doubt that Ashley must be regarded as having been “at sea” when he made it. The evidence shows that he telephoned the owners of the *CPLB Crawler* or their agents for instructions

on 12 February. Those instructions can only have been to proceed to join the ship in Bombay, because all his recorded activity in England after 12 February was directed towards preparation for the journey to India, in particular the obtaining of the visa. ...’ *Re Servoz-Gavin (deceased); Ayling v Summers* [2009] EWHC 3168 (Ch), [2010] 1 All ER 410 at [54]–[59], per Judge Peter Langan QC (notes omitted)

AT WORK

New Zealand [Health and Safety in Employment Act 1992, s 15: ‘Every employer shall take all practicable steps to ensure that no action or inaction of any employee while at work harms any other person’.] ‘[45] I find that the practicable steps required by s 15 extend beyond steps to prevent harm at the employer’s work sites only. Section 15 recognises that employees’ conduct may endanger persons not employed by the employer and impels employers to address that conduct. Section 15 makes no specific reference to the harm occurring in a particular location. Although s 15 does contain the phrase “at work”, this is placed after the words “no action or inaction of any employee” and connected to those words with the conjunction “while”. On plain reading of s 15, the “at work” requirement qualifies the employee’s action or inaction, not the harm. It describes the circumstances in which the action or inaction occurs. The words “while at work” require an employer to address employees’ conduct connected to the employer’s enterprise, rather than employees’ conduct in a private capacity.’ *WorkSafe New Zealand v Department of Corrections* [2016] NZDC 18502, [2017] DCR 321 at [45], per Chief Judge Doogue

ATTAINDER

[For 10 Halsbury’s Laws of England (4th Edn) (Reissue) para 354 see now 24 Halsbury’s Laws of England (5th Edn) (2010) para 643.]

ATTEST

[For 50 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 362 et seq see now 102 Halsbury’s Laws of England (5th Edn) (2010) para 70 et seq.]

ATTORNMENT

[For 27(1) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 3 see now 62 Halsbury’s Laws of England (5th Edn) (2016) para 3.]

ATTORNEY

[For 44(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 1 see now 65 Halsbury’s Laws of England (5th Edn) (2015) para 435.]

AUCTION

[For 2(3) Halsbury’s Laws of England (4th Edn) (Reissue) para 201 see now 4 Halsbury’s Laws of England (5th Edn) (2011) para 1.]

AUCTIONEER

[For 2(3) Halsbury’s Laws of England (4th Edn) (Reissue) para 201 see now 4 Halsbury’s Laws of England (5th Edn) (2011) para 2.]

AUTREFOIS CONVICT

[For 11(3) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 1272 see now 27 Halsbury’s Laws of England (5th Edn) (2015) para 369.]

AUTHOR

[For 9(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 110 et seq see now 23 Halsbury’s Laws of England (5th Edn) (2016) para 504 et seq.]

Joint author

Australia [Copyright Act 1968 (Cth), s 10.] ‘[85] A “work” for the purposes of the Act is the work of a single author, except where it is a work of joint authorship. The parties agree that the author or joint authors must be identified: *IceTV [IceTV Pty Ltd v Nine Network Australia Pty Ltd]* (2009) 239 CLR 458; 254 ALR 386; 80 IPR 451; [2009] HCA 14] at [99], [105], [151]. The “author” of a literary work and the concept of “authorship” are central to the statutory protection given by the Act: *IceTV* at [22]. The essential source of original works remains the activities of the authors: *IceTV* at [96]. However, as French CJ observed in *IceTV* (at [23]), technological developments of today

throw up new challenges in relation to “the paradigm of the individual author”.

‘[86] Joint authorship is defined in s 10(1) of the Act:

work of joint authorship means a work that has been produced by the collaboration of two more or authors and in which the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors.

...
 ‘[94] It has long been stated that a work of joint authorship is one produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other or others. The contributions must not have been distinct (*Copinger* [W A Copinger, E P Skone James, K Garnett, G Davies and G Harbottle, *Copinger and Skone James on Copyright*, 15th ed, Sweet & Maxwell, London, 2005] at [5–163]); each contributor must contribute a significant part of the skill and labour protected by the copyright (Laddie et al [H Laddie, P Prescott, M Vitoria et al, *The Modern Law of Copyright and Designs* (3rd ed, Butterworths, 2000)] at [4.71]). Straightforward editing of articles for the purpose of inclusion on a page, which may or may not involve substantial changes to the article, is not sufficient to attract joint authorship for copyright purposes.

...
 ‘[101] The evidence does not establish joint authorship of the ten selected article/headline combinations within the meaning of s 10(1) of the Act, as Fairfax’s evidence makes it clear that the writing of articles and the writing of headlines are separate and distinct tasks with different authors. Accordingly, the article/headline combination is not a discrete work in which copyright can subsist.’ *Fairfax Media Publications Pty Ltd (ACN 003 357 720) v Reed International Books Australia Pty Ltd (ACN 001 002 357) (t/as LexisNexis)* [2010] FCA 984, (2010) 272 ALR 547 at [85]–[86], [94], [101], per Bennett J

AVAILABLE

Available for his occupation

[Housing Act 1996, ss 175, 176. Section 175 provides: ‘A person is homeless if he has no accommodation available for his occupation, in the United Kingdom or elsewhere ...’. Under s 176, accommodation is to be regarded as

available for a person’s occupation only if it is available for occupation by him together with—(a) any other person who normally resides with him as a member of his family, or (b) any other person who might reasonably be expected to reside with him.] ‘[7] The issue in this case, in short, is to what extent (if at all) the extended meaning of the expression “available for his occupation” in the 1996 Act implies a requirement that the family be accommodated not only together, but in a single unit of accommodation.

...
 ‘[17] This is a short point which does not permit of much elaboration. Etherton LJ relied on what he considered to be the ordinary meaning of the statutory language. In my respectful view, the ordinary meaning does not support that interpretation. The word “accommodation” in itself is neutral. It is not in its ordinary sense to be equated with “unit of accommodation”. It is no abuse of language to speak of a family being “accommodated” in two adjoining flats. The limitation, if any, must therefore be found in the words “available for occupation ... together with” the other members of his family. The statutory test will be satisfied by a single unit of accommodation in which a family can live together. But it may also be satisfied by two units of accommodation if they are so located that they enable the family to live “together” in practical terms. In the end, as Mr Arden submits, this comes down to an issue of fact, or of factual judgment, for the authority. Short of irrationality it is unlikely to raise any issue of law for the court.’ *Sharif v Camden London Borough Council* [2013] UKSC 10, [2013] 2 All ER 309 at [7], [17], per Lord Carnwath SCJ

AVERAGE

[For 43(2) Halsbury’s Laws of England (4th Edn) (Reissue) paras 1791, 1792–1793 see now 7 Halsbury’s Laws of England (5th Edn) (2015) paras 606–608.]

General average

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 420 see now 60 Halsbury’s Laws of England (5th Edn) (2011) para 386.]

Particular average

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 433 see now 60 Halsbury’s

Laws of England (5th Edn) (2011) para 399.]

AVOID

[For the Income and Corporation Taxes Act 1988, s 739 see now the Income Tax Act 2007, s 720.]

B

BAGGAGE

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

BAILIWICK

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 1111 see now 69 Halsbury's Laws of England (5th Edn) (2009) para 115B.1.]

BAILMENT

[For 3(1) Halsbury's Laws of England (4th Edn) (2005 Reissue) paras 1, 2 see now 4 Halsbury's Laws of England (5th Edn) (2011) paras 101, 106.]

BANK—BANKING

[For 3(1) Halsbury's Laws of England (4th Edn) (2005 Reissue) para 125 see now 48 Halsbury's Laws of England (5th Edn) (2015) para 134.]

BANKNOTE

In this Part [Part 6 (ss 207–227)] 'banknote' means a promissory note, bill of exchange or other document which—

- (a) records an engagement to pay money,
- (b) is payable to the bearer on demand, and
- (c) is designed to circulate as money.

Banking Act 2009, s 208

BARNARDISATION

See also HELD; PERSONAL DATA

[Data protection.] '[T]he agency had provided him with a copy of a document entitled *Draft Guidance on Handling Small Numbers*, which was subsequently published by the Information Services Division (ISD) of National Health Services in Scotland in July 2005. It set out a process to be followed when handling statistics where there is a potential risk of disclosure of

personal information as a result of small cell counts. This is a disclosure control method, known as "barnardisation". As employed by ISD, it uses a modification rule which adds 0, +1, or -1 to all values where the true value lies in the range from 2 to 4 and adding 0 or +1 to cells where the value is 1. 0s are always kept at 0. It does not guarantee against disclosure but aims to disguise those cells that have been identified as unsafe.'

'[50] Plainly, a body like the agency has information about the health of people all over Scotland. Bodies which gather and disseminate such personal information are very conscious of the need to ensure that, when they disclose any of this information, or data derived from the information, the disclosure is done in such a way as to minimise the risk that the individuals to whom the information or data relate can be identified and, as a result, suffer distress and embarrassment—or worse. Obviously, the risk is greatest where the data are broken down by reference to small units, such as census wards, in which the data will consist of small numbers. Bodies which publish frequency statistics have accordingly developed various techniques—such as combining data for a larger age range or for a larger geographical area, and suppressing particular figures in tables—to counteract the problem. One technique, which is of particular relevance to this appeal, is "barnardisation". It is applied to frequency tables, such as were requested by Mr Collie. The procedure involves modifying each internal cell of every table by +1, 0 or -1. But the technique does not always provide adequate protection, since, when the probability of the event occurring is small, the majority of cells are not modified and so the probability that a 1 is a true 1 is quite high. In such cases the risk of identification may remain unacceptably high.

'[51] In July 2005 ISD published draft guidance on disclosure control, relating to handling small numbers. It described the goal as being:

"to devise a method for publishing data that minimises the risk and potential damage to an individual due to inadvertent disclosure of a detail; and to do so without adopting such restrictions that unjustifiably curtail the presentation of information that would otherwise be beneficial to the community at large."

The guidance went on to identify data of a sensitive nature—for example, where there had

been a high degree of controversy or stigma in the recent past regarding the subject matter. These included data on sexually transmitted diseases, abortions, mental health diagnoses and alcohol misuse. The guidance went on to explain that ISD employed barnardisation as its preferred method of perturbing data. It also indicated that other techniques for avoiding the risk of individuals being identified—such as grouping by broader age bands, by a larger geographical area, or using aggregated years of data—should be considered. The guidance concluded:

‘Whilst this is straightforward for publications, for customer requests re-specification should only be performed after discussion with the customer to ensure it will continue to meet their needs and this is not wasted effort.’

‘[52] Barnardisation is, accordingly, one method of reducing the risk of identification. It does not guarantee that the risk will be eliminated. ... [B]arnardisation will reduce the risk of identification to a level which will be acceptable for some data but not for others.’ *Common Services Agency v Scottish Information Comr* [2008] UKHL 47, [2008] 4 All ER 851 at [10], per Lord Hope of Craighead and at [50]–[52], per Lord Rodger of Earlsferry

BARONET

[For 35 Halsbury’s Laws of England (4th Edn) (Reissue) para 963 see now 79 Halsbury’s Laws of England (5th Edn) (2014) para 861.]

BARRATRY

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 342 see now 60 Halsbury’s Laws of England (5th Edn) (2011) para 333.]

BASE FEE

[For 39(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 134 see now 87 Halsbury’s Laws of England (5th Edn) (2017) para 160.]

BATHE

Australia ‘[35] Lotteries’ primary argument was that the word “BATHE” did not match the picture of the person swimming with the word “SWIM” underneath it. I reject that argument.

‘[36] The following dictionaries define the

verb “bathe” as having “swim” as one of its meanings:

- the *Collins English Dictionary* (3rd ed) (Special Australian Consultants GA Wilkes WA Krebs): sense 1 was: “intr[ansitive] to swim or paddle in a body of open water or a river”;
- the *Australian Concise Oxford Dictionary of Current English* (3rd ed): sense 1 was: “(intr) immerse oneself in water; exp to swim”;
- the *Collins Australian Dictionary* (Gem: 8th ed 2006) which was actually consulted by Mr Kuzmanovski: It gave a first sense as “swim in open water for pleasure”;
- the *Macquarie Dictionary* (4th ed): sense 7 (which was the second meaning for intransitive usage given): “*Chiefly British*: to swim for pleasure”;
- the *New Shorter Oxford English Dictionary* (Vol 1; 1993): sense 4 (which was the first meaning for intransitive usage given): “Immerse oneself in water, esp in the sea, a river, a swimming pool etc, for recreation”; it gave the examples of “bathing beauty” as being “an attractive woman in a swimsuit” and of “bathers (esp Austral.) swim-trunks, a swimming costume”.

‘[37] An ordinary and natural meaning in Australian English usage of “bathe” is “swim”. It follows that the picture of a person swimming, taken by itself, matches the word “bathe” on the ticket. Lotteries argued that because the *Macquarie Dictionary* used the qualification “chiefly British” in relation to this meaning of “bathe”, I should not make this finding. It contended that I should accord primary regard to that dictionary because in *House of Peace Pty Ltd v Bankstown City Council* (2000) 48 NSWLR 498; [2000] NSWCA 44 at [33] (*House of Peace*) [para 3] Mason P had described it as the “most authoritative Australian dictionary” following what Kirby P had said in *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd* (1991) 25 NSWLR 541 at 553 (*Provincial Insurance*). It also pointed to the methodology that the *Macquarie Dictionary* stated it had employed, of putting the central meaning of each part of speech first. Lotteries relied on the fact that the “chiefly British” meaning was the second meaning the *Macquarie Dictionary* gave for the intransitive usage of “bathe”.

‘[38] The meaning of a word used in ordinary speech or writing is a question of fact. Dictionaries provide a useful and often important source or aid from which the answer to that

question of fact can be determined. However, it is not legitimate to defer to one particular usage in one dictionary as the only meaning for a word. Here, the *Macquarie Dictionary*, and three others prepared for Australian use, as well as common experience of the use of “bathe” as a word of ordinary speech, recognise that a natural and ordinary meaning of bathe was “swim”. No contractual provision or rule identified the exact means or dictionary by which a word’s meaning was agreed to be ascertained. Thus the relationship of the parties in these proceedings did not require deference to Lotteries’ asserted meaning for “bathe” as not being “swim”. *Kuzmanovski v New South Wales Lotteries Corp* [2010] FCA 876, (2010) 270 ALR 65 at [35]–[38], per Rares J

BATTERY

[For 11(1) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 1210 see now 25 Halsbury’s Laws of England (5th Edn) (2016) para 134.]

BED

Of minerals

[For 31 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 6 see now 76 Halsbury’s Laws of England (5th Edn) (2013) para 14.]

BENEFICIAL OWNERSHIP

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

BENEFICE

[For 14 Halsbury’s Laws of England (4th Edn) para 768 see now 34 Halsbury’s Laws of England (5th Edn) (2011) para 542.]

‘Benefice’ means the office of rector or vicar of a parish or parishes with cure of souls, but not including the office of vicar in a team ministry or any office in a cathedral church: Patronage (Benefices) Measure 1986 s 39(1).

[Note that the Pastoral Measure 1983 is repealed as from 1 July 2012 by the Mission and Pastoral Measure 2011, s 111, Sch 9. The definition of ‘benefice’, in the same terms as before, is now contained in the 2011 Measure, s 105(1), which makes reference to s 104.]

BENEFIT

See also OBTAINS PROPERTY

[Proceeds of Crime Act 2002.] ‘The legislation is intended to deprive defendants of the benefit they have gained from relevant criminal conduct, whether or not they have retained such benefit, within the limits of their available means. It does not provide for confiscation in the sense understood by schoolchildren and others, but nor does it operate by way of fine. The benefit gained is the total value of the property or advantage obtained, not the defendant’s net profit after deduction of expenses or any amounts payable to co-conspirators’: *R v May* [2008] UKHL 28, [2008] 4 All ER 97 at [48], per Lord Bingham of Cornhill

Australia [Commonwealth Constitution, s 51(xxiiiA); whether provision of chaplaincy services at a school is a ‘benefit’ to students.] ‘[45] It would not be right to attempt to state some comprehensive definition of what may be “benefits”, whether “benefits to students” or any of the several other forms of benefits identified in s 51(xxiiiA). Nothing in these reasons should be understood as attempting that task. It is enough, for the purposes of this case, to observe that the constitutional expression “benefits to students” cannot be construed piecemeal. That is, the expression is not to be approached as if it presented separate questions about whether there is a “benefit” and whether that “benefit” is provided to or for “students”.

‘[46] Section 51(xxiiiA) uses the word “benefits” in several different collocations. It uses the word to refer to the provision of aid to or for individuals for human wants arising as a consequence of the several occasions identified: being unemployed, needing pharmaceutical items such as drugs or medical appliances, being sick, needing the services of a hospital, or, as is relevant to this case, being a student. The benefits are occasioned by and directed to the identified circumstances. In the usual case, the assistance will be a form of material aid to relieve against consequences associated with the identified circumstances. Provision of the benefit will relieve the person to whom it is provided from a cost which that person would otherwise incur. In the case of unemployment and sickness benefits, the aid will relieve against the costs of living when the individual’s capacity to work is not or cannot be used. That aid may take the form of payment of money or provision of other material aid against the needs

brought on by unemployment or sickness. Pharmaceutical and hospital benefits provide aid for or by the provision of the goods and services identified. And in the case of benefits to students, the relief would be material aid provided against the human wants which the student has by reason of being a student.

[47] Providing at a school the services of a chaplain or welfare worker for the objective described in item 407.013 in Pt 4 of Sch 1AA to the [Financial Management and Accountability Regulations 1997 (Cth)] is not provision of “benefits” of the kind described by McTiernan J in the *BMA* case [*British Medical Association v Commonwealth* (1949) 79 CLR 201, [1949] ALR 865] or by the court in the *Alexandra Hospital Case* [*Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271; 69 ALR 631]. Providing those services does not provide material aid to provide for the human wants of students. It does not provide material aid in the form of any service rendered or to be rendered to or for any identified or identifiable student. There is no payment of money by the Commonwealth for or on behalf of any identified or identifiable student. And the service which is provided is not directed to the consequences of being a student. There is no more than the payment of an amount (in this case to an intermediary) to be applied in payment of the wages of a person to “support the wellbeing” of a particular group of children: those who attend an identified school. And the only description of how the “support” is to be given is that it includes “strengthening values, providing pastoral care and enhancing engagement with the broader community”. These are desirable ends. But seeking to achieve them in the course of the school day does not give the payments which are made the quality of being benefits to students.

[48] Providing money to pay persons to provide such services at a school is not to provide benefits which are directed to the consequences of being a student. It is not a provision of benefits to students within the meaning of s 51(xxiiiA).’ *Williams v Commonwealth* [2014] HCA 23, (2014) 309 ALR 41 at [45]–[48], per French CJ, Hayne, Kiefel, Bell and Keane JJ

Benefit of the car

[Income Tax (Earnings and Pensions) Act 2003, Pt 3, Ch 6: cash equivalent of ‘the benefit of the car’ to be treated as earnings; employer leased cars to employees on arm’s length commercial terms.] [34] ... I consider it more logical to

deal next with the third issue, viz whether the fact that, as HMRC accept, the employees paid the full market value for the cars means that there was no “benefit of the car” within the meaning of s 120 and hence nothing that could be liable to tax in this case.

...

[43] Parliament has used the phrase “the benefit of the car” in ss 114(2) and 120(1) without defining it. Nonetheless, HMRC submits that it should be construed as no more than a drafting formula, describing the consequences of the application of s 114(1), rather than treating it as a meaningful phrase. On HMRC’s case, Parliament could as well have used the phrase “the provision of the car”. Indeed, in para 2 of the skeleton argument of counsel for HMRC, the issue on the appeal is said to be whether an income tax charge arises in respect of “the provision” of cars.

[44] It is true, as HMRC submit, that once Ch 6 is engaged so that the need to calculate the cash equivalent of the benefit of a car arises, the calculation is linked not to the value of the provision of the car, as would for example be the case if the calculation started with the market rate at which the car would be leased, but is linked to the price of a new car and its CO₂ emissions. In my judgment, this does not mean that the word “benefit” is to be treated as carrying no meaning or significance. It means only that, if the employee receives a benefit as that word is normally understood, it is valued for tax purposes by reference to the price of a new car and its CO₂ emissions. HMRC’s case suggests that the underlying policy rationale for Ch 6 is to impose a tax on pollution but, if that were truly the policy, this is a very odd way of giving effect to it. Not only is it included in the statute imposing income tax on employment-related income, it is not carried out in any effective or consistent manner. HMRC accept that if an employer sold a car to an employee at full market price, no charge to income tax would arise, whatever the CO₂ emissions of the car.

[45] These are all considerations which, in my judgment, show that the choice of the word “benefit”, without any definition qualifying or altering its ordinary meaning, was intended to show that, before a charge to income tax in these circumstances arises, there must be a benefit to the employee in the ordinary sense of that word. It is not a case of implying a requirement or condition into Ch 6. It is simply a case of giving meaning and effect to its express terms.’ *Revenue and Customs Commissioners v Apollo Fuels Ltd* [2016] EWCA Civ

157, [2016] 4 All ER 464 at [34], [43]–[45], per David Richards LJ

Benefit of the law

Canada [Canadian Charter of Rights and Freedoms, s 15(1); appeal from a Federal Court decision dismissing the appellant's judicial review application of the Minister of Foreign Affairs' refusal to inscribe 'Jerusalem, Israel' on the appellant's Canadian passport as his place of birth in accordance with special Passport Canada policy prohibiting Canadian citizens born in Jerusalem after 14 May 1948 from indicating country of birth on passport.] '[41] Before addressing whether the three elements required to establish discrimination are present in this case, it is necessary to consider a preliminary issue: does the Passport Canada policy in issue generally confer a "benefit of the law" within the meaning of subsection 15(1) of the Charter? The issue here is not whether the Passport Canada policy is a "law," as it is well established that laws for the purpose of section 15 include government policies (see *McKinney v University of Guelph* [1990] 3 SCR 229, at page 276). Rather, the issue is whether the Passport Canada policy confers a "benefit" on others, which it denies to Mr Veffer. In our view, it does not. We will explain.

'[42] The meaning of the word "benefit" has not been the subject of judicial scrutiny, in so far as it is used in section 15 of the Charter. In fact, the guarantee of "equal benefit of the law" is a relatively new creation. Before the enactment of the Charter in 1982, paragraph 1(b) of the *Canadian Bill of Rights* [RSC, 1985, Appendix III] only guaranteed "the right of the individual to equality before the law and the protection of the law". It was thought, as a result of the Supreme Court decision in *Bliss v Attorney General (Can)* [1979] 1 SCR 183, that the equality guarantee was intended to address burdens imposed by legislation, and not benefits conferred. With the insertion of "equal benefit of the law" in subsection 15(1) of the Charter, Parliament has ostensibly created a broader, more comprehensive, equality guarantee. The guarantee of "equal benefit of the law" has since been used to successfully challenge substantial things like the denial of pension benefits and employment insurance schemes, the provision of medical treatment, and other legislative benefits schemes.

'[43] In recent cases, such as *Auton [Auton (Guardian ad litem of) v British Columbia (Attorney General)]* [2004] 3 SCR 657, (2004)

245 DLR (4th) 1] and *Gosselin [Gosselin v Quebec (Attorney General)]* [2002] 4 SCR 429, (2002) 221 DLR (4th) 257], the Supreme Court has indicated somewhat imprecisely that subsection 15(1) guarantees "equal treatment", which might imply that a claimant need only show a differentiation to engage the equality guarantee. However, it is not just any differential treatment which is sufficient to invoke subsection 15(1). What is significant is treatment which denies "equal protection" or "equal benefit of the law". These words must have a discernible meaning in our Charter, and it is imperative that a claimant who intends to make a serious allegation of discrimination demonstrate that the so-called treatment complained of falls within the language of the equality guarantee, that is, that equal benefit or equal protection has been denied.

'[44] What, then, constitutes a "benefit" for the purposes of subsection 15(1) of the Charter? It is helpful, in deciding this threshold requirement, to review how some other fundamental freedoms of the Charter are understood. As already discussed, the freedom of religion and conscience right in paragraph 2(a) of the Charter protects only government conduct which interferes with the practice or observance of religious beliefs that are substantial.

'[45] Consistent with that, the jurisprudence has established that section 7 of the Charter is engaged only where an applicant can demonstrate that government conduct seriously interferes with an individual's "life, liberty and security of the person." To explain, it is not every deprivation of an individual's liberty or security of the person which engages section 7 of the Charter, for almost every piece of government legislation could be said to restrain individuals in one way or another. "Liberty" has been defined, for the purpose of section 7, as freedom from physical restraint, and freedom from state compulsions or prohibitions which affect important and fundamental choices (see *Blencoe v British Columbia (Human Rights Commission)* [2000] 2 SCR 307, at paragraph 49). Similarly, "security of the person" has been defined as freedom from state interference with bodily integrity and serious state-imposed psychological stress (*Blencoe*, at paragraph 55). While the right to "life" has not been extensively discussed, it surely includes the right to be free from a risk of death and free from excessive waiting times for medical treatment in a public health care system (see *Chaoulli v Quebec (Attorney General)* [2005] 1 SCR 791).

[46] In keeping with this theme, the guarantee of “equal benefit of the law” in subsection 15(1) of the Charter must be understood to refer to benefits which objectively have some meaningful consequence to the individuals affected. In our view, this threshold requirement has not been met in this case.

[47] Mr Veffer argues that the “benefit” conferred on others, which is not available to him, is the ability to express an important aspect of his religious identity in a government identity document. While Mr Veffer may sincerely believe that this amounts to a denial of a “benefit” that is conferred on others, we are not persuaded that this is the case. The purpose of a passport is, as already discussed, to identify an individual as a Canadian citizen and to facilitate travel to other countries. Here, Mr Veffer was issued a passport, the passport identifies him as a Canadian citizen, and there is no evidence that the absence of a country name beside “Jerusalem” hinders his ability to travel in any way. Nor is there any suggestion that the addition of a country name will improve his ability to travel or be identified as a Canadian citizen.

[48] We emphasize that the equality guarantee is one of the most fundamental values protected in the Charter, and an allegation that the government has discriminated against someone must not be taken lightly. By the same token, subsection 15(1) should not be used simply because an individual is displeased with some differential treatment under a government policy. In our view, it would trivialize the equality guarantee if it were used to attack every situation where an individual subjectively feels annoyed or offended by legislation that affects him differently than others. To engage section 15 of the Charter, an applicant must, therefore, demonstrate that a meaningful “benefit of the law” has been denied. This Mr Veffer has not done.’ *Veffer v Canada (Minister of Foreign Affairs)* [2008] 1 FCR 641, 283 DLR (4th) 671, [2007] FCJ No 908, 2007 FCA 247 at [41]–[48], per Richard CJ, Linden and Ryer JJ A

BENEVOLENT

[For 5(2) Halsbury’s Laws of England (4th Edn) (2001 Reissue) para 58 see now 8 Halsbury’s Laws of England (5th Edn) (2015) para 93.]

BEQUEST

[For 50 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 575 see now 102

Halsbury’s Laws of England (5th Edn) (2010) para 286.]

BET

[For 4(1) Halsbury’s Laws of England (4th Edn) (2002 Reissue) para 2 see now 67 Halsbury’s Laws of England (5th Edn) (2016) para 281.]

BILL OF LADING

[For 43(2) Halsbury’s Laws of England (4th Edn) (Reissue) paras 1532, 1542 see now 7 Halsbury’s Laws of England (5th Edn) (2015) paras 314, 324.]

[For 41 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 366 see now 91 Halsbury’s Laws of England (5th Edn) (2012) para 377.]

BILL OF SALE

[For 4(1) Halsbury’s Laws of England (4th Edn) (2002 Reissue) para 601 see now 49 Halsbury’s Laws of England (5th Edn) (2015) para 403.]

BISHOP

[For 14 Halsbury’s Laws of England (4th Edn) para 458 see now 34 Halsbury’s Laws of England (5th Edn) (2011) para 177.]

Suffragan bishop

[For 14 Halsbury’s Laws of England (4th Edn) para 493 see now 34 Halsbury’s Laws of England (5th Edn) (2011) para 214.]

BLASPHEMY

[Note. The offences of blasphemy and blasphemous libel under the common law of England and Wales are abolished: Criminal Justice and Immigration Act 2008 s 79(1).]

BLOCKADE

[For 36(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 814 see now 85 Halsbury’s Laws of England (5th Edn) (2012) para 614.]

BOARDING HOUSE

[For 24 Halsbury’s Laws of England (4th Edn) para (Reissue) 1110 see now 68 Halsbury’s

Laws of England (5th Edn) (2016) paras 648, 661.]

BODY

Corpse

[For 9(2) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 956 see now 24 Halsbury's Laws of England (5th Edn) (2010) para 83.]

Of note

[For 4(1) Halsbury's Laws of England (4th Edn) (2002 Reissue) para 323 see now 49 Halsbury's Laws of England (5th Edn) (2015) para 304.]

Of persons

[For the Income and Corporation Taxes Act 1988, s 832(1) see now the Income Tax Act 2007, s 989.]

BONA VACANTIA

[For 12(1) Halsbury's Laws of England (4th Edn) (Reissue) para 235 see now 29 Halsbury's Laws of England (5th Edn) (2014) para 149.]

[For 17(2) Halsbury's Laws of England (4th Edn) (Reissue) para 613 see now 102 Halsbury's Laws of England (5th Edn) (2010) para 513.]

BOND

[For 4(1) Halsbury's Laws of England (4th Edn) (2002 Reissue) para 185 see now 6 Halsbury's Laws of England (5th Edn) (2011) para 383.]

BONDWASHING

[For the Income and Corporation Taxes Act 1988, ss 710–728 see now the Income Tax Act 2007, Pt 12 (ss 615–681). For Simon's Taxes A1.448, A1.466 see now Simon's Taxes A1.548, A1.566.]

BOOK

[For the Companies Act 1985, s 722 see now the Companies Act 2006, ss 1134, 1138.]

BOOTY

[For 36(2) Halsbury's Laws of England (4th Edn) (Reissue) para 805 see now 85 Halsbury's Laws of England (5th Edn) (2012) para 605.]

BOTTOMRY

[For 43(1) Halsbury's Laws of England (4th Edn) (Reissue) para 474 see now 93 Halsbury's Laws of England (5th Edn) (2008) para 437.]

BOUNDARY

[The reference to 4(1) Halsbury's Laws of England (4th Edn) (2002 Reissue) para 401 should be to 4(1) Halsbury's Laws of England (4th Edn) (2002 Reissue) para 901. See now 4 Halsbury's Laws of England (5th Edn) (2011) para 301.]

BREXIT

The popular term, combining 'Britain' and 'exit', for the decision following a referendum provided for under the European Union Referendum Act 2015 that the United Kingdom should leave the European Union.

BRIBE

New Zealand [Crimes Act 1961.] '[45] The word "bribe" is defined by s 99 to mean: "any money, valuable consideration, office or employment, or any benefit, whether direct or indirect". This definition departs from the normal meaning of the word in the sense that it is essentially value neutral, as compared with the usual connotations. Within the statutory scheme of s 103, the word "bribe", depending on the particular context, is synonymous with "gift" or "gratuity". For the purposes of the Crimes Act, "bribe" takes on the colour of culpability only in the context of each section of which it is part.

'[46] In everyday language "bribes" are socially disapproved inducements of official action meant to be gratuitously exercised.

...

'[48] "Bribery" is a legal concept, and accordingly at the end of the day the law determines what counts as bribery in a particular society. The use of the word "bribe" in the New Zealand statute is apt to mislead. As Mr Moore SC for the Crown correctly noted in the case before us, there is in fact no such

offence as “corruption and bribery of a Member of Parliament” in New Zealand’s criminal code. Rather, in the present context, there is an offence of “corruptly accepting or obtaining, or agreeing or offering to accept or attempting to obtain, any bribe”. That is, a “bribe” is simply the subject-matter of that which is done corruptly. As noted, in itself it is essentially a neutral term. The work of s 103 is done by the word “corruptly”, to which we will shortly turn. However, it is important to note that in classical criminal law analytical terms the subject-matter of a “bribe” is the *actus reus* of the offence. Somebody has to have taken a “benefit” before the mental element of the offence — “corruptness” — can come into play.

...
 [52] But what is meant by the term “corruptly”? And how is the necessary mental element to be expressed, always remembering that it must be expressed in such a way that it can fairly and properly be applied by a jury? Further, it will be relatively obvious that how the mental element is expressed will raise or lower the bar which the prosecution has to surmount. Hence, in addition to its functional importance, this issue has difficult intellectual challenges.

...
 [54] There is no New Zealand authority which is binding on us on this issue. Unfortunately, as the foregoing citations demonstrate, the overseas authorities on the meaning of the term are in “impressive disarray”.

[55] The reason for this suggested disarray appears to be because there are three competing strands of the judicial interpretation of the term “corruptly” in legislation of this character. First, there is a line of authorities dating back to the decision of the House of Lords in *Cooper v Slade* [(1857) 6 HL Cas 746, (1857) 10 ER 1488]. In that case the majority held that “corruptly” meant “purposely doing an act which the law forbids as tending to corrupt”. Professor Smith [A T H Smith *Property Offences: the protection of property through the criminal law* (Sweet & Maxwell, London, 1994) at 792–793] has suggested that such an interpretation leaves the word “corruptly”, “devoid of any functional significance”. In *Broom v Police* [[1994] 1 NZLR 680 at 688], Tipping J voiced the similar criticism that that definition, as adopted in *R v Wellburn* [(1979) 69 Cr App R 254, CA], was “open to the dual criticism of being both unhelpful and potentially circular”. A second line of analysis maintains that what is at issue is a dishonest intention to

weaken the loyalty of an agent to his or her principal. A third possibility is that suggested by cases such as the *Bradford Election Case* (No 2) [(1869) 19 LT 723] in which Baron Martin held that “corruptly” is not otiose and has to be given some meaning, which he stated to be akin to an evil mind. On such an approach seemingly both motive and intention would be relevant in deciding whether the alleged conduct was “corrupt”.

[56] It will be at once apparent that the first two possibilities relate “corruptly” directly to a breach of duty of some kind. The first towards one’s duty as an official or office holder, the second in relation to a master/servant situation. The third has a more generic mien to it. It is more like the concept of “dishonesty” to be found in the general criminal law.

[57] We take the view, although it is not completely free of difficulty, that the first line of reasoning is the more appropriate for s 103.

...
 [64] In our view therefore, as a matter of general principle, the sounder basis on which to put the offence relating to a member of Parliament is to recognise that it catches the corrupt acceptance of a “bribe” in connection with the performance of that member’s duties as a parliamentarian. A bribe is corruptly accepted if in accepting the bribe the particular member is knowingly outside the recognised bounds of his or her duties.’ *Field v R* [2010] NZCA 556, [2011] 1 NZLR 784 at [45]–[46], [48], [52], [54]–[57], [64], per Hammond J; *affd* [2011] NZSC 129, [2012] 3 NZLR 1

BRIBERY

[For 2(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 120 see now 1 Halsbury’s Laws of England (5th Edn) (2008) para 93 and for 11(1) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 532 see now 26 Halsbury’s Laws of England (5th Edn) (2016) para 529.]

BRITISH SHIP

[For 43(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 103 see now 93 Halsbury’s Laws of England (5th Edn) (2008) para 230.]

BROADCAST

Australia [16] For reasons published on 28 April 2016, the primary judge held that live-streaming did not constitute broadcasting

for the purposes of the PSA [program supply agreement]. In the view his Honour took, “to broadcast” is, in the particular context, to disseminate content by free-to-air transmission, as distinct from any other means.

...
 “[27] The reality, it seems to me, is that “broadcast” has different meanings in different contexts and that it is not possible to say, as an abstract proposition, that the word always conveys either the broad meaning for which WIN contends or the more limited concept embraced by Nine. Each is today a plain, natural or ordinary meaning. There is no single fixed meaning that can be said to be the plain, natural or ordinary meaning.

...
 “[64] None of the grounds of appeal concerning construction of cl 2.1 of the PSA succeeds. Viewed in its context, the word “broadcast” was correctly regarded by the primary judge as referring to broadcasting by free-to-air transmission; and that meaning applied both for the purpose of delineating the right granted to WIN and in determining the scope and content of the restriction accepted by Nine as a consequence of the exclusive quality of the licence it granted.’ *Win Corporation Pty Ltd v Nine Network Australia Pty Ltd* [2016] NSWCA 297, (2016) 341 ALR 467 at [16], [27], [64], per Barrett AJA

BROADCASTING

Canada [In the *Broadcasting Act*, SC 1991, c 11, ‘broadcasting’, ‘radiodiffusion’, means any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place.] ‘1. This is an application for a reference by the Canadian Radio-television and Telecommunications Commission (the CRTC). The question being referred is:

Do retail Internet service providers (ISPs) carry on, in whole or in part, “broadcasting undertakings” subject to the *Broadcasting Act*, [SC 1991, c 11 (the *Broadcasting Act*)] when, in their role as ISPs, they provide access through the Internet to “broadcasting” requested by end-users?

The terms “broadcasting” and “broadcasting undertaking” are as defined in the *Broadcasting Act* as amended.

...

“31. The question as framed is based on the assumption that “broadcasting” takes place on the Internet. This assumption is based on a number of prior findings made by the CRTC, i.e. that the delivery of content on the Internet involves the “transmission” of the content; that computers constitute a “broadcasting receiving apparatus”; that the content transmitted on the Internet can be a “program” and that such transmission is “for reception by the public”.

“32. In its memorandum of fact and law, Shaw took issue with these findings. In particular Shaw challenged the fundamental assumption that “broadcasting” takes place on the Internet. However, at the hearing of the appeal, counsel for Shaw acknowledged that in dealing with the question, the Court must accept the assumption on which it is framed. He nevertheless expressed the concern that the Court might be viewed as sanctioning underlying the findings.

“33. To be clear, neither the assumption that “broadcasting” takes place on the Internet nor the underlying findings made by the CRTC are in issue in this proceeding with the result that the Court in answering the referred question cannot be viewed as making any pronouncement with regard to the assumption or any of these findings.

“34. Turning to the question, the parties expressed the common view during the hearing that the answer turns on whether ISPs, when providing access to “broadcasting”, are themselves “broadcasting”. Counsel for Shaw and for the Coalition conceded that if ISPs are thereby “broadcasting”, they must be viewed as “broadcasting undertakings”. If not, counsel for the Cultural Group agreed that the opposite conclusion must be reached.

“35. When regard is had to the wording of the definition, the issue to be decided is whether, when providing access to the “transmission of programs ...”, ISPs are broadcasting. The answer to this question hinges on a consideration of the findings of the CRTC as to how programs are transmitted on the Internet on the one hand, and the exact purport of the definition of the word “broadcasting”, on the other.

...

“38. The referred question assumes that programs are transmitted on the Internet. The issue which must be elucidated is by whom? The answer turns on whether the definition of “broadcasting”, beyond being aimed at the person who transmits the program, extends to the person whose sole involvement is to provide

the mode of transmission.

'39. I agree with the Cultural Group that the definition of "broadcasting" when read on its own can include a person whose sole involvement is to provide the mode of transmission since no distinction is made as to the active or passive nature of the involvement. However, this ceases to be the case when the definition is considered contextually having regard to the scheme and purpose of the *Broadcasting Act*.

...
'48. Relying on the logic adopted by Binnie J in *CAIP [Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers 2004 SCC 45, [2004] 2 SCR 427]* in construing the word "communicate" under the *Copyright Act*, I am of the view that the definition of "broadcasting" is also directed at the person who transmits a program and that a person whose sole involvement is to provide the mode of transmission is not transmitting the program and hence, is not "broadcasting".

'49. This interpretation is consistent with the policy objectives set out in subsection 3(1) of the *Broadcasting Act*. The primary focus is on the cultural enrichment of Canada through the broadcasting of programs which involve a significant amount of Canadian artistic creativity in their production, encourage Canadian expression and the use of Canadian talent, and which reflect Canada's linguistic duality and multicultural society. The *Broadcasting Act* sets out specific provisions on programming content to achieve these objectives such as the allocation of broadcasting time, the character and volume of advertising, and the carriage of foreign programming (subsection 10(1) of the *Broadcasting Act*). Furthermore, in setting out the manner in which the *Broadcasting Act* is to be interpreted, subsection 2(3) refers to the "freedom of expression and journalistic, creative and programming independence enjoyed by broadcasting undertakings".

'50. Because ISPs' sole involvement is to provide the mode of transmission, they have no control or input over the content made available to Internet users by content producers and as a result, they are unable to take any steps to promote the policy described in the *Broadcasting Act* or its supporting provisions. Only those who "transmit" the "program" can contribute to the policy objectives.

...
'59. In providing access to "broadcasting", ISPs do not transmit programs. As such, they are not "broadcasting" and therefore they do not come within the definition of "broadcasting

undertaking". In so holding, I wish to reiterate as was done in *CAIP* that this conclusion is based on the content-neutral role of ISPs and would have to be reassessed if this role should change (*CAIP*, para 92).

'60. I would therefore answer the reference question as follows: Retail ISPs do not carry on, in whole or in part, "broadcasting undertakings" subject to the *Broadcasting Act* when, in their role as ISPs, they provide access through the Internet to "broadcasting" requested by end-users.' *Re Broadcasting Act (Canada)* [2010] FCJ No 849, 2010 FCA 178, Fed CA, at paras 1, 31–35, 38–39, 48–50, 59–60, per Noël JA

Broadcasting service

Australia [Broadcasting Services Act 1992 (Cth), s 6.] '[1] This appeal is concerned with the construction of the definition of *broadcasting service* in s 6(1) of the Broadcasting Services Act 1992 (Cth) (the Broadcasting Act), as that definition is affected by a ministerial determination made in accordance with the provisions of the Broadcasting Act. The question arises in the context of an agreement (the industry agreement) made between the appellant (PPCA) and the respondent (CRA) on 16 June 2000.

...
[65] The word *service* appears in several places in the definition of broadcasting services in s 6 and in the ministerial determination. The word should be construed as having the same meaning wherever it appears, both in the language of s 6 and in the language of the ministerial determination. The word *service*, as a matter of ordinary English, has diverse meanings. For example (see the *Macquarie Dictionary*), it might signify:

- the supplying or supplier of articles, commodities or activities;
- the providing or provider of a public need, such as communications, transport and the like;
- the organised system of apparatus, appliances, employees and the like, for supplying a public need; or
- the performance of duties or work for another.

Thus service can signify:

- the person who supplies a benefit;
- the benefit that is supplied; or
- the means whereby the benefit is supplied.

'[66] The definition of *broadcasting service* in s 6, as affected by the ministerial determination, contains a number of elements as follows:

- A broadcasting service delivers radio programs to persons having the appropriate equipment: clearly enough, the word *service* must mean something other than the radio program that is the subject of the delivery; thus, a service must be something that is capable of delivering a radio program.
- That delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means, or a combination of those means: thus, the delivery may be effected by any means or by any combination of means; as indicated above, the means of delivery is something apart from the radio program that is the subject of the delivery; the delivery constitutes the service.
- A broadcasting service is not a service that makes radio programs available using the internet (due to the exclusion in the ministerial determination), unless it is a service that delivers radio programs using the broadcasting services bands (due to the exception to the exclusion in the ministerial determination): thus, only some services that make radio programs available using the internet are excepted from the exclusion in the definition, namely, services that deliver radio programs using that part of the radiofrequency spectrum that consists of the broadcasting services bands.

‘[67] The reason for the distinction in the ministerial determination between *making a radio program available and delivering a radio program* is not entirely clear. The distinction may relate to the fact that the internet is not a means of delivery, such as is described in the first part of the definition. Thus, the internet may use cable, optical fibre or other means of delivery but the internet also involves the various protocols that regulate the manner in which content passes by those means. A radio program is delivered using the broadcasting services bands but does not require protocols such as are required for the use of the internet.

‘[68] The above analysis indicates that the word *service* signifies something other than the radio programs, being the content that includes, relevantly, the Foreign Land Recording. Rather, *service* is the provision, by one means or another, such as the internet or terrestrial transmitters, of that radio program. The same radio program may be delivered by different services. Thus, DMG [DMG Radio (Aust) Pty Ltd] delivered its radio program by one service that used the internet and by another service that used the broadcasting services bands.

‘[69] A broadcasting service is the delivery, in a particular manner, of a radio program, consisting of matter intended to entertain, educate or inform. Thus the delivery of the radio program by transmission from a terrestrial transmitter is a different broadcasting service from the delivery of the same radio program using the internet.

‘[70] Each commercial radio broadcasting licence is subject to the condition that the licensee will not provide commercial radio broadcasting services under the licence outside the licence area. Each licence area is a fixed geographical area within Australia. Access to the internet can be obtained anywhere in Australia. Accordingly, if a CRA member provides commercial radio broadcasting services by way of the internet, it would be providing those services outside the licence area. That consequence indicates that the construction contended for CRA would create real difficulties for a licensee such as DMG. There are some exceptions to that prohibition. The exceptions include that the provision of the services outside the licence area occurs accidentally, or as a necessary result of the provision of commercial radio broadcasting services within the licence area. None of those exceptions would excuse DMG from a breach of the condition of its licence in the circumstances set out in the agreed facts.

‘[71] Clearly, a service that makes radio programs available using the internet will not be a broadcasting service for the purpose of the Broadcasting Act unless the service that makes radio programs available using the internet *also* uses the broadcasting services bands. That is to say, a service might:

- be delivered by the use of any means, including the broadcasting services bands;
- be delivered or made available using the internet; or
- be delivered or made available using the internet *and* the broadcasting services bands,

The first and third categories are broadcasting services. The second category is not a broadcasting service. One of DMG’s services is in the first category. Another of DMG’s services is in the second category. None of the services provided by DMG is in the third category. Only the service provided by DMG that is in the first category is a broadcasting service and only that service is within the licence granted by the member agreement. DMG’s service that is in the third category is not within the licence. ...’ *Phonographic Performance Co of Australia Ltd (ACN 000 680 704) v Commercial Radio*

Australia Ltd (ACN 059 731 467) [2013] FCAFC 11, (2013) 296 ALR 607 at [1], [65]–[71], per Emmett, Besanko and Yates JJ

BROKER

[For 2(1) Halsbury's Laws of England (4th Edn) (Reissue) para 12 see now 1 Halsbury's Laws of England (5th Edn) (2008) para 12.]

[For 41 Halsbury's Laws of England (4th Edn) (2005 Reissue) para 42 see now 91 Halsbury's Laws of England (5th Edn) (2012) para 43.]

BUILDING

[By the Cremation Act 1902, s 2, 'crematorium' means any building fitted with appliances for the purposes of burning human remains, and includes everything incidental or ancillary thereto. Where a person wished to be cremated in accordance with his religious beliefs as a Hindu, the question arose whether a structure within which cremation would occur with a substantial aperture or apertures which would enable sunlight to fall directly on the body while it was being cremated, could be a 'building' within the meaning of the 1902 Act.] '[3]... [E]xamination of the evidence, including further documents put in on behalf of Mr Ghai for the purpose of this appeal, suggested that his religious belief does not in fact require him to be cremated, after his death, on a pyre in the open air. As was confirmed by his counsel on the hearing of this appeal, Mr Ghai's religious belief would be satisfied if the cremation process took place within a structure, provided that the cremation was by traditional fire, rather than by using electricity, and sunlight could shine directly on his body while it was being cremated. An example of the type of structure which would be acceptable to him was shown to us in the form of photographs of premises in Ceuta in Spanish Morocco ("the Ceuta premises"). That example was proffered by the fourth intervener for the first time on this appeal, but there were photographs of other examples in the evidence below.

...
[21] On behalf of the Secretary of State, Mr Swift contended that a structure could only be a "building" within the Act if it was "an inclosure of brick or stonework, covered in by a roof". ...

[22] The first argument is based on the normal meaning of the word "building". The meaning of the word "building", or, to put the

point another way, determining whether a particular structure is a "building", must depend on the context in which the word is used. Interpreting a word in a statute or a contract, or indeed in any other document, can, of course, only be sensibly done by considering the context in which it is being used. However, where, as is the case here, the word is one which is used in ordinary language and has no established special legal or technical meaning, and is not defined in the document in question (in this case, the Act), one can usefully take as a starting point the word's ordinary meaning. In *Moir's case* [1892] 1 QB 264 at 270, 271, and 273, Lord Esher MR, Fry LJ, and Lopes LJ approached the question of the interpretation of the word "building" in the Metropolitan Building Act 1855 by starting with its "ordinar[y]" meaning, its meaning in its "ordinary sense" and "popular usage", or its "ordinary and usual sense", and then considering its context.

[23] In my view, Lord Esher's obiter statement in *Moir's case* [1892] 1 QB 264 at 270 that the "ordinar[y]" meaning of the noun "building" is "an inclosure of brick or stonework, covered in by a roof" can only be justified if it was intended to refer to the ordinary meaning of the word "building" in the context of the statute in which it fell to be construed in the case before him. It is not without significance that there is nothing in the reasoned judgments of Fry LJ or Lopes LJ in *Moir* to support Lord Esher's statement.

[24] Particularly as it appears that Lord Esher's statement as to the "ordinar[y]" meaning of the word "building" may be treated as some sort of authoritative guidance as to the normal meaning of the word, I take this opportunity to say that it would be wrong to see it as having any such effect. In my opinion, the word "building" in normal parlance is naturally used to describe a significantly wider range of structures than would be included within Lord Esher's "inclosure of brick or stonework, covered in by a roof".

[25] There are many wooden or other structures not made of "brick or stonework", such as chalets, stables, or industrial sheds, and there are many structures which are not "inclosures", such as wood-drying stores, bandstands, or Dutch barns, all of which, on the basis of the normal use of the word, are "buildings". Other structures come easily to mind, such the Pyramids or the Colosseum, which are buildings in normal parlance, but do not fall within Lord Esher's "ordinar[y]" meaning. So, too, at least some prefabricated

structures, particularly if attached to a concrete, or similar, base, are naturally described as buildings.

'[26] Deciding what a word means in a particular context can often be an iterative process, and the ultimate decision should not be affected by whether one starts with a *prima facie* assumption as to the meaning of the word and then looks at the context, or one starts by looking at the context and then turns to the word. However, if one approaches the issue by making a preliminary assumption as to the meaning of a word such as "building", then, in agreement with what Etherton LJ said in argument, I do not think that it would be right to take a somewhat artificially narrow meaning of the word, and then see whether the context justifies a more expansive meaning. It is more appropriate to take its more natural, wider, meaning, and then consider whether, and if so to what extent, that meaning is cut down by the context in which the word is used.

'[32] I turn now to what appears to me to be the proper approach to the issue of whether the sort of structure, in which Mr Ghai wishes his remains to be cremated in due course, would be a "building" within the meaning of s 2 of the Act.

'[33] In that connection, I consider that the proper characterisation of the issue is not so much the somewhat abstract question as to what is meant by a "building" in the section; rather it is the more specific question whether a structure acceptable to Mr Ghai would be a "building" within the section. At least in general, it appears to me that, both in principle and in practice, it is inappropriate for the court to seek to define a word or expression used in a statute, where the legislature has not done so. It would virtually be a judicial encroachment onto the legislative function. Judicial guidance on such an issue, through the court's reasoning in a case where the meaning of a word is in issue, is inevitable, and, it is to be hoped, helpful. But a conscious and unnecessary definition of the word by the court is another matter. Judicial observations are made in the context of the facts of the particular case, and any attempt by the judge to provide a general definition of such a word in a statute will often lead to problems, as cases may well arise in the future with facts which are very different or unanticipated in nature, where the earlier definition would lead to difficulties.

'[34] In order to answer the issue to be determined on this appeal, it is right to consider what assistance can be got from the Act. At least for present purposes, the relevant aims of the

Act, which can be gathered from its provisions, were to ensure that cremations were subject to uniform rules throughout the country, to enable the Secretary of State to regulate the manner and places in which cremations were carried out, to require a crematorium to be a building which was appropriately equipped, and to ensure that a crematorium was not located near homes or roads. The Act also envisaged that crematoria would be "constructed". These facets of the Act suggest to me that, provided it is relatively permanent and substantial, so that it can properly be said to have been "constructed", and provided it could normally be so described, a structure will be a "building" within the Act.

'[35] In the light of these factors, I consider that there is no reason not to give the word "building" its natural and relatively wide meaning in s 2 of the Act, as discussed at [21] to [26], above. The fact that the noun which one might primarily use, in ordinary conversation, to describe some of the structures mentioned at [25], above would not be a "building" is nothing to the point. The primary way most people would describe the structure in which they live would be a house or a block of flats, but that does not mean that a house or a block of flats is not, in ordinary language, a building.

'[36] There have, predictably, been many cases which have required the courts to consider the meaning of the noun "building", but the outcome has inevitably been governed by the context. Nonetheless, it is not without interest to note that in this court a reasonably substantial barbeque has been held to be a "building" in the context of a restrictive covenant: see *Windsor Hotel (Newquay) Ltd v Allan* (1980) Times, 2 July. It is also perhaps worth mentioning that the contention that the noun "building" in s 10 of the Open Spaces Act 1906 should be restricted in the way that Mr Swift suggests was rejected in *Re St Luke's, Chelsea* [1976] 1 All ER 609 at 624, [1976] Fam 295 at 312.

'[37] Accordingly, the wording of the Act does not detract from adopting the natural and relatively broad meaning of "building" in s 2. The references to crematoria being "constructed" in ss 5 and 6, and the reference to a donation of land in s 6, tend to suggest that to be a "building" within s 2, a structure must be (at the risk of an oxymoron) relatively permanent and substantial. This may remove some structures from the ambit of the word as used in the Act, but I doubt those aspects take the matter any further: if a structure is not relatively permanent and cannot be described as "constructed", it would not, I think, ordinarily be described as a "building".

[38] This conclusion is supported by other factors. Thus, in the light of the wide regulatory powers given to the Secretary of State by s 7, there is no need to give a restricted meaning to the word “building” in the Act: if it was considered that, for one reason or another, the type of structure in which cremations could occur should be restricted, that could be achieved by regulations made pursuant to s 7. Further, where Parliament wanted to impose restrictions on crematoria (as it did in ss 2 and 5, with regard to fitting out and location), it spelt them out. Additionally, given that cremating bodies was known to be lawful as at 1902, it appears to me that one should lean in favour of a construction which gives a statute, introduced primarily to regularise, and ensure uniformity in, cremations, a generous, rather than a restricted, effect. (Quite apart from this, if, as I prefer to leave open, the Act does not preclude open air cremations, there would be a further reason for adopting a natural and wide definition of “building” for present purposes.)

[39] In these circumstances, I have come to the conclusion that Mr Ghai’s wishes as to how, after his death, his remains are to be cremated can be accommodated under the Act and the regulations. This is because the various structures I have described at [14]–[18], above, namely the cremation area in the Ceuta premises and the various structures in India, are “building[s]” within s 2 of the Act. They are buildings in the ordinary sense of the word, and they are substantial and effectively permanent structures. There is nothing in the Act, or in any external material which can be taken into account when construing the Act, to support the notion that the word is not to be given its ordinary meaning in s 2.’ *R (on the application of Ghai) v Newcastle City Council (Ramgharia Gurdwara, Hitchin and another intervening)* [2010] EWCA Civ 59, [2010] 3 All ER 380 at [3], [21]–[26], [32]–[39], per Lord Neuberger MR

BURIAL GROUND

[Note that the Pastoral Measure 1983 is repealed as from 1 July 2012 by the Mission

and Pastoral Measure 2011, s 111, Sch 9. The definition of ‘burial ground’ for the purposes of the 2011 Measure, s 44 is now contained in s 44(6), in terms similar to the former definition.]

BUSINESS

[For 47 Halsbury’s Laws of England (4th Edn) (2001 Reissue) para 6 see now 18 Halsbury’s Laws of England (5th Edn) (2009) para 370.]

BY REASON OF

New Zealand [Securities Markets Act 1988, s 3.] [202] The issue arises from the language of s 3(1)(b) of the Act which, related to the present appeal, provides that the relevant inside information must have been held or acquired “by reason of” Mr Patek being a principal officer (director) of Southern. By virtue of s 3(2) of the Act, it is presumed, in the absence of evidence to the contrary, that a principal officer of a public issuer has the relevant information by reason of being a principal officer of the public issuer.

...
[205] We do not think it necessary to engage in any detailed analysis of the term “by reason of” in the context of the present case. We are content to adopt the straightforward approach that the phrase may be equated with “because of” or “by virtue of”. We are also satisfied that it does not matter whether the inside information is received by a principal officer of the public issuer in more than one capacity. While there may be cases where it may be possible in the particular factual circumstances to clearly differentiate between the possession or receipt of information by a principal officer in one capacity or another, this was clearly not such a case.’ *Haylock v Patek* [2011] NZCA 674, [2012] 1 NZLR 665 at [202], [205], per Randerson J

BYELAW

[For 29(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 424 see now 69 Halsbury’s Laws of England (5th Edn) (2009) para 553.]

C

C.I.F.

[For 41 Halsbury's Laws of England (4th Edn) (2005 Reissue) paras 13, 324 see now 91 Halsbury's Laws of England (5th Edn) (2012) paras 14, 335.]

CALL

[For 7(1) Halsbury's Laws of England (4th Edn) (2004 Reissue) para 825 see now 15A Halsbury's Laws of England (5th Edn) (2016) para 1321.]

CANON

[For 14 Halsbury's Laws of England (4th Edn) para 643 see now 34 Halsbury's Laws of England (5th Edn) (2011) para 352.]

CANON LAW

[For 14 Halsbury's Laws of England (4th Edn) paras 305–308 see now 34 Halsbury's Laws of England (5th Edn) (2011) paras 7–10.]

CANVASSER

[For 15(3) Halsbury's Laws of England (4th Edn) (2007 Reissue) para 254 see now 37 Halsbury's Laws of England (5th Edn) (2013) para 247.]

CAPABLE

Of being limited

Australia [Income Tax Assessment Act 1997 (Cth), s 243–20(2). Expenditure deductible under the Income Tax Assessment Act 1997 (Cth) was liable to be reduced if the loan constituted a 'limited recourse debt' within the meaning of s 243–20(2). Such a debt exists where the creditor's rights of recourse are "capable of being limited" under the loan.] '[3] The issue in dispute is whether a loan from one wholly owned subsidiary of BHPB, BHP

Billiton Finance Ltd (Finance) to BHP Billiton Direct Reduced Iron Pty Ltd (BHPDRI) was a "limited recourse debt" within the meaning of Div 243 of the Act. BHPDRI is a wholly owned subsidiary of BHP Minerals Holdings Pty Ltd (Holdings) which is in turn a wholly owned subsidiary of BHPB.

...
[53] To describe a creditor's rights of recourse as "capable of being limited" is to refer to a power of a person to limit or bring about a limitation on those rights. In possible deference to the definition of "arrangement" in the Act, it was accepted by the respondents in argument that s 243–20(2) is not necessarily confined to enforceable arrangements; however, this case does not call for any decision about an unenforceable arrangement. It is the certain liability of the creditor's rights of recourse to limitation—by the exercise by a person of a power to limit, or to cause a limitation to those rights—which has the effect that a debtor has not been fully at risk in relation to an amount of expenditure. Such a power must exist at the inception of the loan, whether it arises as a result of an arrangement or a circumstance or conduct (from which an arrangement may be inferred) or in some way other than the way covered by subs (1). It follows that s 243–20(2) would not be satisfied by the existence, at the inception of the loan, of a possibility of a person acquiring a capacity (that is a power) to limit, or a power to cause the relevant limitation of, a creditor's rights of recourse at some point in the future.

[54] Otherwise it would seem that all loans used by a debtor to acquire property, including loans for special purpose projects involving a corporate group and intra-group financing, must be characterised as giving rise to obligations which must be treated as limited recourse debts within s 243–20(2), even though the provision is directed at a debtor taxpayer who has not been fully at risk in relation to an amount of expenditure. Such an interpretation carries the potential, recognised by Edmonds J, for discouraging investment in special purpose projects.

[55] The interpretation of s 243–20(2) set out in these reasons aligns closely with the language of the Act, which supports the clear legislative purpose of allowing an adjustment of a taxpayer's income if the taxpayer has not been fully at risk in respect of an amount of expenditure. Secondly, the interpretation gives a clear operation to s 243–20(2) and excludes a conjectural approach to the question of whether an adjustment should be made to a taxpayer's

income. This fits with the character of the provision as one which affects liability to taxation. Thirdly, this construction facilitates obedience in circumstances where, despite overlap, a debtor taxpayer wishes to determine whether a debt is capable of being dealt with as a commercial debt which has been forgiven or whether it should be dealt with as a limited recourse debt.’ *Comr of Taxation (Cth) v BHP Billiton Ltd (Matter Nos M117/2010, M118/2010, M119/2010 and M120/2010)* [2011] HCA 17, (2011) 277 ALR 224 at [3], [53]–[55], per French CJ, Heydon, Crennan and Bell JJ

CAPACITY

‘[27] The conflict of laws rules that govern the legal capacity of companies and other bodies corporate or unincorporate with regard to contracts are outside the scope of the Rome Convention on the Law Applicable to Contractual Obligations 1980, which was given the force of law in the United Kingdom by the Contracts (Applicable Law) Act 1990. Such issues are therefore governed by English common law conflict rules. As already noted, Tomlinson J considered this issue by reference to the English conflict of laws rule as stated in Dicey, Morris and Collins, r 162(1) and (2):

- “(1) The capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation and by the law of the country which governs the transaction in question.
- (2) All matters concerning the constitution of a corporation are governed by the law of the place of incorporation.”

... ‘[43] Sir Carleton Kemp Allen, in his inaugural lecture as Oxford Professor of Jurisprudence, described “capacity”, at least for English law purposes, as meaning—

“the ability to exercise (which of course presupposes the ability to acquire) specific rights, not the mere ability, in general, to possess legal rights. By incapacity we mean the converse of this ability. It goes without saying that capacity or incapacity may be total or partial”.

The ability to exercise the legal right of concluding contracts is an obvious example of a capacity of a legal entity. On this analysis it may be total, or it may be partial in the sense that the ability may exist for some cases but not for

others. But, if the ability does not exist in a particular case, then the consequence would be absolute, at least in English law.

‘[44] Does the word “capacity”, when used to mean the legal ability to exercise specific rights, equate to the word “power” to exercise specific rights, for the purposes of Dicey’s conflict of laws rule? It seems to me that so long as “power” is used only in the sense of a legal ability to exercise specific rights, the two words will have the same meaning and effect.

‘[45] Yet, as I have already recorded, Mr Pollock emphasised in argument how English law has distinguished “capacity” from “powers” in relation to corporations, including those established under the Companies Acts. In relation to the latter it became axiomatic that the extent of the ability of such a legal entity to exercise specific legal rights must be within the purposes for which the entity was created, which will be defined in a company’s memorandum of association.

‘[46] However, as Tomlinson J notes in his judgment, this approach to the concept of the “capacity” of a non-human entity such as a company is not universal. There is the Anglo-American tradition which maintains that a legal entity’s “capacity” or “power of law” is established with specific purposes in mind, so that actions beyond that purpose are not binding on the entity, because it cannot have any capacity outside its purpose. On the other hand there is what is described as a “continental” or “German” perception which considers the legal entity’s “power of law” to be universal, in which case there is no room for a doctrine of ultra vires. But, on the second approach, if there is to be some concept of a limitation on the ability of a non-human legal entity to conclude valid contracts, that has to be found in some principle other than ultra vires.

‘[47] So, I return to the question: in what sense must we interpret the word “capacity” in Dicey’s rule? Counsel have found no authorities in which there is any discussion of the meaning of the word for the purposes of the rule. None of the cases cited in the footnotes to Dicey assist on this point. It appears to be a novel issue. How the word “capacity” is interpreted for the purposes of the rule is, as Etherton LJ has stated in his judgment, ultimately a matter of policy. In my view it is important to remember the purpose of the rule, which is to determine which systems of laws will be used, under English conflict rules, to decide whether a “corporation” has the ability to exercise the legal right to enter into a binding contract with a third party. If that accurately summarises the rule’s purpose, then I

think, following the approach of Auld LJ in the *Macmillan* case [*Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 All ER 585 at 604, [1996] 1 WLR 387 at 407] that the concept of “capacity” has to be given a broader, “internationalist”, meaning and must not be confined to the narrow definition accorded by domestic English law. In my view it should be interpreted as the legal ability of a corporation to exercise specific rights, in particular, the legal ability to enter a valid contract with a third party. So I agree with the approach of the judge; for the purposes of English conflict of laws, a lack of substantive power to conclude a contract of a particular type is equivalent to a lack of “capacity”, to use English terminology.’ *Haugesund Kommune v Depfa ACS Bank (Wibborg Rein & Co, Part 20 defendant)* [2010] EWCA Civ 579, [2011] 1 All ER 190 at [27], [43]–[47], per Aikens LJ

CAPITAL

[For 7(1) Halsbury’s Laws of England (4th Edn) (2004 Reissue) para 520 see now 15A Halsbury’s Laws of England (5th Edn) (2016) para 1231.]

Capital adequacy ratio

Australia [46] At present the regulation of entities which accept monies on deposit is accomplished by the Banking Act 1959 (Cth). The prudential supervision of such bodies — which, naturally enough, include banks — is conducted by the Australian Prudential Regulation Authority (APRA) under Pt II of the Banking Act. However, APRA’s role as the prudential regulator was brought about only by the passage of the Financial Sector Reform (Amendments and Transitional Provisions) Act 1998 (Cth) and the Australian Prudential Regulation Authority Act 1998 (Cth). Relevantly, those laws commenced on 1 July 1998. Prior to that time, and more particularly during the merger between St George and Advance, the prudential regulator was the Reserve Bank of Australia (RBA). From 1996 to 1997 the RBA required all banks in Australia to maintain certain minimum ratios of capital to risk-weighted assets.

[47] The expressions “capital” and “risk-weighted assets” were explained in a document issued by the RBA entitled “Capital Adequacy of Banks: Prudential Statement C1” (PSC1). There is no dispute that PSC1 sought to be, and expressed itself as, consistent in all substantial

respects with the approach to bank capitalisation recommended by the Basel Committee on Banking Supervision. Those recommendations were then known as the Basel Capital Accords and were issued by the Basel Committee which, at the time, consisted of representatives of the central banks and regulatory authorities of the eleven countries presently making up the Group of Ten. Since the time of the transactions the subject of the present litigation those accords have been replaced with a fresh accord known as Basel II. However, Basel II has no present relevance.

[48] For the purposes of PSC1 the capital of a bank is broken into Tier 1 and Tier 2 capital. Tier 1 capital was described in PSC1 in the following terms:

- 16 The foundation of a bank’s capital is made up of permanent shareholders’ equity and disclosed reserves (created or increased by the appropriation of retained earnings or other surplus). Such elements fully meet the essential characteristics of capital and represent capital resources which can best contribute resilience and flexibility to a bank experiencing financial difficulties.
- 17 Tier 1 capital includes paid-up ordinary shares, non-cumulative irredeemable preference and any non-repayable premiums arising from the issue of such shares. Partly paid shares (and other capital instruments) qualify only for the value of funds actually received. General reserved and retained earnings (including measured current year earnings net of expected dividends and taxation payments), although distributable in some circumstances, generally meet the attributes of Tier 1 capital. Minority interests in subsidiaries which are consistent with other named capital instruments are eligible to be counted in the calculation of Tier 1 capital of the consolidated group.
- 18 Non-cumulative irredeemable preference shares included in Tier 1 capital must be subordinated to depositors and unsecured creditors of the bank; may not contain any conversion feature that effectively provides for a return of capital or compensation for unpaid dividends; and dividends payable on the shares should not be influenced by the credit standing of

the bank. The shares should not provide for any compensation to investors other than by way of dividend. The non-declaration of a dividend should not trigger any restrictions on the bank other than the need to seek approval of the holders of the shares before paying dividends on other shares or before retiring other shares.

‘[49] Tier 2 capital was described in PSC1 in this way:

- 20 There are other capital elements that impart strength to a bank’s position but to a varying degree fall short of the qualities of Tier 1 capital instruments. These may be included in a bank’s capital base as Tier 2 capital up to an amount equal to the bank’s Tier 1 capital (net of goodwill, other intangible assets and future income tax benefits).
- 21 Tier 2 capital is divided into two segments, termed Upper and Lower Tier 2 capital. Upper Tier 2 capital includes elements that are essentially permanent in nature and have characteristics of both equity and debt.
- 22 Lower Tier 2 capital consists of elements which are not permanent. Lower Tier 2 capital may be included in Tier 2 capital to a maximum, in aggregate, of 50 per cent of Tier 1 capital (net of goodwill, other intangible assets and future income tax benefits).

‘[50] Further explanation of lower Tier 2 capital appeared from cl 33 of PSC1 which showed that appropriately subordinated debt could be counted as Tier 2 capital:

- 33 Term subordinated debt and similar limited life instruments (including redeemable preference shares) are eligible to be included in Lower Tier 2 capital provided they satisfy the criteria set out in Attachment III. This includes being appropriately subordinated and having an original maturity of at least 7 years.

‘[51] It will be apparent that the capital requirements of PSC1 comprehended notions of “capital” which formed a spectrum constituted by equity interests at one end and subordinated debt interests at the other.

‘[52] Risk-weighting was referred to in cl 10

of PSC1 in the following terms:

- 10 Each Australian bank is expected to maintain a minimum ratio of total capital to risk-weighted assets, on both a consolidated group and stand-alone basis, of 8 per cent (of which at least 4 per cent should be Tier 1 capital). These levels will be kept under review.

‘[53] The concept of the risk-weighting of assets was explained in Attachment IV to PSC1 which it is not necessary to set out. In essence, the riskier an asset held by a bank the greater the proportion of its value which was to be brought to account in calculating capital adequacy. Thus gold, notes and balances held with the RBA were treated as riskless and assigned a zero weighting whereas, at the other end of the continuum, loans to Australian trading enterprises were weighted at 100%. Clause 10, therefore, required each bank to maintain a ratio of capital to risk-weighted assets of at least 8% of which at least 4% had to be Tier 1 capital. In practical terms cl 10 meant, for example, that for a \$100,000 commercial loan to an Australian business a bank would be required to have \$8000 of capital made up of at least \$4000 of capital having equity characteristics (Tier 1) and \$4000 having qualities lying somewhere between subordinated debt and equity (Tier 2).

‘[54] Because it will be presently relevant two further matters should also be noted: *first*, this requirement did not apply just to a bank on a standalone basis but also on a consolidated group basis; *second*, the RBA could require a bank — pursuant to cl 11 — to maintain a higher minimum capital adequacy ratio. Clause 11 provided:

- 11 The Reserve Bank may require a bank to maintain a higher minimum ratio, eg for a newly established bank, or a bank judged to have an excessive concentration of credit risk exposures or significant other risk exposures.

‘[55] Obedience to the requirements of the RBA was secured by a condition to that effect imposed by the Commonwealth on St George’s banking licence and the then s 9(6) of the Banking Act which made compliance with such conditions mandatory.’ *St George Bank Ltd v Comr of Taxation* [2009] FCAFC 62, (2009) 256 ALR 391 at [46]–[55], per Perram J

Circulating capital

[Note that the passage from 7(1) Halsbury's Laws of England (4th Edn) (2004 Reissue) para 524 is not reproduced in 15 Halsbury's Laws of England (5th Edn) (2009) para 1042.]

Fixed capital

[For 7(1) Halsbury's Laws of England (4th Edn) (2004 Reissue) para 524 see now 15A Halsbury's Laws of England (5th Edn) (2016) para 1231.]

Issued and unissued capital

[For 7(1) Halsbury's Laws of England (4th Edn) (2004 Reissue) para 521 see now 15A Halsbury's Laws of England (5th Edn) (2016) para 1234.]

Of a capital nature

[Income Tax Assessment Act 1997 (Cth) s 8-1; payments made to bank's US subsidiary under a debenture.] '[73] Whether the payments of interest by St George to [St George Funding Company LLC (LLC)] could be deducted by St George from its assessable income was determined by the operation of s 8-1(1) and (2) of the Act. Relevantly they provided:

- (1) You can *deduct* from your assessable income any loss or outgoing to the extent that:
 - (a) it is incurred in gaining or producing your assessable income; or
 - (b) it is necessarily incurred in carrying on a business for the purpose of gaining or producing your assessable income.
- (2) However, you cannot deduct a loss or outgoing under this section to the extent that:
 - (a) it is a loss or outgoing of capital, or of a capital nature;

...

'[74] It was accepted by the commissioner that the interest paid by St George to LLC was an outgoing incurred by St George in gaining, or in carrying on a business for the purpose of gaining, assessable income. Accordingly, there was no issue but that s 8-1(1) was satisfied.

'[75] As the trial judge noted, no argument was pursued by St George that the commissioner's concession that the interest payments were incurred by St George in gaining assessable

income necessarily meant that they could not be of a capital nature. That being so it is unnecessary to explore whether the exemptions created by s 8-2 are true exceptions or, rather, as some see it, examples in contradistinction to s 8-1: compare, *John Fairfax & Sons Pty Ltd v FCT* (1959) 101 CLR 30 at 34; [1959] ALR 267 at 268 (*John Fairfax*) per Dixon CJ (with whom Kitto J agreed at CLR 43; ALR 274), at CLR 40; ALR 272 per Fullager J and at CLR 48; ALR 277-8 per Menzies J (with whom Taylor J agreed at CLR 43; ALR 274); *Steele v DCT* (1999) 197 CLR 459; 161 ALR 201; [1999] HCA 7 at [24] (*Steele*) per Gleeson CJ, Gaudron and Gummow JJ (with whom Callinan J agreed at [93]), [69]-[70] per Kirby J; compare, *Macquarie Finance Ltd v Cmr of Taxation* (2005) 146 FCR 77; 225 ALR 694; [2005] FCAFC 205 at [104]; *Macquarie Finance FCAFC* per French J, [255] per Gyles J; R W Parsons, *Income Taxation in Australia*, Law Book Company, Sydney, 1985, at [5.12]-[5.13].

'[76] That issue not being raised, the case was conducted on the basis that the question for determination was whether the interest payments were of a capital nature within the meaning of s 8-1(2)(a) and, hence, were not deductible.

'[77] That question is well-known and has been traversed by a number of authorities both in the High Court and this court. For present purposes, both the commissioner and St George accepted as a correct statement of the law the following passage from the judgment of Dixon J in *Sun Newspapers Ltd v FCT* (1938) 61 CLR 337 at 363; [1939] ALR 10 at 15-16 (*Sun Newspapers*):

There are, I think three matters to be considered, (a) the character of the advantage sought, and in this its lasting qualities may play a part, (b) the manner in which it is to be used, relied upon or enjoyed, and in this and under the former head recurrence may play its part, and (c) the means adopted to obtain it; that is, by providing a periodical reward or outlay to cover its use or enjoyment for periods commensurate with the payment, or by making a final provision or payment so as to secure future use or enjoyment.

... '(A) The nature of the transaction in context

'[80] St George argued that in determining the character of the expenditure and the character of the advantage sought, regard was to

be had to the particular transaction undertaken and to the advantage sought by the specific taxpayer and not other related companies. This required a focus on the nature of the liability created in *St George* by the debenture. Reliance was placed upon the Full Court's decision in *Asiamet (No 1) Resources Pty Ltd v FCT* (2003) 126 FCR 304; 196 ALR 692; [2003] FCA 35 at [104] per Emmett J (affirmed *Commissioner of Taxation v Asiamet (No 1) Resources Pty Ltd* (2004) 137 FCR 146; [2004] FCAFC 73 at [150], [162]–[164] per Allsop J with whom Ryan and Finkelstein JJ agreed) and on the well-known judgment of Gibbs ACJ in *Commissioner of Taxation v South Australian Battery Makers Pty Ltd* (1978) 140 CLR 645 at 655–6; 21 ALR 59 at 65 (*Battery Makers (SA)*). The commissioner, on the other hand, argued that the character of the interest payments was not exhaustively to be determined by a consideration of the terms of the debenture but was to be gauged by a consideration of the broader series of transactions of which the debenture was merely an integer.

[81] There is no tension between these arguments. The questions raised by s 8–2(a) are concerned with the characterisation of liabilities which already exist and whose legal nature is not in doubt. Section 8–2(a) takes as its point of departure known legal qualities and asks whether those qualities are capital in nature. Thus, to say of a liability that it is “rent” or “interest” is not to answer the question posed by s 8–2(a). As this court's decision in *Ure v FCT* (1981) 34 ALR 237 shows, interest may, depending on the purposes for which the application and use of the borrowed money were intended to gain, be of a capital or a revenue nature. Consistent therewith, in *Steele* at [29] Gleeson CJ, Gaudron and Gummow JJ thought that particular circumstances might make it appropriate “to regard the purpose of interest payments as something other than the raising or maintenance of the borrowing and thus, potentially, of a capital nature”.

[82] Unsurprisingly, no different principle obtains in the case of rent. Indeed, although Gibbs ACJ did not think it appropriate on the particular facts in *Battery Makers (SA)*, his Honour was clearly of the view (at 655; at 65) that a payment of rent could be partly capital. Stephen and Aickin JJ agreed at 661.

[83] It should be accepted, as *St George* submitted, that resort to the wider context must not be permitted to obscure or alter the legal characterisation of the payments in issue. However, acceptance of that proposition provides no reason so to limit the focus when the

question is how the liability thus identified is to be characterised for the purposes of s 8–2(a). The authorities are usefully collected by Goldberg J in *Commissioner of Taxation v Star City Pty Ltd* [2009] FCAFC 19 at [27]–[31] and make the same point. The commissioner's argument that the wider context must be examined should therefore for present purposes be accepted.

‘(B) Are the payments of interest to be characterised as consideration for the acquisition of a capital asset?’

[84] It is useful in the first instance to recall some basic matters. In what follows, references are to the present Corporations Act 2001 (Cth) but equivalent provisions existed under the Corporations Law in the relevant years of income.

[85] *First*, a company has a separate legal identity from that of its members and, having that separate existence, has all the powers and capacities of a natural person: s 124.

[86] *Second*, the relationship between a company and its members is unlike relationships that natural persons may have for reasons which include the inability of natural persons to issue interests in themselves. It is because of that that the powers to raise and return shareholders' capital and to pay dividends thereon are expressly granted by statute: see s 124(1). Such powers are not included beneath the broad canopy of powers possessed by natural persons. A necessary consequence is that the payment of dividends and the raising and return of capital are sui generis activities neither sourced in, nor analogous with, the activities of natural persons.

[87] *Third*, s 8–2(a) is directed to all persons both natural and otherwise. It operates on notions of capital which are applicable to every kind of transaction regardless of the legal personality of the actors concerned. Further, the questions it raises are questions concerned with the characterisation of outgoings. Thus although s 8–2(a) refers in terms to outgoings of “capital” as well as those which are of a “capital nature” the denotation of those terms must extend beyond the company law meaning of “capital”.

[88] *Fourth*, by contrast, company law observes a distinction within a company between “capital”, on the one hand, and “profits” on the other: compare Pt 2H.5 and Ch 2J of the Corporations Act. Although there are corresponding concepts in the law of partnership and the law of trusts the position of company law is attended by a significant distinguishing feature. Whereas a company has a legal personality separate from its members

and its liabilities are not those of its members, the liabilities of a partnership are indistinguishable from the liabilities of the partners comprising it. In the case of a trust, the trust has no separate existence — what exists is the trustee and its liabilities are its alone although it has a right of indemnity out of the trust assets. No question therefore arises in the case of a partnership or of a trust of creditors being prejudiced by the removal of wealth from the undertaking embodied in them. No distribution of capital by a partnership to its partners can erase their liability to creditors and a trustee remains just as exposed to creditors even if it has disposed of all of the trust assets and even though its indemnity out of those assets be insufficient. The existence of a separate legal personality in a company, by contrast, makes necessary that those contributing their capital to the constituted venture do not withdraw it in a way which prejudices creditors. It is because the existence of the corporate veil presents the opportunity for injustice to be visited upon creditors that those standing behind the company are required to maintain their capital in it. The *quid pro quo*, therefore, of the granting of separate legal personality to a company is the concomitant obligation to ensure that the capital advanced by its members remains in play.

[89] *Fifth*, to give effect to that fundamental consideration two principles are axiomatic: members may receive dividends only out of the profits and the members' capital may only be returned to them in tightly controlled circumstances which include requirements protecting both creditors and the position of the members *inter se*. Such requirements are absent from the law of trusts and the law of partnerships.

[90] *Sixth*, where a company issues a share to a member, the member acquires and owns the bundle of rights making up the share. Unless the member's business consists of buying and selling such shares so that the share forms part of a body of trading stock, the share thus held will ordinarily be a capital asset. Where such an issue occurs what is obtained by the company depends upon the terms upon which the share was issued: s 254B(1). If the subscription consideration is money then the company obtains money; if it is land, it obtains land; if the share is not fully paid then the company acquires a right to call upon the unpaid portion. The "capital" of the company is the money or money's worth derived by the company from the issue of shares: *Re Swan Brewery Co Ltd* (1976) 3 ACLR 164 at 166 per Gillard J.

[91] *Seventh*, by that issue of shares the

company obtains assets consisting of the subscription consideration proffered for the shares. Those assets may or may not be capital assets. The company may, of course, use the assets obtained by the issue of the shares in any lawful way it chooses. If cash has been obtained, it may choose to acquire another capital asset. If it does so, then the purchase monies constituting that outgoing will clearly be capital in nature. On the other hand, if the money is used to meet ordinary everyday expenses such outgoings will not be ones to which s 8-2(a) applies.

[92] *Eighth*, the assets thus acquired by the company on the issue of its shares are, however, *not* the share capital of the company. Those assets are owned by the company; the share capital is owned by the members. While it is no doubt convenient to refer to a company's capital it is important to understand the limitations inherent in that expression. In particular, it must not be thought that the use of the possessive connotes ownership by the company of the capital. Where every member of a group owns a thing or shares a quality it is common to ascribe ownership of that thing or possession of that quality to the noun describing the entire group. Thus, *the army's hopes* really means *the hopes of the soldiers of the army* for armies, unlike soldiers, do not have hopes, and to speak of *the speed of a team* is but a shorthand way of saying *the speed of the players on a team*. It is in that sense that the expression *the company's capital* is to be understood and in that light it denotes not capital owned by the company but rather, as commonsense suggests, the capital owned by the members of the company.

[93] *Ninth*, as such, both the concept of "capital" in this context and the concomitant notion of "profits" are concepts whose purpose is to ensure that creditors of a company are not prejudiced by the surreptitious reduction in the company's wealth. This is achieved by the requirement that dividends be paid only out of profits and that reductions in capital only occur where no prejudice is visited upon creditors. So viewed, this notion of capital — quite unlike the notion of capital referred to in s 8-2(a) — is not concerned with a quality possessed by outgoings but, rather, with a concept operating beyond and above the assets of a company and dictating, at that conceptual level, particular outcomes of allocation, distribution and confinement. It is for that reason that no particular asset owned by a company can be identified as being part of the company's capital or of its profits. Both are concepts existing *dehors* the company's assets.

‘[94] It is then useful to compare those principles with the commissioner’s submission that a capital asset was acquired consisting of the “perpetual capital raised”. No doubt LLC raised capital but to say that is only to say that it issued shares in return for money. That money was, of course, an asset of LLC. In calculating the shareholders’ capital in LLC the asset constituted by that money would, no doubt, have to be brought to account (along with all of its liabilities). But this is equally true of all of LLC’s assets both those which were capital assets and those which were not. The mere fact, therefore, that the cash held by LLC was obtained from the issue of the capital securities does not make it part of the capital of LLC in the company law sense.

‘[95] Nor is it possible to describe the money held by LLC as being, in itself, a capital asset. The precise definition of a capital or structural asset may be elusive. However, whatever the limits on the concept, money, or choses in action representing money, lie beyond it.

‘[96] It follows that the commissioner’s submission that the issue by LLC of the capital securities represented the acquisition by LLC of a capital asset cannot be accepted. Neither the increase in LLC’s shareholders’ capital nor the obtaining by it of the money raised from the issue of the capital securities were of that nature.

‘(C) Can the structure of a company’s capital be a structural advantage of a capital nature?’

‘[97] For reasons already given, the allotment and issue of a number of shares by a company does not result in the acquisition by it of a capital asset. In an ordinary case, the number of shares on issue and the arrangements by which the members owning those shares agree inter se to distribute the profits derived from the company have nothing to do with the activities by which the company earns those profits. They are separated conceptually by the distinction between the derivation of profit and the application of profit which has been derived: compare Parsons, 1985, p 414. Profit, in that sense, is what is left after the process of income derivation. Ordinarily, the distribution of such profit cannot be an outgoing incurred in the course of its own earning for similar reasons to those which explain why a cake cannot be one of its own ingredients.

‘[98] However, the complexities of the modern commercial world are such that, in some circumstances, the productive venture carried on by a company may become enmeshed, directly or indirectly, with the

position of the shareholders themselves and even with the rights of those members inter se. It is difficult to be definitive about these matters but when commercial circumstance, or regulatory obligation, impose upon a company particular requirements as to its capital structure, the cost of meeting those requirements may, in some cases, be capital in character. They will be capital in character if the structural advantage accruing to the company by meeting the requirements as to its share capital is an advantage of the kind referred to by Dixon J in *Sun Newspapers*. Where the conclusion is reached that the structural advantage sought is sufficient to render the outgoings associated therewith as capital in nature, it is important to be clear that that capital nature has nothing to do with the fact that the structure in question is in the shareholders’ capital. In that sense, the word “capital” carries with it a considerable risk of conceptual confusion in the context of s 8-2(a). Indeed, it is the structure, rather than the medium in which the structure is expressed, which gives the advantage its capital nature.

‘[99] By way of analogy, the locations in which a company does business could not ordinarily be meaningfully described as capital in nature. Yet, if a company acquire an exclusive right to operate in a particular area then there are usually no particular difficulties in treating that right as a structural or capital advantage for the purposes of determining the nature of an associated outgoing under s 8-2(a) as the result in *Sun Newspapers* itself shows. The capital nature springs not from the concept of location but rather from the structure of rights imposed on the medium of location.

‘[100] So too, when a requirement as to shareholders’ capital is found to bring into existence a structural or capital advantage, the capital nature emerges from the structural advantage and not from the fact that, confusingly, that structural advantage exists in a medium known as shareholders’ capital.

‘[101] The question then devolves to the ordinary kind of inquiry required by *Sun Newspapers*. There are various requirements which may be imposed on a company’s capital structure by the rigours of commerce or the law. A company operating under a licence to broadcast television may be required to maintain a majority of shareholders with a particular national characteristic; a company operating a newspaper may not be permitted to acquire another newspaper without removing a particular shareholder from amongst its members. Other examples of such businesses may be readily imagined.

[102] The business of banking is one such business. The existence of shareholders' equity in a bank increases its ability to absorb losses. The absorption of losses is, no doubt, a benefit to any business, but in the case of banks that utility has the additional beneficial effect of maintaining the confidence of its depositors. The sudden evaporation of that confidence may lead to a significant proportion of depositors withdrawing their funds which, in turn, may expose a bank to a risk of insolvency. It is precisely the need to avoid such losses of confidence and their concomitant damage to the economic system which has led to the introduction of capital adequacy requirements. In this case, compliance by St George with the RBA's requirements had the immediate effect of improving the ability of St George to withstand losses. That ability went to the heart of St George's business as a bank, namely, its continued ability to maintain the confidence of its depositors. It also had, as Hill J pointed out in *Macquarie Finance Ltd v Comr of Taxation* (2004) 210 ALR 508; [2004] FCA 1170 at [7] (*Macquarie Finance FCA*), the superadded effect of allowing the bank to expand its operations where, but for the capital raising, the bank would be prohibited by PSC1 from incurring further debts to make loans.

[103] The increased ability to maintain the confidence of depositors and the associated ability to increase the size of its loan book were advantages "of a lasting character" which endured for the benefit of the "profit earning subject" which was St George: compare *Sun Newspapers* at CLR 363; ALR 16 per Dixon J.

[104] St George objected that the payments of interest did not secure anything but the use for a limited term of the funds advanced under the debenture. The commissioner, on the other hand, denied that the payments had that quality at all. Neither party suggested St George made the payments for both purposes and that apportionment was appropriate (although St George did make an unrelated submission about apportionment). The case was argued on an all or nothing basis: compare *Macquarie Finance FCA* at [64] per Hill J.

[105] The payments of interest were an important — indeed essential — element in an overall transaction whose purpose was to achieve the structural advantage to which reference has been made. The debenture served as the conduit by which profits which had not been distributed to ordinary St George shareholders could be channelled, via LLC, to the holders of the capital securities. The essentiality of those payments can be seen from the

evidence that it was the requirements of the RBA which constituted the sole necessity for the capital raising. There was no evidence which suggested that St George needed the funds extended to it for the debenture although it was accepted that it used the funds in the ordinary course of its business. The capital adequacy requirements of the RBA would have been met even if the funds had remained in LLC. For that reason, the predominant purpose underpinning the payments of interest was the securing of the structural advantage flowing to St George itself from the increase in the shareholders' equity in LLC.

[106] St George also stressed the recurrent nature of the interest payments to support the notion that the payments were on the revenue account. The significance of recurrence may be accepted but is not conclusive and, in this case, does not detract from the conclusion that the outgoings were of a capital nature. Examples of recurrent payments which are nevertheless capital in nature are common enough. The repayments on a home loan almost invariably include a recurrent capital component; a rental payment may also include a capital component which does not vanish merely because it recurs. Closer to the present context, the recurrent nature of the interest payments due on the stapled securities in issue in *Macquarie Finance FCAFC* did not prevent their being characterised as capital in nature.

[107] For these reasons, the interest payments were of a capital nature.' *St George Bank Ltd v Comr of Taxation* [2009] FCAFC 62, (2009) 256 ALR 391 at [73]–[77], [80]–[107], per Perram J

Australia [Income Tax Assessment Act 1997 (Cth), s 8–1.] [2] The central question in this appeal is whether the payments by AusNet of certain statutory charges imposed on PNV as holder of the transmission licence transferred to AusNet, and thereafter payable by AusNet, were deductible expenditures under s 8–1 of the Income Tax Assessment Act 1997 (Cth) (the ITAA) and in particular whether they were payments of capital or of a capital nature within the meaning of s 8–1(2)(a). Section 8–1 relevantly provides:

- (1) You can *deduct* from your assessable income any loss or outgoing to the extent that:
 - (a) it is incurred in gaining or producing your assessable income; or
 - (b) it is necessarily incurred in carrying

on a business for the purpose of gaining or producing your assessable income.

- (2) However, you cannot deduct a loss or outgoing under this section to the extent that:

- (a) it is a loss or outgoing of capital, or of a capital nature.

As appears from subs (2) and as Dixon CJ observed of the analogous s 51(1) of the Income Tax and Social Services Contribution Assessment Act 1936 (Cth) [*John Fairfax & Sons Pty Ltd v Federal Commissioner of Taxation* (1959) 101 CLR 30 at 34; [1959] ALR 267 at 268; [1959] HCA 4 (*John Fairfax*)]:

... a loss or outgoing incurred in gaining or producing the assessable income or in carrying on a business for that purpose may nevertheless be a loss or outgoing of capital.

‘[3] The charges were imposed by an order in council made pursuant to s 163AA of the Electricity Act. They amounted to \$177,500,000 and were payable by force of the Electricity Act. They were also the subject of a contractual promise by AusNet under the asset sale agreement to pay them to the state, in addition to a “Total Purchase Price” of \$2,502,600,000 to be paid to PNV for its assets. For the reasons that follow, the primary judge and the majority in the Full Court of the Federal Court were correct to hold that the payments of the charges by AusNet were of a capital nature and therefore, pursuant to s 8-1(2)(a) of the ITAA, were not deductible. They were paid by AusNet as part of the price of acquiring the assets of PNV, including the transmission licence, which was an essential element of the transmission business. The licence was essential because s 159 of the Electricity Act provided that a person must not engage in the transmission of electricity unless the person was the holder of a licence authorising that activity or was exempted from the requirement to obtain a licence in respect of that activity.

‘[14] The evaluative judgment required to distinguish between expenditure on capital or revenue account is made under the guidance of approaches developed in decisions of this court over many years. Those approaches have necessarily been expressed with a degree of generality sometimes criticised for unpredictability in the outcomes they yield. However, as Dixon J observed in *Hallstroms Pty Ltd v Federal Commissioner of Taxation* [(1946) 72

CLR 634 at 646; [1946] ALR 434 at 437; [1946] HCA 34 (*Hallstroms*)], the courts, having been given by the income tax law “a very general conception of accountancy, perhaps of economics”, have proceeded with the task “in the traditional way of stating what positive factor or factors in each given case led to a decision assigning the expenditure to capital or to income as the case might be”.

‘[15] The distinction between capital and revenue expenditure is readily discerned in cases close to the core of each of those concepts. A once and for all payment for the acquisition of business premises would be treated as an outlay of capital. A rental payment under a lease of the same premises would be treated as an outgoing on revenue account. The distinction is not so readily apparent in penumbral cases. They may require a weighing of factors including the form, purpose and effect of the expenditure, the benefit derived from it and its relationship to the structure, as distinct from the conduct, of a business. Some of those factors may point in one direction and some in another. Definitive and specific criteria are not, and never have been, in abundance in Australia, nor in the decisions of the courts of the United Kingdom in the late 19th century and the first half of the 20th century which have been referred to from time to time in this court’s decisions. ...

‘[16] The fact that a payment is recurrent is not determinative of its character. The payment by instalments of a charge, imposed as a condition upon the grant of a liquor licence reflecting its monopoly value, was held by the Court of Appeal in *Henriksen v Grafton Hotel Ltd* [[1942] 2 KB 184 at 195; [1942] 1 All ER 678 at 684 (*Henriksen*)] to be a capital outlay. *Du Parcq LJ*, citing *Viscount Cave LC* [in *British Insulated and Helsby Cables v Atherton* [1926] AC 205 at 213–214], said:

Here each sum in question was part of a total amount paid to acquire the right to trade for a period of years. At the date when that period began the possession of that right was essential before trading could be begun. In these circumstances, I am of opinion that each sum paid must be considered part of a capital outlay.

Referring to that decision, the Privy Council in *BP Australia* [*BP Australia Ltd v Federal Commissioner of Taxation* (1965) 112 CLR 386 at 405; [1966] AC 224 at 272 (*BP Australia*)] observed that:

Without the license the business could not be carried on. There was also an element of monopoly.

The term “an element of monopoly” might today be understood in terms of enhanced market power where the requirement for a licence, not freely given to all comers, constitutes a barrier to entry for potential competitors into the relevant market.

...
 ‘[18] ... The fact that a payment can be viewed as part of the consideration for the acquisition of a business or capital asset weighs heavily in favour of its character as a capital outlay. However, as also appears from *Cliffs International Inc v Federal Commissioner of Taxation* [(1979) 142 CLR 140; 24 ALR 57; [1979] HCA 8 (*Cliffs*)], the question must always be asked — was the payment made “for” the acquisition?

‘[19] The proposition is well established that expenditure of a kind ordinarily treated as being on revenue account in one set of circumstances may be treated as on capital account in another set of circumstances. An example is found in the decision of the Scottish Court of Session in *Law Shipping Co v Inland Revenue Commissioner* [1924 SC 74]. The expenditure of substantial sums on repairs to a ship which had been necessary at the time of its purchase was treated as capital. The need for repairs meant that the ship when purchased was a less valuable asset than if it had been in repair. Absent the need for repairs, the sellers could have demanded a higher price. Analogical reasoning suggests that the transmission licence, bringing with it as it did the burden of the charges imposed under s 163AA, was on that account a less valuable asset than it would have been if PNV had paid the charges before transfer.

...
 ‘[72] For the preceding reasons, the charges paid by AusNet were of a capital nature. The primary judge and the majority in the Full Court were correct so to conclude. ...” *Ausnet Transmission Group Pty Ltd (ACN 079 798 173) v Commissioner of Taxation (Cth)* [2015] HCA 25, 322 ALR 385 at [2]–[3], [14]–[16], [18], [72], per French CJ, Kiefel and Bell JJ

Paid up capital

[For 7(1) Halsbury’s Laws of England (4th Edn) (2004 Reissue) para 522 see now 15A Halsbury’s Laws of England (5th Edn) (2016) para 1237.]

See also PAID UP

Reserve capital

[For 7(1) Halsbury’s Laws of England (4th Edn) (2004 Reissue) para 526 see now 15A Halsbury’s Laws of England (5th Edn) (2016) para 1363.]

CAPTURE

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) paras 337, 339 see now 60 Halsbury’s Laws of England (5th Edn) (2011) paras 328, 330.]

CARE AND ATTENTION

[National Assistance Act 1948, s 21.] ‘[3] My Lords, the issue before us is whether a local social services authority is obliged, under s 21(1)(a) of the National Assistance Act 1948, to arrange (and pay for) residential accommodation for a person subject to immigration control who is HIV positive but whose only needs, other than for a home and subsistence, are for medication prescribed by his doctor and a refrigerator in which to keep it. The answer to that issue turns on the meaning of the words “in need of care and attention which is not otherwise available to [him]” in s 21(1)(a). ...

...
 ‘[7] ... As originally enacted, s 21(1) imposed a duty on every county and county borough council to provide two kinds of accommodation: “(a) residential accommodation for persons who by reason of age, infirmity or any other circumstances are in need of care and attention which is not otherwise available to them;” and “(b) temporary accommodation for persons who are in urgent need thereof ...” Paragraph (a) was principally used to provide old people’s homes, while para (b) was used to house those homeless people who qualified for help. The post-World War II welfare state never purported to provide housing, as opposed to the means of obtaining it, for all. Accommodation could be provided in premises managed by the local authority, or by another local authority (s 21(4)), or by a voluntary organisation (s 26(1)), and, after 1968, in privately-run care homes (Health Services and Public Health Act 1968, s 44). Local authorities were and remain also required to provide a range of welfare services for disabled people under s 29 of the 1948 Act and for old people under s 45 of the 1968 Act.

...
 ‘[32] ... [T]he “care and attention” which is

needed under s 21(1)(a) is a wider concept than “nursing or personal care”. Section 21 accommodation may be provided for the purpose of preventing illness as well as caring for those who are ill.

[33] But “care and attention” must mean something more than “accommodation”. Section 21(1)(a) is not a general power to provide housing. That is dealt with by other legislation entirely, with its own criteria for eligibility. If a simple need for housing, with or without the means of subsistence, were within s 21(1)(a), there would have been no need for the original s 21(1)(b). Furthermore, every homeless person who did not qualify for housing under the Housing Act 1996 would be able to turn to the local social services authority instead. That was definitely not what Parliament intended in 1977. This view is consistent with *Ex p M* (1997) 30 HLR 10, in which Lord Woolf emphasised (at 20) that asylum seekers were not entitled merely because they lacked money or accommodation. I remain of the view which I expressed in *Wahid’s* case [*R (on the application of Wahid) v Tower Hamlets London Borough Council* [2002] LGR 545] (at [32]), that the natural and ordinary meaning of the words “care and attention” in this context is “looking after”. Looking after means doing something for the person being cared for which he cannot or should not be expected to do for himself: it might be household tasks which an old person can no longer perform or can only perform with great difficulty; it might be protection from risks which a mentally disabled person cannot perceive; it might be personal care, such as feeding, washing or toileting. This is not an exhaustive list. The provision of medical care is expressly excluded. ... This definition draws a reasonable line between the “able bodied” and the “infirm”. *R (on the application of M) v Slough Borough Council* [2008] UKHL 52, [2008] 4 All ER 831 at [3], [7], [32]–[33], per Baroness Hale of Richmond

[National Assistance Act 1948, s 21(1)(a).] [1] The short issue raised by this appeal is whether the respondent (SL), a failed asylum seeker, was at the relevant time in need of “care and attention”, requiring the provision of accommodation by the local authority under s 21(1)(a) of the National Assistance Act 1948. Burnett J decided that he was not ([2010] EWHC 3182 (Admin), [2010] All ER (D) 107 (Dec)), but that decision was reversed by the Court of Appeal ([2011] EWCA Civ 954, [2012] 1 All ER 935), Laws LJ giving the only substantive judgment.

[39] Applying the agreed reformulation of s 21(1)(a) of the 1948 Act, there were two questions for the council: (1) was SL in need of care and attention? (2) if so, was that care and attention “available otherwise than by the provision of accommodation under s 21”? They answered the first in the negative, and the second in the affirmative. The issue for the courts, applying ordinary judicial review principles, was whether they were reasonably entitled to take that view. In agreement with the judge on both issues, I would hold that they were.

[41] On the first issue, authoritative guidance as to the meaning of the expression “care and attention” is given by Lady Hale’s speech in the *Slough* case [*R (on the application of M) v Slough Borough Council* [2008] 4 All ER 831]. I would also read Lord Neuberger’s speech as offering some helpful elaboration of the same idea. Mr Howell asked us to adopt a more restrictive approach, put in various ways, but in substance limiting it to personal care, or service “of a close and intimate nature”. These submissions seemed to turn the clock back not just on previous authority, but on his own concessions (albeit, on behalf of a different council) in the *Slough* case. I do not accept that such limitations are supported by an ordinary reading of the statutory words. Even if I did, I would not regard it as appropriate for us to revisit an issue considered so recently at the highest level.

[42] On the other side, Mr Knafler relies on Lady Hale’s reference to “doing something” for the person being cared for “which he cannot or should not be expected to do for himself”. Echoing Laws LJ, he submits that those words are wide enough to encompass monitoring SL’s condition to avoid a relapse, and arranging contact with counselling groups and befrienders. This approach divorces the concept of care and attention from the overall context of s 21(1)(a). Thus isolated, the term can be given an artificially wide scope. That danger is exemplified by Mr Knafler’s argument that care and attention covers all forms of social care and any form of practical assistance. This could lead to absurd results. Providing a refrigerator for M would in one sense have been “doing something” for him which (if he had no money) he could not do for himself. But as Lord Neuberger said, “care and attention” does not involve “the mere provision of physical things”, even things as important as food and accommodation. It is wrong to elevate the words of Lady Hale in the *Slough* case that care and attention involves “doing something for the person ...

which he cannot or should not be expected to do for himself” into a compendious statement of all the elements of the “care and attention” or “looking after” concept. These words were merely illustrative of an aspect of the notion of what is meant by the stipulation.

‘[44] What is involved in providing “care and attention” must take some colour from its association with the duty to provide residential accommodation. Clearly, in light of the authorities already discussed, it cannot be confined to that species of care and attention that can only be delivered in residential accommodation of a specialised kind but the fact that accommodation must be provided for those who are deemed to need care and attention strongly indicates that something well beyond mere monitoring of an individual’s condition is required.’ *R (on the application of S) v Westminster City Council* [2013] UKSC 27, [2013] 3 All ER 191 at [1], [39], [41]–[42], [44], per Lord Carnwath SCJ

CARE OR CONTROL

Canada [Criminal Code, RSC 1985, c C-46, s 253(1): offence of having care or control of a motor vehicle (1) while ability was impaired by alcohol and (2) with more than 80 mg of alcohol in 100 ml of blood.] ‘9 For the reasons that follow, I have concluded that “care or control”, within the meaning of s. 253(1) of the *Criminal Code*, signifies (1) an intentional course of conduct associated with a motor vehicle; (2) by a person whose ability to drive is impaired, or whose blood alcohol level exceeds the legal limit; (3) in circumstances that create a *realistic risk*, as opposed to a *remote possibility*, of danger to persons or property.

‘10 Only the third element—realistic risk of danger—is in issue on this appeal. The Crown submits that risk of danger is not an element of “care or control” under s. 253(1) of the *Code*. The trial judge found that it is. With respect, I agree with the trial judge.’ *R v Boudreault* 2012 SCC 56, [2012] 3 SCR 157 at paras 9–10, per Fish J

CARGO

Deck cargo

[For 43(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 682 see now 7 Halsbury’s Laws of England (5th Edn) (2015) para 456, 94

Halsbury’s Laws of England (5th Edn) (2008) para 662.]

CARRIAGE BY AIR

[Carriage by Air Acts (Application of Provisions) Order 1967, SI 1967/480, Sch 1 Pt III arts 1, 24(1) (the whole order revoked by the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899 art 9, Sch 4, as from 6 August 2004). ‘[52] Mr Davey submits that a contract of “carriage” in arts 1 and 24(1) of Sch 1 involves agreement as to the point of departure and destination prior to embarkation. Since such agreement is not possible in the case of a hot-air balloon, travel by a person in such a balloon is not “carriage”. He relies on the definition of “international carriage” in art 1(2) of the convention [the Warsaw Convention as amended at The Hague, 1955, as further amended by Protocol No 4 of Montreal, 1975] which provides:

“For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party. Carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.”

‘[53] But as Mr Davey recognises, the House of Lords in *Fellowes (or Herd) v Clyde Helicopters Ltd* [[1997] 1 All ER 775, [1997] AC 534] held that it was not necessary for a person to be carried under a contract of a particular type and rejected the submission that agreement as to departure and destination was required. He submits, however, that, if the House of Lords were to consider the matter today, they would reach a different conclusion from that reached in *Fellowes (or Herd) v Clyde Helicopters Ltd* on this point.

‘[54] This is because Council Regulation (EC) 2027/97 (on air carrier liability in respect of the carriage of passengers and their baggage

by air (OJ 1997 L285 p 11)) has now come into force. The *Fellowes (or Herd) v Clyde Helicopters Ltd* decision was given in February 1997, whereas Regulation 2027/97 came into force on 9 October 1997. He submits that the 1967 Order should be interpreted in a manner which is compatible with Regulation 2027/97. Mr Davey relies on two recitals which are in these terms:

“(4) Whereas in addition the Warsaw Convention applies only to international transport; whereas, in the internal aviation market, the distinction between national and international transport has been eliminated; whereas it is therefore appropriate to have the same level and nature of liability in both national and international transport ...

(6) Whereas, in compliance with the principle of subsidiarity, action at Community level is desirable in order to achieve harmonization in the field of air carrier liability and could serve as a guideline for improved passenger protection on a global scale ...”

‘[55] Mr Davey submits that, in accordance with the principle of harmonisation and the elimination of distinctions between the nature of liability in national and international air transport, the definition of “international air carriage” in the convention should apply to the definition of “air carriage” in Sch 1 (subject to the removal of the requirement that the agreed places of departure and destination be in the territories of different High Contracting Parties).

‘[56] I do not accept these submissions for three reasons. First, the reference in art 1(2) of the convention to the place of departure and the place of destination “according to the agreement between the parties” is no more than a way of defining the carriage as “international”: the place of departure and the place of destination must be situated “either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State”. Article 1(2) goes on to say what does *not* count as international carriage for the purposes of the convention, namely “[c]arriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of the Convention”. It

is significant that the article does not say that “the two points” within the territory of a single state must be agreed beforehand for the purposes of the convention.

‘[57] Secondly, as Mr Lawson points out, Regulation 2027/97 does not purport to amend, or require the amendment of, Sch 1 in the way suggested by Mr Davey. The limited extent of its effect is summarised in its art 1, which provides:

“This Regulation lays down the obligations of Community air carriers in relation to liability in the event of accidents to passengers for damage sustained in the event of death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board an aircraft or in the course of any of the operation of embarking or disembarking.

This Regulation clarifies some insurance requirements for Community air carriers.

In addition, this Regulation sets down some requirements on information to be provided by air carriers established outside the Community which operate to, from or within the Community.”

‘[58] The point of the recitals relied on by Mr Davey is that the obligations and requirements imposed by Regulation 2027/97 were applied to all flights by Community air carriers, not only those governed by the convention.

‘[59] Thirdly, Regulation 2027/97 could have no application in the present case because the defendant has not been a Community air carrier at any material time. The term “Community air carrier” is defined in art 2(1)(b) of Regulation 2027/97 as being “an air carrier with a valid operating licence granted by a Member State in accordance with the provisions of Regulation (EEC) No 2407/92”. I agree with what the judge said at [64] of his judgment:

“In this context it is necessary to have regard to Council Regulation (EEC) 2407/92 on the licensing of air carriers (OJ 1992 L240 p 1). It is clear from art 1 that the regulation is concerned with the requirements for granting and maintaining operating licences by member states in relation to air carriers established in the Community. It is provided, however, by art 1(2) as follows:

“The carriage by air of passengers, mail and/or cargo, performed by

non-power driven aircraft and/or ultra-light power driven aircraft, as well as local flights not involving carriage between different airports, are not subject to this Regulation. In respect of these operations, national law concerning operation licences, if any, and Community and national law concerning the air operator's certificate (AOC) shall apply.'

Since the court is here concerned with an instance of carriage by air performed by a non-power driven aircraft, and since the flight did not involve carriage between different airports, it is doubly clear that Regulation 2027/97 has no application to the circumstances."

Laroche v Spirit of Adventure (UK) Ltd [2009] EWCA Civ 12, [2009] 2 All ER 175 at [52]–[59], per Dyson LJ

CARRIAGE OF GOODS

[For 5(1) Halsbury's Laws of England (4th Edn) (Reissue) paras 541–597 see now 7 Halsbury's Laws of England (5th Edn) (2015) paras 7–26.]

CARRIER

Private carrier

[For 5(1) Halsbury's Laws of England (4th Edn) (Reissue) paras 501–540 see now 7 Halsbury's Laws of England (5th Edn) (2015) paras 56–70.]

CARRY ON BUSINESS

[For 7(1) Halsbury's Laws of England (4th Edn) (2004 Reissue) para 201 note 1 see now 14 Halsbury's Laws of England (5th Edn) (2016) para 1 note 1.]

CASH CONSIDERATION

See PAID

CASUAL PROFIT

[For 23(1) Halsbury's Laws of England (4th Edn) (Reissue) para 567 see now 58 Halsbury's Laws of England (5th Edn) (2014) para 653.]

CATHEDRAL

Cathedral preferment

[Note that the Pastoral Measure 1983 is repealed as from 1 July 2012 by the Mission and Pastoral Measure 2011, s 111, Sch 9. The definition of 'cathedral preferment', in the same terms as before, is now contained in the 2011 Measure, s 104(5).]

CAUSE (LEGAL ACTION)

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

Cause of action

[For 37 Halsbury's Laws of England (4th Edn) (Reissue) para 18 see now 11 Halsbury's Laws of England (5th Edn) (2015) para 114.]

CAUSE (VERB)

'[1] The Road Safety Act 2006 created the offence of causing death by driving when unlicensed, disqualified or uninsured by adding s 3ZB to the Road Traffic Act 1988 as follows:

"A person is guilty of an offence under this section if he causes the death of another person by driving a motor vehicle on a road and, at the time when he is driving, the circumstances are such that he is committing an offence under—(a) section 87(1) of this Act (driving otherwise than in accordance with a licence); (b) section 103(1)(b) of this Act (driving whilst disqualified), or (c) section 143 of this Act (using a motor vehicle while uninsured or unsecured against third party risks."

...

'[10] As we have set out, Miss Whitehouse accepted that it was ordinarily not enough to show that what had happened which was charged as a crime was caused by the conduct of the defendant, but that that conduct also had to be blameworthy. It was submitted that this was established in the development of the common law.

'[11] Clearly this must be so; there had been a time when the criminal law imposed strict liability, but there developed the requirement that morally blameworthy conduct was required: see *Russell on Crime* (12 edn, 1964) pp 18–25. We agree with Miss Whitehouse that *R v Dalloway* (1847) 2 Cox CC 273 (to which

she initially referred us) is not clear authority for the general proposition that there must be a blameworthy act to prove that a defendant caused a result in a legal sense. The general principle is, however, clear. Although the requirement of morally blameworthy conduct is the background against which the intention of Parliament in attributing criminal liability without blameworthy conduct must be considered (cf *Sweet v Parsely* [1969] 1 All ER 347 at 349, [1970] AC 132 at 149 and *Gammon (Hong Kong) v A-G of Hong Kong* [1984] 2 All ER 503 at 508, [1985] AC 1 at 14), the question for the court is whether when Parliament enacted this offence it intended to and did depart from the general principle.

'[12] The 1988 Act (as amended) contains three other provisions creating offences where the defendant's driving has caused death: (i) causing death by dangerous driving (ss 1 and 3) where the penalty is 14 years' imprisonment; (ii) causing death by careless driving when under the influence of drink or drugs (s 3A) where the maximum penalty is 14 years' imprisonment; (iii) causing death by careless or inconsiderate driving (s 2B) where the maximum penalty is five years' imprisonment. Section 3ZA defines careless and inconsiderate driving in the following terms:

"(2) A person is to be regarded as driving without due care and attention if (and only if) the way he drives falls below what would be expected of a competent or careful driver applied where a person ceased to be the administrator of a company and provided that the former administrator's remuneration and expenses 'shall be—charged on and payable out of property of which he had custody or control immediately before cessation' where 'cessation' meant the time when the former administrator ceased to be the company's administrator

...
(4) A person is to be regarded as driving without reasonable consideration for other persons only if those persons are inconvenienced by his driving."

'[13] It was therefore submitted on behalf of the Crown that it could be inferred that as Parliament had enacted the offence of causing death while driving whilst unlicensed, disqualified or uninsured, Parliament cannot have intended that any fault was necessary as it had already provided for death by driving involving simple or low level fault with the offence of

death by careless or inconsiderate driving.

'[14] In *R v Marsh* [1997] 1 Cr App Rep 67 the court had to consider the provision under s 12(A)(1) of the Theft Act 1968 relating to aggravated vehicle taking. That section provided that a person who committed the basic offence of vehicle taking was to be convicted of aggravated vehicle taking, if it was proved that the vehicle was driven or injury or damage caused in circumstances including: "That, owing to the driving of the vehicle, an accident occurred by which injury was caused to any person." The defendant in that case was convicted of the offence in circumstances where an accident had happened where he had not been at fault. It was asserted on his behalf, both in the Crown Court and on appeal, that no liability could attach to him under the section unless it was proved that the accident had been occasioned by culpable driving on his part. In the judgment of the court, upholding the direction of the Assistant Recorder that fault was not required, it was said:

"In a sense, of course, the manner in which the vehicle was being driven is necessarily relevant. If in this case the car was being reversed at the time, the accident would not have occurred. But it is unhelpful, in our judgment, to gloss the statute by referring to the manner or mode of driving; the words are plain and simple. In our view the question for the court on their proper construction is, was the driving of the vehicle a cause of an accident? Any other approach would require the court to read in words which are not there."

We consider that the approach of this court in *R v Marsh* applies even more clearly to the offence under s 3ZB; fault is not required. The simple question for the court is whether the death was caused by driving without insurance or without a driving licence.

...
'[18] Although [passages by commentators set] out severe criticism of the policy of Parliament in enacting the provision, none suggests that the words are other than clear and that the offence can occur without any blameworthy conduct. In our view, as a matter of simple statutory construction, that is plainly right.

'[19] Furthermore if the section were to be interpreted to require any blameworthy conduct, bearing in mind the very wide scope of the offence of causing death by careless and inconsiderate driving, it is difficult to see what

purpose the offence could have. Indeed Miss Evans, when asked by the court if she could give an example of circumstances where there could be some fault or blameworthy conduct on the part of an uninsured or unlicensed driver which would not also be caught by the offence of causing death by careless or inconsiderate driving, she very fairly accepted she could think of none, though she added, quite rightly, that the fact that an illustration could not be readily identified did not mean that one might not exist. To hold that blameworthy conduct was required would be to re-write s 3ZB.’ *R v Williams* [2010] EWCA Crim 2552, [2011] 3 All ER 969 at [1], [10]–[15], [18]–[19], per Thomas LJ

CERTIFICATE

[The Animal Welfare Act 2006, s 18(5) provided that an inspector or a constable may take a protected animal into possession if a veterinary surgeon certifies—(a) that it is suffering; or (b) that it is likely to suffer if its circumstances do not change.] ‘[35] There has been judicial disagreement about the proper interpretation of s 18(5). In the case of *R v Rumachic* (23 October 2008, unreported), Judge Waddicor held on an appeal from the magistrates’ court to Lewes Crown Court that s 18(5) required a written certificate. She reasoned that Parliament cannot have intended any distinction to be drawn between the verb “certifies” in sub-s (5) and the phrase “issue a certificate” in sub-s (10), which clearly connoted a document. Further, sub-s (6) made provision for an inspector or constable to act without a certificate in circumstances where an animal appeared to be suffering, or at risk of suffering, and the need for action was such that it was not reasonably practicable to wait for a veterinary surgeon. Parliament had thereby anticipated that there might be circumstances in which it would be very difficult for a veterinary surgeon to produce a written certificate, but the welfare of the animal concerned required immediate action.

‘[36] Judge Waddicor considered that if Parliament had intended that the word “certifies” should include an oral expression of opinion, the subsection would have used other language. It would have said “if a veterinary surgeon is of the opinion that” or “considers that”, just as sub-s (6) uses the expression “if it appears to him” in relation to an inspector or a constable.

‘[37] In *James v Royal Society for the*

Prevention of Cruelty to Animals [2011] EWHC 1642 (Admin), (2011) 175 JP 485 Keith J took a different view. He held that s 18(5) does not require the certification to be in writing. He accepted that the word “certificate” is more consistent with a requirement for a document, but he considered that the context necessitated a different approach. The aim of the Act is to promote animal welfare. Contrary to the underlying purpose of the Act, an animal might be subjected to unnecessary further suffering if a veterinary surgeon who was called to the scene was not immediately in a position to produce a written certificate and if in those circumstances there were no power of seizure. He noted that s 18(6) was intended to cater for those occasions when animals should be put out of their suffering quickly, but he did not regard that subsection as applying in the hypothetical situation to which I have referred. ...

‘[38] I prefer the reasoning of Judge Waddicor. Mr Fullerton referred to the *Oxford English Dictionary* definition of “certificate” as “A formal document attesting a fact, esp birth, marriage, or death, a medical condition, a level of achievement, a fulfilment of requirements, ownership of shares, etc”.

‘[39] I take due note of the purpose of legislation, but none the less I do not consider that the drafter of the Act can have intended the word “certificate” to include something which was not in writing. As Judge Waddicor observed, if that had been the drafter’s intention, other language would have been used.

...
‘[41] In my judgment, to be within s 18(5) the certifying must be in writing.’ *R (on the application of Gray) v Aylesbury Crown Court* [2013] EWHC 500 (Admin), [2013] 3 All ER 346 at [35]–[39], [41], per Toulson LJ

CERTIFIED PRACTISING ACCOUNTANT

Australia ‘[5] In addition, the applicant is specifically recognised in reference works such as the *Penguin Macquarie Dictionary of Economics & Finance*. The term “certified practising accountant” or “CPA” is defined as:

A member of the AUSTRALIAN SOCIETY OF ACCOUNTANTS who has completed a minimum number of hours additional study above the Society’s entry requirements and intends to continue to keep abreast of new accounting practices and developments. This new, higher class of accountants was introduced in 1983.

...

[30] I will deal first with the applicant's case based upon Mr Dunn's stated refusal to undertake not to use the term "certified practising accountant" in his letterhead. I am satisfied, on the evidence, that those of the applicant's members who have been accorded the qualification of "certified practising accountant" have acquired a reputation through that designation. I accept the applicant's submission that the combination of those three words have a secondary meaning, namely that a person who has that designation has obtained "membership of [the applicant] which, by its tests and examinations and by its rules and requirements as to qualification, confer[s] on its members a status different from that of other members of the profession" who do not have the same qualification: *Society of Accountants & Auditors v Goodway & London Association of Accountants Ltd* [1907] 1 Ch 489 at 500.

[31] In *Aust Society of Accountants [Australian Society of Accountants v Federation of Australian Accountants Inc]* (1987) 9 IPR 282], Woodward J reached precisely the same conclusion regarding the words "certified practising accountant". His Honour's decision was upheld by a Full Court. Of course, that decision turned on a question of fact in a case involving only one of the two parties before me. However, it is fair to say that his Honour reached that view on the basis of only 3 years of promotion of the designation "certified practising accountant". The evidence before me is much stronger. The term has now been used for more than 23 years, and as previously indicated has found its way into both state and Commonwealth legislation.

[32] For these reasons, Mr Dunn's argument that the word "certified" means nothing more than "qualified", and that as he has a degree in accounting, and practises as an accountant, he is entitled with impunity to describe himself as a "certified practising accountant", must fail. The term has a distinct secondary meaning, and as a consequence Mr Dunn's use of it would be likely to mislead or deceive.

[33] Mr Dunn's argument fails at other points as well. Though he has a degree, one would not normally describe the University that granted it to him as having "certified" him as a practising accountant. The reason is plain. Many graduates in accounting do not go on to practise in that field.

[34] In my view, Mr Dunn's use of the designation "certified practising accountant" would be likely to induce at least some members of the public, including his own

clients, to believe that some professional body or organisation has conferred that status upon him. The reality is that no such body or organisation has done so. His certification is self awarded. He has never been given that certification by the applicant, or by any other body capable of conferring it upon him.' *CPA Australia Ltd v Dunn* [2007] FCA 1966, (2007) 74 IPR 495, BC200710880 at [5], [30]–[34], per Weinberg J

CERTIFIED PUBLIC ACCOUNTANT

Australia [36] Much the same can be said about Mr Dunn's use of the phrase "certified public accountant". That term closely resembles the designation "certified practising accountant". The visual and aural similarities are real. It is clearly established that the use of different but similar words and phrases can constitute misleading or deceptive conduct. For example, in *Mobileworld Communications Pty Ltd v Q & Q Global Enterprise* (2003) 61 IPR 98, [2003] FCA 1404 the court was concerned with the use by one business of the name "Crazy Ron's". Allsop J held that that name was misleading or deceptive because of its similarity to the pre-established trade name "Crazy John's". His Honour further concluded that disclaimers would not be sufficient, and that injunctive relief was appropriate.

[37] Finally, the use of the term "certified public accountant" would be likely to mislead because it suggests that there is some organisation that awards that qualification, and that Mr Dunn has satisfied the requirements of that organisation in order to acquire that status. In fact, the evidence reveals that there is no such organisation. Mr Dunn has not undertaken any continuing education of the kind that the applicant requires in order to grant certification, and he has not undertaken any examinations which are a prerequisite to the designation in question. He may be a public accountant holding tertiary qualifications. However, he is not a "certified public accountant" because no professional body or organisation has conferred that title upon him.' *CPA Australia Ltd v Dunn* [2007] FCA 1966, (2007) 74 IPR 495, BC200710880 at [36]–[37], per Weinberg J

CHALLENGE

[For 11(3) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 1290 see now 61 Halsbury's Laws of England (5th Edn) (2010) para 825.]

CHAMPERTY

[For 9(1) Halsbury's Laws of England (4th Edn) (Reissue) para 850 see now 22 Halsbury's Laws of England (5th Edn) (2012) para 438.]

CHANCELLOR

Of diocese

[For 14 Halsbury's Laws of England (4th Edn) paras 1274–1275 see now 34 Halsbury's Laws of England (5th Edn) (2011) paras 1035–1036.]

CHANGE

Canada '[106] On this item in the Quebec application, therefore, the Court must determine whether the legislative amendment made to the RSTA [Retail Sales Tax Act] to include the GST [Goods and Services Tax] in the QST [Quebec Sales Tax] base is a "change ... in the rates or in the structures of provincial taxes or other modes of raising the revenue" of Quebec within the meaning of paragraphs 6(1)(b) of the Act and 12(1)(b) of the Regulations [Federal-Provincial Fiscal Arrangements Regulations 1987] which the Minister should take into account in his calculation of Quebec's revenue subject to stabilization from that source for the 1991–1992 fiscal year.

...
 '[118] Paragraph 12(1)(b) of the Regulations indicates that the amount to be deducted from revenue subject to stabilization for the current fiscal year corresponds to the amount of the increase of the revenues in the fiscal year that results from changes either in the rates or in the structures of provincial taxes or other modes of raising revenue.

'[119] Two points are essential in considering this first point at issue. First, it must be a change made by the province. Secondly, the change must be to the rates or structures either of provincial taxes or of other modes of raising provincial revenue.

'[120] The ordinary meaning of the word "change" is [TRANSLATION] "alteration" (*Le Nouveau Petit Robert*); [TRANSLATION] "making more or less different, altering" (*Trésor de la langue française*).

'[121] "Structure" means [TRANSLATION] "organization of the parts of a whole" (*Trésor de la langue française*); [TRANSLATION] "complex and extensive organization, considered in its essentials" (*Le Nouveau Petit Robert*).

'[122] In English "change" means "alteration, variation" and "structure" means "The organization of the elements or parts" (*Black's Law Dictionary*, 8th ed).

'[123] In the implementing Regulations the legislature gave a non-exhaustive list of what may be regarded as changes in the rates or structure either of provincial taxes or other modes of raising revenue ...:

'[124] In the case at bar, faced with the termination of the FST and introduction of the GST, a new direct tax, by Canada, Quebec amended the RSTA to specifically include the GST in its definition of selling price or purchase price. This amendment authorized Quebec to tax the GST through the QST.

'[125] Canada acknowledges that Quebec made a change which Canada describes as a legislative, not a fiscal change, because before the GST, Quebec taxed the FST, the federal tax, through the QST: nothing has in fact changed as Quebec still taxes a federal sales tax.

'[126] The problem is one of construction of legislation. According to *Rizzo & Rizzo Shoes* [at paragraph 21], above, the analysis is to "[read] the words of an Act ... in their context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

'[127] To begin with, I have no difficulty concluding that by its ordinary and grammatical sense, seen in the context of the examples which the legislature itself set out in its Regulations, the amendment of the RSTA to allow application of the QST to the GST represents a change (amendment to the RSTA) in the structure (a significant part) of one of its modes of raising revenue (the retail sales tax). I find in Quebec's favour on this point.

'[128] Before the GST, Quebec, through the QST, did not directly tax the FST: it taxed the purchase price paid by the consumer at retail, which itself included the FST imposed at the point of production. The amendment allowed Quebec to tax the GST directly. In practice, in the case of the SAQ, the GST could tax the latter's mark-up, which was not the case with the FST, as it was included in the base price of its products sold to the public.

'[129] In Canada's submission, the judgment in *Rizzo & Rizzo Shoes*, above, held that the Act and Regulations should be interpreted in a general context taking into account the spirit of the Act, the scheme of the Act and the intention of Parliament.

'[130] As mentioned in the Canada-Alberta arbitration, the purpose of the Act is to facilitate

transfer of revenue collected by the federal government to the provinces to finance the public services which each province provides within its legislative powers. In particular, the purpose of Part II of the Act is to stabilize revenue in the provinces to compensate for a decline in revenue in one year compared with that of the previous year.

[131] As the Canada-Alberta arbitration also indicated, the Minister must add the provincial revenue for the year of the application to offset provincial fiscal changes so as to accurately measure the revenue subject to stabilization in the two years, notwithstanding the changes desired in a province's fiscal policy. In other words, the purpose of the Minister's adjustments is to ensure that provincial revenue in both years in question is comparable on an equivalent fiscal basis, otherwise the comparison would be distorted. The comparison exercise is a question of substance, not form.

[132] Canada is right in saying that in 1990 the QST taxed a federal sales tax (the FST) and that with the legislative amendment the QST in 1991 continued to tax a federal sales tax (the GST). Ms Daigneault was right in saying that the methodology used by Quebec (the VDTAX exercise) did not permit an appropriate comparison between 1991–1992 and the previous year. The financial impact of this change is not what is alleged by Quebec.

[133] I feel that these two factors cannot serve to deny the fact that, by amending the RSTA, Quebec made a change in the fiscal structure of the QST.' *Quebec (Attorney General) v Canada* [2008] 2 FCR 230, [2007] FCJ No 1086, 2007 FC 826 at [106], [118]–[133], per Lemieux J (aff'd [2008] FCJ No 911, 2008 FCA 201, CAFCA)

Canada [Municipal Government Act, RSA 2000, c M-26, s 467.] '45. On its face, the language of s 467(1) empowers the Board to "change" an assessment with respect to "any matter referred to in section 460(5)". Section 460(5) references "an assessment" of value. As the Municipal Government Board reasonably observed in *Army & Navy [Edmonton (City) v Army & Navy Department Stores Ltd* [2002] AMGBO No 126 (QL)] (at para 114), as a matter of ordinary language, the word "change" includes "increase".

'46. This grammatical and ordinary meaning of s 467(1) is consistent with the purpose of the MGA. The Court of Appeal said that the broad term "change" was used because some of the matters that can be subject to complaint, for example, the "description of a property"

(s 460(5)(a)), are not numerical in nature. However, the Municipal Government Board in *Army & Navy* noted that to interpret "change" to mean only "confirm or lower" would frustrate the overarching intent of the MGA, being to ensure that assessments are "current, correct, fair and equitable" (para 114). This reasoning is compelling. The importance of fairness and equity to the assessment process is repeatedly emphasized throughout the MGA: for example, s 293(1) provides that property assessors are subject to an overarching duty to prepare the assessment "in a fair and equitable manner?"; s 467(3) directs the Board to consider fairness and equity when making its decisions; and s 324(1) provides that the Minister of Municipal Affairs may quash an assessment if the Minister is of the opinion that it is not fair and equitable. As the Board emphasizes in its submissions, if it cannot increase an assessment that is below market value, other taxpayers would effectively bear more than their fair share of the overall tax burden. It was reasonable for the Board to conclude that such a result would run contrary to—not further—the MGA's objects.

...

'61. To conclude, it was reasonable for the Board to interpret s 467(1) to permit it to increase the assessment at the City's request. As the Municipal Government Board concluded in *Army & Navy*, this interpretation is consistent with the ordinary meaning of "change" and the overarching policy goal of the MGA, to ensure assessments are correct, fair and equitable. The alternative would permit taxpayers to use the complaints process to prevent assessments made in error from being corrected, thereby frustrating the MGA's purpose.' *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd* [2016] SCJ No 47, [2016] 2 SCR 293 at paras 45–46, 61, per Karakatsanis J

CHANNEL

Narrow channel

[For 43(1) Halsbury's Laws of England (4th Edn) (Reissue) para 809 see now 94 Halsbury's Laws of England (5th Edn) (2008) para 729.]

CHAPEL

[For 14 Halsbury's Laws of England (4th Edn) para 1225 see now 34 Halsbury's Laws of England (5th Edn) (2011) para 990.]

CHAPTER

[For 14 Halsbury's Laws of England (4th Edn) para 638 see now 34 Halsbury's Laws of England (5th Edn) (2011) para 348.]

CHARITY—CHARITABLE PURPOSES

[For 5(2) Halsbury's Laws of England (4th Edn) (2001 Reissue) para 2 see now 8 Halsbury's Laws of England (5th Edn) (2015) para 2.]

[Note that the definitions of 'charity' and 'charitable purposes' in the Charities Act 2006 applied as from 1 April 2008 and are replaced as from 14 March 2012 by those in the Charities Act 2011 (see ss 1–4, Sch 7 para 1).]

Australia '[10] In order to obtain tax exempt status under the legislation in question, an institution must qualify as a "charitable institution"; ss 50–05, 50–50 and 50–52 ITA Act [Income Tax Assessment Act 1997 (Cth)]. The Act does not define "charitable". In *Incorporated Council of Law Reporting (Qld) v FCT* (1971) 125 CLR 659; [1972] ALR 127 Barwick CJ said at CLR 666; ALR 131–2, that an institution will be considered charitable if it satisfies the requirements of the general law in this regard. In *Central Bayside General Practice Assn Ltd v Cmr of State Revenue* (2006) 228 CLR 168 at 178, fn 28; 229 ALR 1 at 7, fn 6; [2006] HCA 43, Gleeson CJ, Heydon and Crennan JJ held that, there is a general rule that, when used in a statute, the word "charitable" bears its technical legal meaning unless otherwise indicated, and that:

"The general rule just mentioned has been accepted as the law in this country at least since the decision of the Privy Council in *Chesterman v Federal Commissioner of Taxation* (1925) 37 CLR 317; 32 ALR 9; [1926] AC 128. The word is commonly used in statutes. It is reasonable to assume that parliamentary counsel, taxpayers, revenue authorities, settlors, testators and others have acted on the faith of an understanding that the general rule applies.

'[11] Their Honours accepted that the technical legal meaning of "charitable" is as defined in Lord Macnaghten's classic statement of the categories of charity in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 at 583 (*Pemsel*) "by reference to the spirit and intendment of the preamble to the Statute of Charitable Uses Act 1601".

Lord Macnaghten's "classic statement" in *Pemsel* was:

"... Charity in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

'[12] A common requirement underlies these categories; for a purpose to be charitable it must be able to be construed by the court as being for the public benefit. If the institution has multiple purposes, only some of which are charitable, it will none the less be a charitable institution if the non-charitable purposes are ancillary to the charitable purpose: *Stratton v Simpson* (1970) 125 CLR 138 at 159–60; [1971] ALR 117 at 129–30. Where taxation concessions in respect of a year of income are at stake it is also necessary for the institution to have in fact carried out that purpose: *Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204; 251 ALR 206; [2008] HCA 55 at [34]–[35] (*Word Investments*) at [20] per Gummow, Hayne, Heydon and Crennan JJ. As in *Word Investments* there is no suggestion here that Aid/Watch has operated outside its stated objects.

'[13] Political purposes are said to be inconsistent with charity in the legal sense. The principle was famously articulated by Lord Parker in *Bowman v Secular Society Ltd* [1917] AC 406 at 442 (*Bowman*) where his Lordship said:

"... a trust for the attainment of political objects has always been held invalid ... because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift."

'[14] As with other non-charitable purposes, a political purpose will only be fatal to charitable classification if it is a "main purpose" of the institution: *Royal North Shore Hospital of Sydney v A-G (NSW)* (1938) 60 CLR 396 at 426; [1938] ALR 434 at 443 per Dixon J; and *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 at 62–3 (*National Anti-Vivisection*) per Lord Simonds. A political purpose which is merely ancillary or incidental to an established charitable object will not disqualify the institution from being classified as charitable. ...' *Comr of Taxation v*

Aid/Watch Incorporated [2009] FCAFC 128, (2009) 266 ALR 526 at [10]–[14], per Kenny, Stone and Perram JJ

Australia [Local Government Act 1995 (WA), s 6.26(2)(g): land exempt from being reateable if being used ‘exclusively for charitable purposes’.] ‘[48] In my opinion, the word “charitable”, in the undefined expression “charitable purposes” in s 6.26(2)(g) of the LG Act, bears its technical legal meaning by reference to the Preamble or the four principal divisions stated by Lord Macnaghten in *Pemsel [Commissioners for Special Purposes of Income Tax v Pemsel]* [1891] AC 531, HL. That reflects the general rule that, “charitable” having a technical legal meaning, the word is to be understood in its legal sense when used in a statute (by reference to its source in the general law as it is developed in Australia from time to time), unless a contrary intention appears. See *Central Bayside General Practice Association Ltd (formerly known as Central Bayside Division of General Practice Ltd) v Commissioner of State Revenue (Vic)* (2006) 228 CLR 168; 229 ALR 1; [2006] HCA 43 at [18] (fn 28) (Gleeson CJ, Heydon & Crennan JJ); *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539; 227 ALR 417; [2010] HCA 42 at [23]–[24] (French CJ, Gummow, Hayne, Crennan & Bell JJ). No contrary intention appears in s 6.26 or any other provision of the LG Act.’ *City of Mandurah v Australian Flying Corps & Royal Australian Air Force Association (WA Division) Inc* [2016] WASCA 185, (2016) 339 ALR 697 at [48], per Buss P

New Zealand [Charities Act 2005, ss 5, 13.] ‘[40] In this case Greenpeace will qualify for registration as a charitable entity only if it is “established and maintained exclusively for charitable purposes” as required by s 13(1)(b)(i). The requirement that a charitable entity be both “established and maintained” exclusively for charitable purposes reflects the need to focus not only on the objects of the society but also on its activities, current and proposed. The inclusion of the specific reference to an entity being “maintained” exclusively for charitable purposes reflects both the entity’s ongoing obligations and the chief executive’s ongoing monitoring function.

‘[41] The expression “charitable purpose” is defined in s 5, which relevantly provides:

5. Meaning of charitable purpose and effect of ancillary non-charitable purpose—(1) In this Act, unless the

context otherwise requires, charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.

...

- (3) To avoid doubt, if the purposes of a trust, society, or an institution include a non-charitable purpose (for example, advocacy) that is merely ancillary to a charitable purpose of the trust, society, or institution, the presence of that non-charitable purpose does not prevent the trustees of the trust, the society, or the institution from qualifying for registration as a charitable entity.
- (4) For the purposes of subsection (3), a non-charitable purpose is ancillary to a charitable purpose of the trust, society, or institution if the non-charitable purpose is —
 - (a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society, or institution; and
 - (b) not an independent purpose of the trust, society, or institution.

‘[42] For present purposes, this definition has several significant features. First, Parliament has adopted the well-established fourfold classification of “charitable purpose”, namely relief of poverty, the advancement of education or religion, and any other matter beneficial to the community. In doing so, Parliament rejected the recommendation of the Working Party that a new definition be adopted which would have recognised as legitimate charitable purposes a number of new purposes, including “the advancement of the natural environment” and “the promotion and protection of civil and human rights”.

‘[43] Second, the retention of the fourth category of charitable purpose, namely “any other matter beneficial to the community”, confirms that the decisions of this Court relating to its interpretation and application remain applicable. In particular, the purpose must be for the public benefit and charitable in the sense of coming within the spirit and intendment of the preamble to the Statute of Charitable Uses Act 1601 (43 Eliz I c 4) (the preamble). The

public benefit requirement focuses on whether the purpose is beneficial to the community or a sufficient section of the public. The requirement to be charitable within the spirit and intendment to the preamble focuses on analogies or the presumption of charitable status. Even in the absence of an analogy, objects beneficial to the public are prima facie within the spirit and intendment of the preamble and, in the absence of any ground for holding that they are outside its spirit and intendment, are therefore charitable in law. Mr Gunn did not submit otherwise.

[44] Third, the enactment of an inclusive definition (“includes”), which along with the references to “every” charitable purpose and “any other matter beneficial to the community”, makes it clear that the definition remains a broad definition which in its terms is not exhaustive.

[45] Fourth, the specific reference in s 5(3) to “advocacy” makes it clear that “advocacy” may be an ancillary, non-independent non-charitable purpose, but not a primary, independent purpose. A similar distinction is drawn in the Canadian legislation, but not in the Australian legislation, which does not contain a definition of “charitable purpose”. The absence of this distinction was taken into account by the High Court of Australia in reaching its decision in *Aid/Watch Inc* [*Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42, (2010) 241 CLR 539].

[46] Fifth, the specific terms of s 5(4) clarify that an ancillary non-charitable purpose that is not an independent purpose of a society does not prevent the society from qualifying for registration.

[55] We now turn to consider relevant aspects of the law relating to the nature and scope of the expression “charitable purpose” in New Zealand. We note at the outset, however, our agreement with Mr Gunn’s submission for the Board that any significant change to the law in this respect should be made by Parliament and not the Court. ...

[60] Having reached this view, we proceed on the basis that Parliament did not intend to alter the well-established principles of law relating to the nature and scope of the expression “charitable purpose” in New Zealand. This means in particular that we are not prepared to depart from the decision of this Court in *Molloy v Commissioner of Inland Revenue* [[1981] 1 NZLR 688, CA], which has effectively been endorsed by the Act and which established that a society established for

contentious political purposes could not be said to be established principally for charitable purposes.

[68] The final point of general importance in the context of this appeal is that the law is clear that a charity cannot have an illegal or unlawful purpose. This is because illegal activity is neither for the public benefit nor within the spirit and intendment of the preamble and so cannot be charitable. Similarly, a society with lawful charitable purposes which pursues illegal or unlawful activities will run the risk of losing its registration as a charitable entity under the Act. This is because it will not have been “maintained” exclusively for charitable purposes as required by s 13(1)(b)(i) of the Act.

[70] The first specific issue relates to object 2.2 of Greenpeace’s rules, which is to be amended to include, along with its already accepted charitable purposes, the promotion of:

... peace, nuclear disarmament and the elimination of all weapons of mass destruction.

[71] As Mr Gunn for the Board accepted, the Courts have consistently held that the promotion of peace itself is for the public benefit and therefore capable of being a charitable purpose. In *Southwood v Attorney-General*, a decision of the English Court of Appeal, Chadwick LJ said [[2000] EWCA Civ 204, [2000] WTLR 1199 at [29]]:

There is no objection—on public benefit grounds—to an educational programme which begins from the premise that peace is generally preferable to war. For my part, I would find it difficult to believe that any court would refuse to accept, as a general proposition, that it promotes public benefit for the public to be educated to an acceptance of that premise.

[72] We agree. It is uncontroversial and uncontentious today that in itself the promotion of peace is both for the public benefit and within the spirit and intendment of the preamble, either by way of analogy or on the basis of the presumption of charitable status. It is therefore within the fourth head of the definition of charitable purpose under the Act.

[82] Our conclusion on the first specific issue is that the public benefit of nuclear disarmament and the elimination of all weapons of mass destruction is now sufficiently well

accepted in New Zealand society that the promotion of peace through these means should be recognised in its own right as a charitable purpose under the fourth head of the definition.

'[83] The second specific issue relates to object 2.7 of Greenpeace's rules which is to be amended to read:

Promote the adoption of legislation, policies, rules, regulations and plans which further the objects of the Society listed in clauses 2.1–2.6 and support their enforcement or implementation through political or judicial processes, as necessary, where such promotion or support is ancillary to those objects.

'[84] In our view, once this object is amended in this way, it will be clear that the "advocacy" purpose is intended to be ancillary to and not independent from Greenpeace's primary charitable purposes in objects 2.1–2.6. The amended object would then be designed to meet the requirements of s 5(3) and (4) of the Act and would support Greenpeace's case that it is *now* established "exclusively for charitable purposes".

'[85] The proposed amendments to Greenpeace's objects would then have three significant consequences for the decisions reached by the Commission and the High Court as to Greenpeace's political activities, which were based on Greenpeace's unamended objects.

'[86] First, the amendments to objects 2.2 and 2.7 when taken together answer the concerns of the Commission and the High Court that object 2.7 was not ancillary to a charitable purpose. Our decision that Greenpeace's amended "peace and nuclear disarmament" object will be charitable means that the amended "political advocacy" object will no longer be ancillary to a non-charitable purpose.

'[87] Second, the amendments to object 2.7 record an intention on the part of Greenpeace that its "political advocacy" object will be truly ancillary to its principal objects and not an independent stand-alone object. For present purposes, we should assume that once this object is amended, Greenpeace as both an incorporated society and a registered charitable entity will take steps to comply with it.

...
'[90] Third, on the basis that once Greenpeace has amended its objects it will take steps to ensure that through its activities it complies at all times with its new objects, we do not consider that it is necessary to focus attention entirely on the past activities of

Greenpeace in the same way as the Commission and the High Court were required to. In our view the focus should now be on Greenpeace's new objects and its proposed activities in light of those objects. The question is whether Greenpeace is now "established and maintained" exclusively for charitable purposes.

...
'[93] The final specific issue relates to the finding by the Commission that as Greenpeace's activities might have involved illegal activities, such as trespassing, such activities would not meet the public benefit test.

...
'[96] There is no dispute that a society that pursues illegal or unlawful purposes or activities is not entitled to registration as a charitable entity under the Act and that a registered society with lawful charitable purposes which pursues them through illegal or unlawful activities should lose its registration. Responsibility for ensuring that a society that pursues such activities is either not registered in the first place or is subsequently deregistered rests with the chief executive, who considers applications for registration and monitors the activities of registered societies, and with the Board, which is responsible for deregistering societies no longer eligible for registration.

'[97] The question whether involvement by Greenpeace or its representatives or agents in an illegal or unlawful activity will be sufficiently material or significant to preclude registration or justify deregistration will be a question of fact and degree in each case. It is likely to be influenced by a range of factors such as:

- (a) the nature and seriousness of the illegal activity;
- (b) whether the activity is attributable to the society because it was expressly or impliedly authorised, subsequently ratified or condoned, or impliedly endorsed by a failure to discourage members from continuing with it;
- (c) whether the society had processes in place to prevent the illegal activity or has since put processes in place to prevent the activity occurring again;
- (d) whether the activity was inadvertent or intentional; and
- (e) whether the activity was a single occurrence or part of a pattern of behaviour.

'[98] In considering these factors, the chief executive and the Board would no doubt be careful to avoid declaring activity to be illegal

or unlawful when that activity had not been judicially determined to be in violation of the law. Where potentially illegal or unlawful activity has come to the attention of the chief executive, it may be appropriate for the chief executive to refer the activity to the appropriate investigative authority in the first instance. The rights and interests of persons alleged to be involved in illegal or unlawful activities are subject to the principles of natural justice and the applicable provisions of the New Zealand Bill of Rights Act.’ *Re Greenpeace of New Zealand Inc* [2012] NZCA 533, [2013] 1 NZLR 339 at [40]–[46], [55], [60], [68], [70]–[72], [82]–[87], [90], [93], [96]–[98], per White J

CHARTERER

New Zealand [Maritime Transport Act 1994, s 222(2); Resource Management Act 1991, s 338(1B).] ‘[17] The appellant submits that the phrase “Any charterer” should be interpreted narrowly for the purpose of s 338(1B). They say it should be interpreted as including only those charters where the charterer has responsibility for the management of the ship. It should exclude charterers who have no responsibility over the management of the ship as with a time charter.

‘[18] The appellant says that when the purpose of both the RMA [Resource Management Act 1991] and the Maritime Transport Act and the context is taken into account the reasonable interpretation is to read down the meaning of “charterer” as including only those who have a role relating to possessing, managing or operating the vessel”.

‘[19] The appellant points out that the purpose of the RMA is to promote the sustainable management of natural and physical resources and the Maritime Transport Act is, as relevant, to ensure that participants in the maritime transport system are responsible for their actions and to protect the marine environment. The appellant says that the purposes of those Acts are not advanced by imposing liability on a class of persons who have no involvement in the operation of a vessel and typically do not have the expertise to understand maritime issues nor the resources to operate a vessel. It says that deterrence is not advanced by imposing liability on such persons.

‘[20] Further, it says that s 222(2)(a)(iii), referring as it does to “managers”, “operators” and other persons “responsible for the navigation or management of the ship”, indicates that “charterer” should be narrowly construed so as

to impose liability only on those who are actually operating a vessel. All those who are referred to in the subsection are actually involved in some way in the operation of the ship. This limitation should therefore be applied to the definition of “charterer”, thereby ensuring only those charterers who have an actual involvement in the management of the vessel are liable as owners.

‘[21] I agree with the approach of the District Court Judge. In my view there is no reason to read down the meaning of “charterer”. Indeed the use of the word “any” before “charterer” in s 222(2)(a)(iii) makes it clear that what is intended is any form of charter. If what was intended was, as the appellant argues, to limit liability only to those charters where the charterer had responsibility for the management of the ship then as the respondent says, it is difficult to understand why it would be necessary for the word “charterer” to be used at all. The remaining words of the section would adequately cover liability. The appellant did not identify any parliamentary intention to narrow the definition of charterer beyond its “ordinary” meaning. The other obvious point is that if Parliament had intended to give a narrow specific meaning to “charterer” then it could have done so. In doing so it would not have used the word “any”.’ *Southern Storm (2007) Ltd v Nelson City Council* [2011] 1 NZLR 715 at [17]–[21], per Ronald Young J

CHARTERPARTY

[For 43(2) Halsbury’s Laws of England (4th Edn) (Reissue) paras 1411, 1414 see now 7 Halsbury’s Laws of England (5th Edn) (2015) paras 208, 211.]

CHATTELS

Corporeal and incorporeal

[For 35 Halsbury’s Laws of England (4th Edn) (Reissue) para 1205 see now 80 Halsbury’s Laws of England (5th Edn) (2013) para 806.]

Personal

[For 35 Halsbury’s Laws of England (4th Edn) (Reissue) para 1204 see now 80 Halsbury’s Laws of England (5th Edn) (2013) para 805.]

Real

[For 35 Halsbury's Laws of England (4th Edn) (Reissue) para 1203 see now 80 Halsbury's Laws of England (5th Edn) (2013) para 804.]

[For 39(2) Halsbury's Laws of England (4th Edn) (Reissue) para 3 see now 87 Halsbury's Laws of England (5th Edn) (2017) para 3.]

CHEQUE

[For 4(1) Halsbury's Laws of England (4th Edn) (2002 Reissue) paras 302–308 see now 48 Halsbury's Laws of England (5th Edn) (2015) para 152 et seq.]

CHILD—CHILDREN

[For 5(3) Halsbury's Laws of England (4th Edn) (Reissue) para 125 see now 9 Halsbury's Laws of England (5th Edn) (2012) para 142.]

CHURCH

[For 14 Halsbury's Laws of England (4th Edn) para 302 see now 34 Halsbury's Laws of England (5th Edn) (2011) para 2.]

[Note that the Pastoral Measure 1983 is repealed as from 1 July 2012 by the Mission and Pastoral Measure 2011, s 111, Sch 9. The definition of 'church', in the same terms as before, is now contained in the 2011 Measure, s 106(1).]

Church of England

[For 14 Halsbury's Laws of England (4th Edn) para 302 see now 34 Halsbury's Laws of England (5th Edn) (2011) para 2; and for 14 Halsbury's Laws of England (4th Edn) para 345 see now 34 Halsbury's Laws of England (5th Edn) (2011) para 50.]

CHOSE IN ACTION

[For 6 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 1 see now 13 Halsbury's Laws of England (5th Edn) (2017) para 1.]

[For 35 Halsbury's Laws of England (4th Edn) (Reissue) para 1205 see now 80 Halsbury's Laws of England (5th Edn) (2013) para 806.]

CHOSE IN POSSESSION

[For 35 Halsbury's Laws of England (4th Edn) (Reissue) para 1205 see now 80 Halsbury's

Laws of England (5th Edn) (2013) para 806.]

CHURCHWAY

[For 21 Halsbury's Laws of England (4th Edn) (2004 Reissue) para 6 see now 55 Halsbury's Laws of England (5th Edn) (2012) para 6.]

[For 12(1) Halsbury's Laws of England (4th Edn) (Reissue) para 637 see now 32 Halsbury's Laws of England (5th Edn) (2012) para 37.]

CIVIL COMMOTION

[For 25 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 597 see now 60 Halsbury's Laws of England (5th Edn) (2011) para 571.]

CIVIL LIST

[For 12(1) Halsbury's Laws of England (4th Edn) (Reissue) para 207 see now 29 Halsbury's Laws of England (5th Edn) (2014) para 120.]

CIVIL PARTNERSHIP

A civil partnership is a relationship between two people of the same sex ('civil partners')—

- (a) which is formed when they register as civil partners of each other—
 - (i) in England or Wales (under Part 2),
 - (ii) in Scotland (under Part 3),
 - (iii) in Northern Ireland (under Part 4), or
 - (iv) outside the United Kingdom under an Order in Council made under Chapter 1 of Part 5 (registration at British consulates etc or by armed forces personnel), or
 - (b) which they are treated under Chapter 2 of Part 5 as having formed (at the time determined under that Chapter) by virtue of having registered an overseas relationship.
- (Civil Partnership Act 2004, s 1(1))

[A civil partnership ends only: (a) on death, dissolution or annulment; or (b) in the case of a civil partnership formed as mentioned in subsection (1)(a)(i) or (iv), on the conversion of the civil partnership into a marriage under section 9 of the Marriage (Same Sex Couples) Act 2013: s 1(3) (amended by the Marriage (Same Sex Couples) Act 2013, s 17(4), Sch 7 paras 33, 34).]

A civil partnership is a relationship between, and affording the same legal status and rights as a married couple to, two people of the same sex which is formed when they register as civil partners of each other or which they are treated

as having formed by virtue of having registered an overseas relationship. Two people are not eligible to register as civil partners of each other if they are not of the same sex, or if either of them is already a civil partner or is lawfully married. A civil partnership ends only on death, dissolution or annulment, or in the case of a civil partnership formed by registration in England and Wales or by registration abroad at British consulates etc or by armed forces personnel, on the conversion of the civil partnership into a marriage under the Marriage (Same Sex Couples) Act 2013. (72 Halsbury's Laws of England (5th Edn) (2015) para 3)

CLAIM

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

Australia [Corporations Act 2001 (Cth), s 553: 'in every winding up, all debts payable by, and all claims against, the company (present or future, certain or contingent, ascertained or sounding only in damages), being debts or claims the circumstances giving rise to which occurred before the relevant date, are admissible to proof against the company'.] '[104] There is one sense in which Ms Sutton had a claim at the time that the administrators were appointed. In that sense, she had a claim because she had litigation on foot in the Industrial Relations Commission, in which she was claiming an order from the commission.

'[105] However, just because something is a "claim" in one sense of the word does not mean necessarily mean that it is a "claim" within the meaning of s 553. The particular shade of meaning that "claim" has in s 553 can be ascertained from the purpose of the section. That purpose is that all the legal obligations to which a company is subject should be ascertained, and each of them valued as at a common date, so that those obligations can be taken into account in a winding up or other administration that is under way. Someone has a "claim" within the meaning of s 553 if he or she has a basis, founded on an existing legal right, for asserting a right to participate in the division of the assets of the company. Ms Sutton did not have one of those.' *BE Australia WD Pty Ltd (subject to a deed of company arrangement) v Sutton* [2011] NSWCA 414, (2011) 285 ALR 532 at [104]–[105], per Campbell JA

New Zealand [Discretion of court not to dismiss a proceeding under the High Court

Rules r 6.29 where it is established that there is a good arguable case that the claim falls wholly within one or more of the paragraphs of r 6.27.] '[51] In the High Court, the submission by the appellants focused partly on the meaning of the word "claim" where it appears in r 6.29(1)(a)(i). The expression "claim" is not defined in the High Court Rules but we agree with the finding of the Judge that the term has a broad meaning in the context of r 6.29 and is not synonymous with the phrase "a cause of action". A "claim" in this context, properly construed, is an amalgam of the factual and legal basis for the relief sought. This interpretation is supported by r 5.25, which provides that where a proceeding is commenced the statement of claim must (among other things):

- (a) ... show the general nature of the plaintiff's *claim* to the relief sought; and
- (b) ... give sufficient particulars of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances to inform the court and the party or parties against whom relief is sought of the plaintiff's *cause of action* ... [Emphasis added.]

'[52] Proceedings may also be commenced under Part 19 of the rules by originating application but any such application must also state the relief sought, the grounds justifying the relief and the legal authority relied upon.

'[53] These considerations support our conclusion as to the interpretation of "claim" in r 6.29(1)(a)(i). A "claim" is a broad term which is wide enough to include one or more causes of action.' *Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754 at [51]–[53], per Randerson J

An asylum claim or a human rights claim

[The Nationality, Immigration and Asylum Act 2002, s 82(1) provides a right of appeal to the Asylum and Immigration Tribunal (AIT) where an immigration decision is made in respect of a person; s 92(1) establishes the general proposition that a person may not appeal under s 82(1) while he is in the United Kingdom unless his appeal is of a kind to which s 92 applies, and s 92(4)(a) provides that s 92 applies to an appeal against an immigration decision if the appellant 'has made an asylum claim or a human rights claim, while in the United Kingdom'.] '[2] ... The relevant provisions are to be found in Pt 5 of the Nationality, Immigration and Asylum Act 2002, which deals

with immigration and asylum appeals. The question is whether the expression “an asylum claim, or a human rights claim” in s 92(4)(a) of the 2002 Act includes any second or subsequent claim that the asylum seeker may make, or only a second or subsequent claim which has been accepted as a “fresh claim” by the Secretary of State under r 353 of the Immigration Rules.

‘[24]... Miss Laing [counsel for the Secretary of State] invites us to follow Sir Thomas Bingham MR’s analysis of the problem in *Ex p Onibiyo* [R v Secretary of State for the Home Dept, *ex p Onibiyo* [1996] 2 All ER 901], to hold that the words “an asylum claim, or a human rights claim” in s 92(4)(a) of the 2002 Act mean a first asylum or human rights claim or a second or subsequent claim which has been accepted by the Secretary of State as a “fresh claim”, and that the procedure for determining whether or not a second or subsequent claim is a fresh claim is to be found in r 353 of the Immigration Rules. Mr Husain [counsel for one of the asylum seekers] on the other hand invites us to examine those words in the context of the current legislation read as a whole, taking full account of the progress of thinking since *Ex p Onibiyo* as to how the problem of repeat claims should be addressed. He submits that there is no justification, in the light of the provisions for dealing with repeat claims that the 2002 Act contains, for enlarging upon the plain words of the statute.

‘[25] The strength of Miss Laing’s argument lies in the fact that the definition of the phrase “claim for asylum” has remained, in substance, the same since its first appearance in s 1 of the 1993 Act where it was said to mean—

“a claim made by a person (whether before or after the coming into force of this section) that it would be contrary to the United Kingdom’s obligations under the Convention for him to be removed from, or required to leave, the United Kingdom ...”

The convention there referred to was, of course, the Refugee Convention. The definition in s 167 of the 1999 Act [Immigration and Asylum Act 1999] was in substantially the same terms. Section 113 of the 2002 Act varies the language a little bit, because it calls this kind of claim an “asylum claim”, introduces a requirement for it to be made at a place designated by the Secretary of State (no such place has been designated) and adds a definition in almost identical terms of a “human rights claim”. The

relevant phrase throughout is “a claim”.

‘[26] In *Ex p Onibiyo* the Secretary of State’s argument that once there had been a claim for asylum and one appeal there could be no further “claim for asylum” unless the claimant had left the United Kingdom and returned before making the fresh application was rejected. It was held that there could be a fresh “claim for asylum” with the same consequences as to the right of appeal as follow on the refusal of an initial claim, provided that the Secretary of State recognised the fresh claim as a “claim for asylum”. If one looks no further and applies what *Bennion on Statutory Interpretation* (5th edn, 2008), section 201 and Part XIV described as “the informed interpretation rule”, there is plainly much to be said for the view that the definitions that are set out in s 113 of the 2002 Act should be read in the same way. The procedure for determining whether a repeat claim is or is not a “fresh claim” is set out in r 353 of the Immigration Rules, the effect of which I attempted to explain in *ZT (Kosovo) v Secretary of State for the Home Dept* [2009] 3 All ER 976 at [33], [2009] 1 WLR 348. It is a short step to conclude that a repeat claim which is not held under r 353 to be a fresh claim falls to be disregarded as “an asylum claim, or a human rights claim” for the purposes of s 92(4)(a). Like Lloyd LJ, I would not draw an inference either way from the amendment of s 113 by s 12 of the 2006 Act as it is not yet in force.

‘[27] It is an elementary principle, however, that the words of a statute should be construed in the context of the scheme of the statute as a whole. And it is plain that the scheme of the 2002 Act is not the same as that of the 1993 Act to which Sir Thomas Bingham MR addressed himself in *Ex p Onibiyo*. The problem to which he addressed himself was created by the absence of any provision in the statute to prevent abuse. The question was how that gap might best be filled, having regard to the fact that the blunt solution that was proposed by the Secretary of State would, as the Master of the Rolls pointed out ([1996] 2 All ER 901 at 909, [1996] QB 768 at 781), undermine the beneficial object of the convention and the measures giving effect to it in this country.

‘[28] Parliament might, of course, have stood still and left the matter to be dealt with under the Immigration Rules. But it has not stood still. The experience of the intervening years has been taken into account. First, there were the provisions against abuse in ss 73–77 of the 1999 Act. Now there is a set of entirely new provisions in the 2002 Act. As Lord Hoffmann

said in *A v Hoare* [2008] UKHL 6 at [15], [2008] 2 All ER 1 at [15], [2008] 1 AC 844, while there is a good deal of authority for having regard in the construction of a statute to the way a word or phrase has been construed by the court in earlier statutes, the value of such previous interpretation as a guide to construction will vary with the circumstances. In this case the phrase in question has remained, in essence, unchanged. But the system in which it must be made to work is very different. This is a factor to which full weight must be given.

‘[29] The new system contains a range of powers that enable the Secretary of State or, as the case may be, an immigration officer to deal with the problem of repeat claims. The Secretary of State’s power in s 94(2) of the 2002 Act to certify that a claim is clearly unfounded, if exercised, has the effect that the person may not bring his appeal in-country in reliance on s 92(4). The power in s 96 enables the Secretary of State or an immigration officer to certify that a person who is subject to a new immigration decision has raised an issue which has been dealt with, or ought to have been dealt with, in an earlier appeal against a previous immigration decision, which has the effect that the person will have no right of appeal against the new decision. It is common ground that the present cases are not certifiable under either of these two sections. Why then should they be subjected to a further requirement which is not mentioned anywhere in the 2002 Act? It can only be read into the Act by, as Sedley LJ in the Court of Appeal put it, glossing the meaning of the words “a ... claim” so as to exclude a further claim which has not been held under r 353 to be a fresh claim: [2009] QB 686 at [20], [30]. The court had to do this in *Ex p Onibiyo*. But there is no need to do this now.

...
‘[31] If Miss Laing is right, the effect of a decision by the Secretary of State that the representations that a person makes against an immigration decision of the kind mentioned in s 82(2)(k)—a refusal to revoke a deportation order—is not a fresh claim will be that an appeal against that decision must be brought out of country. But the interpretative route by which she reaches that position does not save that person from the exclusionary rule in s 95, unless—which has not been done in these cases—the claims are also certified under s 94(2) as clearly unfounded. The ground of appeal referred to in s 84(1)(g) has been designed to honour the international obligations of the United Kingdom. To exclude claims which the Secretary of State considers not to be

fresh claims from this ground of appeal, when claims which he certifies as clearly unfounded are given the benefit of it, can serve no good purpose. On the contrary, it risks undermining the beneficial objects of the Refugee Convention which the court in *Ex p Onibiyo*, under a legislative system which had no equivalent to s 95, was careful to avoid.

‘[32] In my opinion Lloyd LJ in the Court of Appeal was right to attach importance to this point: [2009] QB 686 at [39]–[40]. As he said, the development of the legislative provisions and the powers given to the Secretary of State to limit the scope for in-country appeals deprive Miss Laing’s submissions of the foundation which they need. There is obviously a balance to be struck. The immigration appeals system must not be burdened with worthless repeat claims. On the other hand, procedures that are put in place to address this problem must respect the United Kingdom’s international obligations. That is what the legislative scheme does, when s 95 is read together with s 94(9). It preserves the right to maintain in an out-of-country appeal that the decision in question has breached international obligations. I would hold that claims which are not certified under s 94 or excluded under s 96, if rejected, should be allowed to proceed to appeal in-country under ss 82 and 92, whether or not they are accepted by the Secretary of State as fresh claims.

‘[33] There is no doubt, as I indicated in *ZT (Kosovo) v Secretary of State for the Home Dept* [2009] 3 All ER 976 at [33], that r 353 was drafted on the assumption that a claimant who made further submissions would be at risk of being removed or required to leave immediately if he does not have a “fresh claim”. That was indeed the case when this rule was originally drafted, as there was no equivalent of s 92(4) of the 2002 Act. But Mr Husain’s analysis has persuaded me that the legislative scheme that Parliament has now put in place does not have that effect. Its carefully interlocking provisions, when read as a whole, set out the complete code for dealing with repeat claims. Rule 353, as presently drafted, has no part to play in the legislative scheme. As an expression of the will of Parliament, it must take priority over the rules formulated by the executive. Rule 353A on the other hand remains in place as necessary protection against premature removal until the further submissions have been considered by the Secretary of State.’ *R (on the application of BA (Nigeria)) v Secretary of State for the Home Department* [2009] UKSC 7, [2010] 2 All ER 95 at [2], [24]–[29], [31]–[33], per Lord Hope DP

CLAIM IN RESPECT OF PERSONAL INJURIES

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

CLAIMANT

[For 37 Halsbury's Laws of England (4th Edn) (Reissue) para 15 see now 11 Halsbury's Laws of England (5th Edn) (2015) para 117.]

CLASS

Gift to

[For 50 Halsbury's Laws of England (4th Edn) (2005 Reissue) para 465 see now 102 Halsbury's Laws of England (5th Edn) (2010) para 175.]

CLEAR (PERIOD)

[For 45(2) Halsbury's Laws of England (4th Edn) (Reissue) para 234 see now 97 Halsbury's Laws of England (5th Edn) (2015) para 335.]

New Zealand [Misuse of Drugs Act 1975, s 31.] '[22] The District Court hearing took place on Monday 23 April 2012. The ESR certificate was sent by facsimile to the appellant's counsel at 4.50 pm on Sunday 15 April 2012. It is common ground that it would have been received by the Public Defence Service on the morning of Monday 16 April 2012 (during office hours). Mr Wall responsibly accepts that service must be taken to have been effected on the Monday and not on the preceding Sunday.

'[23] Section 31(3)(a) requires service "at least seven clear days before the hearing at which the certificate is tendered ...". Mr Wall submits that service on the Monday complies with the requirements of the subsection. He relies on s 35(4) of the Interpretation Act 1999 which provides that a period of time described as ending before a specified day, act, or event, does not include that day or the day of the act or event. He submits that, by implication, the first day of the relevant period may be included. Accordingly, he submits, the relevant period of seven days is to be calculated by including Monday 16 April.

'[24] I disagree. I consider that the provisions of s 35(5) of the Interpretation Act are engaged. That subsection provides that a reference to a number of days between two

events does not include the days on which the events happened. Here, the two events are the date of service and the date of the hearing. Proper weight must be given to the requirement for seven clear days' notice. Mr Wall suggested that the word "clear" is mere surplusage, but that cannot be right. It is well established that a requirement for a specified period of clear days' notice must be taken to exclude both the date of the notice and the date upon which it is to take effect.

'[25] In my view, the notice, which was served on Monday 16 April 2012, did not give seven clear days' notice prior to the hearing on Monday 23 April 2012. Accordingly, for that separate reason, I conclude that the respondent was not entitled to rely upon the ESR certificate at the District Court hearing.' *Tessema v Police* [2012] NZHC 2603 [2012] NZAR 957 at [22]–[25], per Allan J

CLERICAL ERROR

[Administration of Justice Act 1982, s 20(1); rectification of will where it was so expressed that it failed to carry out the testator's intentions, in consequence (a) of a clerical error or (b) of a failure to understand his instructions. By an oversight on the part of the solicitor the husband executed the will drawn up for his wife and she executed the will drawn up for him.] '[75] I accept that the expression "clerical error" can have a narrow meaning, which would be limited to mistakes involved in copying or writing out a document, and would not include a mistake of the type that occurred in this case. However, the expression is not one with a precise or well-established, let alone a technical, meaning. The expression also can carry a wider meaning, namely a mistake arising out of office work of a relatively routine nature, such as preparing, filing, sending, organising the execution of, a document (save, possibly, to the extent that the activity involves some special expertise). Those are activities which are properly to be described as 'clerical', and a mistake in connection with those activities, such as wrongly filing a document or putting the wrong document in an envelope, can properly be called "a clerical error".

'[76] For present purposes, of course, "clerical error" is an expression which has to be interpreted in its context, and, in particular on the assumption that s 20 is intended to represent a rational and coherent basis for rectifying wills. While I appreciate that there is an argument for saying that it does nothing to discourage

carelessness, it seems to me that the expression “clerical error” in s 20(1)(a) should be given a wide, rather than a narrow, meaning.

[77] First, rectification of other documents (including unilateral documents) is not limited to cases of clerical error, however wide a meaning that expression is given. Accordingly, given that there is no apparent reason for a different rule for wills, it would appear appropriate that the grounds for rectification is as wide for wills as the words of s 20(1) can properly allow.

[78] Secondly, there is no apparent limit on the applicability of s 20(1)(b), which supports the notion that s 20(1)(a) should not be treated as being of limited application. However, s 20(1)(b) also has a potential limiting effect on the ambit of s 20(1)(a), in the sense that s 20(1)(a) should not be given a meaning which significantly overlaps with, let alone subsumes, that of s 20(1)(b).

[79] Thirdly, ss 17–21 of the 1982 Act are, as I see it, all aimed at making the law on wills more flexible and rendering it easier to validate or “save” a will than previously. Section 17, which re-enacts s 9, is concerned with the “relaxation” of formalities (see [14], above); ss 18 and 19 introduce greater flexibility in relation to the effect of the testator’s marriage and death of his issue; s 20 introduces rectification for the first time for wills, and s 21 permits the testator’s subjective intention to be taken into account for the first time. The whole thrust of the provisions is therefore in favour of a broad interpretation of a provision such as s 20(1)(a).

[80] Fourthly, I consider that the law would be somewhat incoherent if subtle distinctions led to very different results in cases where the ultimate nature of the mistake is the same. If a solicitor is drafting two wills, and accidentally cuts and pastes the contents of B’s draft will onto what he thinks is A’s draft will, and hands it to A, who then executes it as his will, that will would be rectifiable under s 20(1)(a), as the solicitor’s mistake would, on any view, be a clerical error: see [72] and [73], above. On the other hand, if the solicitor accidentally gives B’s will to A to execute, and A executes it, that would not, on the respondents’ case, be a clerical error and therefore rectification would not be available.

[81] While I accept that fine distinctions can often lead to different outcomes where one is near the limits of the scope of some statutory provisions, a distinction of this sort seems to me to be capricious or arbitrary. The position is essentially the same in the two cases. In each

case, it was because his solicitor accidentally handed A a document which contained B’s will rather than A’s will, that A executed B’s will thinking that it was his will. In each case, the reason that the will which A executed did not represent his intentions was a silly mistake by the solicitor in the mechanics of faithfully carrying out his instructions. In neither case did the mistake involve the solicitor misunderstanding or mischaracterising the testator’s intention or instructions, or making any error of law or other expertise, so the error may fairly be characterised as “clerical”—and there is no question of trespassing into s 20(1)(b) territory.

[82] As explained in [75], above, the term “clerical error” can, as a matter of ordinary language, quite properly encompass the error involved in this case. There was an error, and it can be fairly characterised as clerical, because it arose in connection with office work of a routine nature. Accordingly, given that the present type of case can, as a matter of ordinary language, be said to involve a clerical error, it seems to me to follow that it is susceptible to rectification.

[83] I accept that the error in this case is not within the narrower meaning of “clerical error”, as is reflected by the approach to the expression summarised by Blackburne J in *Bell v Georgiou* [[2002] EWHC 1080 (Ch), [2002] All ER (D) 433 (May)] as representing the effect of the first instance authorities. However, for the reasons given in [75]–[82], above, I have concluded that, the expression can, and, in the context of s 20(1)(a) should, be given its wider meaning, which covers the mistake made in this case.’ *Marley v Rawlings* [2014] UKSC 2, [2014] 1 All ER 807 at [75]–[83], per Lord Neuberger P

CLOG

[For 32 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 517 see now 77 Halsbury’s Laws of England (5th Edn) (2016) para 320.]

CLOSEABLE OPENINGS

New Zealand [Smoke-free Environments Act 1990, s 12(1): the licensee of any licensed premises must take all reasonably practicable steps to ensure that no person smokes at any time in a part of the premises that is not an open area.] [17] “Open area” is defined in s 2(1) of the Act as:

open area, in relation to any premises, means a part of the premises that is not an internal area.

‘[18] “Internal area” is defined as:

internal area, in relation to any premises or vehicle, means an area within or on the premises or vehicle that, when all its doors, windows, and other closeable openings are closed, is completely or substantially enclosed by—

- (a) a ceiling, roof, or similar overhead surface; and
- (b) walls, sides, screens, or other similar surfaces; and
- (c) those openings.

... ‘[38] A purposive approach to the definition therefore requires meaning to be driven by whether or not an area is enclosed or substantially enclosed. It is in that context that the meaning of “closeable openings” and “when” as used in the definition is to be determined.

‘[39] The Judge held that the retractable blinds were “closeable openings” and the word “when” meant that they were assumed to be closed at the time of assessment.

‘[40] Viewed in isolation, the natural and ordinary meaning of “closeable openings” is wide enough to encompass the blinds in this case. The term itself is cast in broad terms. A closeable opening simply means an opening that may be closed. As the Judge found, a closeable opening provides for temporary space. When the retractable blinds are rolled down, they close the space, and when they are rolled up, they leave it open. In that sense, they operate much like a door or window.

... ‘[51] Applying a purposive approach therefore, an area cannot be considered an internal area unless it is in fact enclosed or substantially enclosed as at the date of the infringement. Deeming entire walls or roof-like surfaces to be in place when they are not is inconsistent with both the scheme and purpose of the Act.

‘[52] That result prompts a fresh look at the meaning of “closeable openings”. The appellant suggests that “closeable openings” are structures which sit within a wall or roof, and are not therefore the wall or roof itself. That submission receives support from the definition which distinguishes between wall and roof-like surfaces on the one hand and closeable openings on the other. Such an interpretation would mean that structures which function as either a wall or

roof (such as the blinds in this case) would have to *in fact* enclose a space, but closeable openings (being something different to either a roof or wall surface) would be assumed closed. Applying that distinction, the blinds in this case would fall outside the definition of “closeable openings” because they function as a wall surface.

‘[53] That approach reconciles meaning with purpose in the circumstances of this case. But there are a myriad of different structures which may simultaneously operate as both a closeable opening and wall or roof surface. Whether such structures are to be assumed closed depends less on their classification as a closeable opening, and more on the function they play in enclosing an area at a particular point in time. In my view, what is to be regarded as a closeable opening is to be determined on a case by case basis in light of the scheme and purpose of the Act.’ *Shearwater Hotels Ltd v Ministry of Health* [2017] NZHC 1142, [2017] 3 NZLR 268 at [17]–[18], [38]–[40], [51]–[53], per Edwards J

CLOSED MATERIAL PROCEDURE

‘A “closed material procedure” means a procedure in which: (a) a party is permitted to (i) comply with his obligations for disclosure of documents, and (ii) rely on pleadings and/or written evidence and/or oral evidence without disclosing such material to other parties if and to the extent that disclosure to them would be contrary to the public interest (such withheld material being known as “closed material”), and (b) disclosure of such closed material is made to special advocates and, where appropriate, the court; and (c) the court must ensure that such closed material is not disclosed to any other parties or to any other person, save where it is satisfied that such disclosure would not be contrary to the public interest. For the purposes of this definition, disclosure is contrary to the public interest if it is made contrary to the interests of national security, the international relations of the United Kingdom, the detection and prevention of crime, or in any other circumstances where disclosure is likely to harm the public interest.’ *Al Rawi v Security Service* [2009] EWHC 2959 (QB) at [2], per Silber J, cited in [2011] UKSC 34, [2012] 1 All ER 1 at [1], per Lord Dyson SCJ

CLUB

[For 6 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 101 see now 13 Halsbury’s

Laws of England (5th Edn) (2017) para 201.]

Incorporated club

[For 6 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 106 see now 13 Halsbury's Laws of England (5th Edn) (2017) para 207.]

Members club

[For 6 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 105 see now 13 Halsbury's Laws of England (5th Edn) (2017) para 206.]

Proprietary club

[For 6 Halsbury's Laws of England (4th Edn) (2003 Reissue) paras 108–198 see now 13 Halsbury's Laws of England (5th Edn) (2017) paras 210–211.]

CODICIL

[For 50 Halsbury's Laws of England (4th Edn) (2005 Reissue) para 301 see now 102 Halsbury's Laws of England (5th Edn) (2010) para 1.]

COLLATION

[For 14 Halsbury's Laws of England (4th Edn) paras 845–846 see now 34 Halsbury's Laws of England (5th Edn) (2011) paras 631–632.]

COLLECTIVE INVESTMENT SCHEME

(1) In this Part [Part XVII] 'collective investment scheme' means any arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income.

(2) The arrangements must be such that the persons who are to participate ('participants') do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions.

(3) The arrangements must also have either or both of the following characteristics—

(a) the contributions of the participants

and the profits or income out of which payments are to be made to them are pooled;

(b) the property is managed as a whole by or on behalf of the operator of the scheme.

(Financial Services and Markets Act 2000, s 235)

COLLIERY

[For 31 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 17 see now 76 Halsbury's Laws of England (5th Edn) (2013) para 15.]

COLLISION

Collision clause in marine policy

[For 25 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 345 see now 60 Halsbury's Laws of England (5th Edn) (2011) para 336.]

COLLUSION

Interpleader proceedings

[Delete the entry relating to 37 Halsbury's Laws of England (4th Edn) (Reissue) para 1436.]

COMMAND

Under command

[For 43(1) Halsbury's Laws of England (4th Edn) (Reissue) para 818 note 9 see now 94 Halsbury's Laws of England (5th Edn) (2008) para 737 note 9.]

COMMERCIAL ACTIVITY

Canada [State Immunity Act, RSC 1985, c S-18, ss 2, 5.] '17. There are exceptions to the general principle of immunity from jurisdiction. One of the most important is the commercial activity exception provided for in s 5:

A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.

In s 2, an attempt was made to concisely define the term "commercial activity":

"commercial activity" means any particular transaction, act or conduct or any regular

course of conduct that by reason of its nature is of a commercial character.

Section 12(1)(b) excludes property used for this type of activity from the immunity from execution.

'18. The Act includes a number of other exceptions, such as the one in s 6 regarding proceedings brought against a foreign state for injuries that occur in Canada, which this Court considered in *Schreiber* [*Schreiber v Canada (Attorney General)*, 2002 SCC 62, [2002] 3 SCR 269]. Only the commercial activity exception was raised in this appeal; it will therefore be necessary to review this exception if the *SIA* must be found to apply to the application for recognition of the foreign judgment in the instant case.

...
'24. As I mentioned above, the *SIA* represents a clear rejection of the view that the immunity of foreign states is absolute. It reflects a recognition that there are now exceptions to the principle of state immunity and in so doing reflects the evolution of that principle at the international level. But I need not determine here whether the *SIA* is exhaustive in this respect or whether the evolution of international law and of the common law has led to the development of new exceptions to the principles of immunity from jurisdiction and immunity from execution (on this issue and the controversies it has generated, see F. Larocque, "La Loi sur l'immunité des états canadienne et la torture" (2010), 55 McGill L.J. 81). It will suffice to determine whether the commercial activity exception applies in the case at bar.

...
'27. The interpretation of [the UK and US] statutes, like that of the corresponding Canadian statute, raises the issue of the scope of the commercial activity exception to the principle of state immunity. This issue in turn leads to another one, that of the very nature of the general principle confirmed by s 3 of the *SIA*. In light of s 5 of the *SIA*, which provides for the commercial activity exception that is in issue in the case at bar, does s 3 apply only to sovereign acts (*acta jure imperii*), as understood in the context of public international law, or does it also apply to commercial acts (*acta jure gestionis*)? The Quebec Court of Appeal seems to conclude that there is a category of commercial acts that are protected by state immunity even though they are not sovereign acts (para 68).

'28. Both in the United Kingdom and in the United States, state immunity seems to be

limited in the modern case law to true sovereign acts, with the exceptions being used to confirm an interpretation that corresponds to the restrictive theory of state immunity that has been developed in public international law.

'29. In the United Kingdom, the courts ask whether the act in question could be performed by a private individual. Lord Goff of Chieveley recommended the use of this test in one of the decisions related to the litigation between KAC and IAC on which the instant case is based. Relying on an earlier opinion of Lord Wilberforce in *I Congreso del Partido*, [1983] AC 244, at pp 262, 267 and 269, he found that the proper test would be not what the state's objective is in performing the act, but whether the act could be performed by a private citizen (*Kuwait Airways Corp v Iraqi Airways Co*, [1995] 3 All E.R. 694, at pp 704–5). In the United States, the Supreme Court described the sovereign acts protected by state immunity as those performed in the exercise of the powers peculiar to sovereigns:

Under the restrictive, as opposed to the "absolute," theory of foreign sovereign immunity, a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (*jure imperii*), but not as to those that are private or commercial in character (*jure gestionis*).... We explained in *Weltover*, *supra*, at 614 (quoting *Dunhill*, *supra*, at 704), that a state engages in commercial activity under the restrictive theory where it exercises "only those powers that can also be exercised by private citizens," as distinct from those "powers peculiar to sovereigns." Put differently, a foreign state engages in commercial activity for purposes of the restrictive theory only where it acts "in the manner of a private player within" the market.
(*Saudi Arabia v. Nelson*, 507 US 349 (1993), at pp 359–60)

'30. Thus, in both US and English law, the characterization of acts for purposes of the application of state immunity is based on an analysis that focusses on their nature. It is therefore not sufficient to ask whether the act in question was the result of a state decision and whether it was performed to protect a state interest or attain a public policy objective. If that were the case, all acts of a state or even of a state-controlled organization would be considered sovereign acts. This would be inconsistent with the restrictive theory of state immunity in contemporary public international law and

would have the effect of eviscerating the exceptions applicable to acts of private management, such as the commercial activity exception.

'31. In Canadian law, La Forest J recommended in *Re Canada Labour Code* [[1992] 2 SCR 50] that this analytical approach be adopted to resolve the issues related to the application of the *SIA*. But he also made it clear that the Canadian commercial activity exception requires a court to consider the entire context, which includes not only the nature of the act, but also its purpose:

It seems to me that a contextual approach is the only reasonable basis of applying the doctrine of restrictive immunity. The alternative is to attempt the impossible—an antiseptic distillation of a “once-and-for-all” characterization of the activity in question, entirely divorced from its purpose. It is true that purpose should not predominate, as this approach would convert virtually every act by commercial agents of the state into an act *jure imperii*. However, the converse is also true. Rigid adherence to the “nature” of an act to the exclusion of purpose would render innumerable government activities *jure gestionis*. [p 73]

'32. After this, La Forest J stressed Parliament's intention to confirm the restrictive theory of state immunity expressed in the *SIA* and the need for a contextual analysis focussed on the activity itself:

I view the Canadian *State Immunity Act* as a codification that is intended to clarify and continue the theory of restrictive immunity, rather than to alter its substance. The relevant provisions of the Act, ss 2 and 5, focus on the nature and character of the activity in question, just as the common law did. [pp 73–74]

'33. For the purposes of this appeal, therefore, the first step is to review the nature of the acts in issue in KAC's action against Iraq in the English courts in their full context, which includes the purpose of the acts. It is not enough to determine whether those acts were authorized or desired by Iraq, or whether they were performed to preserve certain public interests of that state. The nature of the acts must be examined carefully to ensure a proper legal characterization.

'34. To this end, it is necessary to accept the findings of fact made by Steel J in the judgment

the Quebec court is being asked to recognize. As I mentioned above, the Quebec court is not to review the merits of the case. Steel J's findings are clear and compelling. According to him, starting in 1991, Iraq, the sole proprietor of IAC, its state-owned corporation, had controlled and funded IAC's defence throughout the long series of actions for damages brought against IAC in the English courts by the appellant. Iraq had participated throughout this commercial litigation in the hope of protecting its interests in IAC. In doing so, it was responsible for numerous acts of forgery, concealing evidence and lies (judgment, July 16, 2008, at paras 10–14). These acts misled the English courts and led to other judicial proceedings, including the one in issue in the application for enforcement in which Steel J found that Iraq was not entitled to state immunity and ordered it to pay substantial costs.

'35. The Quebec Superior Court and the Quebec Court of Appeal found that, owing to the nature of Iraq's acts, state immunity applies and the commercial activity exception does not. But Steel J's findings of fact lead to a different legal characterization. It is true that the acts alleged against Iraq that resulted in the litigation were carried out by a state for the benefit of a state-owned corporation. However, the specific acts in issue here are instead those performed by Iraq in the course of the proceedings in the United Kingdom courts. When all is said and done, the subject of the litigation was the seizure of the aircraft by Iraq. The original appropriation of the aircraft was a sovereign act, but the subsequent retention and use of the aircraft by IAC were commercial acts: *Kuwait Airways Corp v Iraqi Airways Co* (1995), at p 711. The English litigation, in which the respondent intervened to defend IAC, concerned the retention of the aircraft. There was no connection between that commercial litigation and the initial sovereign act of seizing the aircraft. As a result, Iraq could not rely on the state immunity provided for in s 3 of the *SIA*. The respondent's exception to dismiss the application for recognition should have been dismissed. ...' *Kuwait Airways Corp v Iraq* 2010 SCC 40, [2010] 2 SCR 571 at paras 17–18, 24, 27–35, per LeBel J

COMMISSION

[Copyright, Designs and Patents Act 1988, s 85: right to privacy of a 'person who for private and domestic purposes commissions the taking of a photograph'.] '[325] There is no definition of

'commission' in Pt I of the 1988 Act, but in Pt I under the heading "Interpretation" there is:

"172. *General provisions as to construction.*—(1) This Part restates and amends the law of copyright, that is, the provisions of the Copyright Act 1956, as amended.

(2) A provision of this Part which corresponds to a provision of the previous law shall not be construed as departing from the previous law merely because of a change of expression.

(3) Decisions under the previous law may be referred to for the purpose of establishing whether a provision of this Part departs from the previous law, or otherwise for establishing the true construction of this Part."

'[326] Section 4(3) of the Copyright Act 1956 provided, so far as relevant:

"... where a person commissions the taking of a photograph ... and pays or agrees to pay for it in money or money's worth, and the work is made in pursuance of that commission, the person who so commissioned the work shall be entitled to any copyright subsisting therein ..."

'[327] In *Apple Corps Ltd v Cooper* [1993] FSR 286 at 299–300 Judge Micklem, sitting as a judge of the High Court held that:

"It is difficult to say that the word 'commission' in section 4(3) of the 1956 Act 'implies' an obligation to pay, because the subsection itself expressly requires such an obligation, but it is not, I think, improper to suggest that it 'connotes' such an obligation in the sense that it is naturally associated with payment ...

What has to be shown to bring the work within the subsection is, first, that a person commissioned the taking of a photograph before the film was exposed and the negative made; secondly, that that person, the commissioner, agreed to pay for it ...

I think that counsel for the defendant is right when he suggests that the rationale of the requirement that there should be either payment before the work comes into existence or an enforceable agreement to pay in money or money's worth is that the money or money's worth is the commissioned person's *quid pro quo* for losing the copyright he would otherwise hold as owner of the material."

'[328] There is a definition in Pt III of the 1988 Act (Design Right) at s 263, namely " 'commission' means a commission for money or money's worth". In *Ultraframe UK Ltd v Fielding* [2003] EWCA Civ 1805 at [27]–[33], [2004] RPC 479 at [27]–[33] the Court of Appeal construed s 263 by applying the words of Judge Micklem in *Apple Corps Ltd v Cooper*. The designer under s 263 must have placed himself under an obligation to produce the work and the commissioning party to pay for it.

'[329] The editors of *The Modern Law of Copyright and Designs* (4th edn, 2011) by Laddie, Prescott and Vitoria suggest at para 13.51 that the omission of a definition of "commission" from Pt I of the 1988 Act is probably an oversight. They suggest that the meaning in s 85 is likely to be the same meaning as was given to it in the 1956 Act. The editors of Copinger and Skone James on *Copyright* (16th edn, 2011) take a similar view at para 11–64, namely that commissioning connotes an obligation to pay, citing *Apple Corps Ltd v Cooper*.

...

'[334] In my judgment the conclusion that I should reach is that commissioning in s 85 means that there must be an obligation on the part of the commissioned party to produce the work and an obligation on the part of the commissioning party to pay money or money's worth.' *Trimingham v Associated Newspapers Ltd* [2012] EWHC 1296 (QB), [2012] 4 All ER 717 at [325]–[329], [334], per Tugendhat J

COMMON

[For 6 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 405 see now 13 Halsbury's Laws of England (5th Edn) (2017) para 306.]

Commonable lands

[For 6 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 406 see now 13 Halsbury's Laws of England (5th Edn) (2017) para 307.]

Rights of common

[For 6 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 406 see now 13 Halsbury's Laws of England (5th Edn) (2017) para 330.]

COMMON CARRIER

[For 5(1) Halsbury's Laws of England (4th Edn) (Reissue) para 502 see now 7 Halsbury's Laws

of England (5th Edn) (2015) para 3.]

COMMON ENTERPRISE

Australia [Managed investment scheme under the Corporations Act 2001 (Cth) s 601ED.] [30]... For the meaning of the expression “common enterprise” reference is usually made to *Australian Softwood Forests Pty Ltd v Attorney-General (NSW)*; *Ex rel CAC* (1981) 148 CLR 121 at 129; 36 ALR 257 at 262; 6 ACLR 45 at 50 (*Australian Softwood*) where Mason J said (at CLR 133; ALR 265; ACLR 54): “An enterprise may be described as common if it consists of two or more closely connected operations on the footing that one part is to be carried out by A and the other B, each deriving a separate profit from what he does, even though there is no pooling or sharing of receipts or profits. It will be enough that the two operations constituting the enterprise contribute to the overall purpose that unites them. There is then an enterprise common to both participants and, accordingly, a common enterprise”. *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd (No 3)* [2009] FCA 450, (2009) 256 ALR 427 at [30], per Finkelstein J

COMMON FORM BUSINESS

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

COMMON LAW

Ecclesiastical law

[For 14 Halsbury’s Laws of England (4th Edn) para 303 see now 34 Halsbury’s Laws of England (5th Edn) (2011) para 3.]

COMMON PARTS

[Leasehold Reform, Housing and Urban Development Act 1993, ss 2, 19. Whether ‘common parts’ of a building include a caretaker’s flat.] [13] “Common parts” is defined by s 101(1): “‘common parts’, in relation to any building or part of a building, includes the structure and exterior of that building or part and any common facilities within it ...”.

[14] The definition is inclusive in form, rather than exhaustive. Thus it impliedly assumes an ordinary meaning of the expression “common parts” which is extended or clarified

by specific reference to, first, the structure and exterior of a building, and, secondly, any “common facilities” within the building. Nothing in this case turns on the reference to the structure or exterior. The question therefore is whether the caretaker’s flat is properly regarded as either “common parts” or “common facilities”.

[15] Perhaps surprisingly, in view of its relative familiarity, the expression “common parts” as such does not appear in the standard dictionaries. We have been referred to a number of other statutory definitions going back to 1963, but these vary in detail, emphasis and context. They are therefore of little help in construing the term in the present context. Nor have we been referred to any direct authority in the higher courts.

[16] Some inferential help is offered by the Act in s 4(2) (to which I shall return in connection with one of the estate’s arguments) which refers to—

“any part of the premises (such as, for example, a garage, parking space or storage area) [which] is used, or intended for use, in conjunction with a particular dwelling contained in the premises (and accordingly is not comprised in any common parts of the premises).”

This suggests, unsurprisingly, that such things as garages and storage areas are “common parts” if available for shared use, but not if used in conjunction with a particular dwelling.

[17] That seems to me to accord with the ordinary meaning of the word “common”: that is, for shared, rather than individual, use or benefit. That hardly needs authority, but it is supported by the decision of the Inner House of the Court of Session in *Marfield Properties v Secretary of State for the Environment* [1996] SCLR 749. The lease contained a definition of “common parts”, which, having referred to a list of particular features (such as car parks and the service yard) included “all other parts ... which are common to the premises”. Lord Hope of Craighead said (at 752): “The adjective ‘common’ stands on its own. This suggests that it has been used here more generally, to include anything that is shared between the premises and other parts of the development or in some other way benefits or is of concern to the occupiers of them”. Although the issues were quite different, that seems to me a useful authority on the ordinary meaning of the word “common” in a context such as the present.

[18] The other words of the definition

present no great difficulty. The word “part” in the context of a building connotes a physical division, whether a particular area within the building (such as a garage), or a particular section of its physical constituents. “Facilities” seems to be designed to extend the definition to include such things as plant or equipment (for example, a lift or boiler). That accords with the dictionary definition of “facilities” as “the physical means or equipment required for doing something, or the service provided by this” (*Oxford English Dictionary* (OED)).

[19] The OED formulation permits a reasonably broad, common sense approach, which would tie in with the guidance as to interpretation ... For example, the “facility” represented by a boiler is not just the physical structure, but also includes the service of hot water provided from it. If the lessees have the right to obtain hot water from a common boiler, then, whether or not they have access to the boiler-room, it can in my view properly be regarded as a “common facility”, and therefore within the common parts. On the other hand, the service cannot be one which is entirely detached from the building or some physical object attached to the building. Otherwise it is hard to see how it could be said to be “included in the demised premises” under the relevant lease, so as to come within s 2.

[20] Applying the same approach, I have little difficulty in agreeing with the judges below on the narrow issue raised by the appeal, at least on the facts of this case. The caretaker’s flat has been identified as a distinct part of the building with a distinct function, at least since 1966. It is referred to as such in two of the current leases, which also give the lessees rights to the services of a resident caretaker. It is true that the common benefit consists principally in the services of the caretaker as a person, rather than the use of the flat itself. However, a resident caretaker requires a flat designated for the purpose. Taken together they can reasonably be regarded as representing a “facility” within the definition.

[23] For the estate, Mr Munro’s main argument turned on a relatively narrow interpretation of the statutory definition. As he put it in his skeleton:

“It is submitted that ‘common parts’ of the building are parts to which the lessees have access and ‘common facilities’ are facilities within the building to which the lessees have access ... A caretaker’s flat to which tenants have no rights and over they have

no access cannot be part of the common parts for the purposes of s 2 and 19.”

[24] As will be apparent from what I have already said, I regard this as an unjustified restriction on the natural meaning of the definition. “Access”, as such, is not a necessary part of it. It is sufficient in my view that the lessees share the benefit of the caretaker’s flat, by enjoying the services for the purposes of which it was provided.

[25] Finally, it is necessary to refer to the last part of the definition, relating to management or maintenance. This was dealt with very shortly by Roth J. He said ([2010] 3 WLR 1125 at [62]):

“If the caretaker’s flat is therefore a common part, is it reasonabl[y] necessary for the respondents to acquire it ‘for the proper management or maintenance of those common parts’? In my judgment, it clearly is, since if they did not acquire the interest under the lease they would not be able to use that flat to accommodate a caretaker. Indeed, if the lease remained in force, the basement flat would not be maintained as a common part at all.”

[26] I agree. Mr Munro argued that statutory acquisition of the flat was not necessary for this purpose, either because the estate had indicated a willingness to negotiate terms to make it available or because it could have been provided in another flat. I see nothing in either point. First, the willingness of the freeholders to negotiate alternative terms cannot be relevant in determining the extent of the statutory right. Secondly, once the existing caretaker’s flat has been identified as “common parts” the only issue is whether acquisition of *that* part is necessary for its management. The fact that the service might be provided elsewhere is irrelevant.’ *Cadogan v Panagopoulos* [2010] EWCA Civ 1259, [2011] 2 All ER 21 at [13]–[20], [23]–[26], per Carnwath LJ

COMMONLY OR CUSTOMARILY HELD

[Public Order Act 1986, s 11. Under s 11(1), advance written notice has to be given to the police of any proposal to hold specified types of public procession, but s 11(2) provides that the advance notice requirement does not apply where the procession is one which is ‘commonly or customarily held’ in the police area in which it is proposed to be held.] [12] Is Critical Mass a “procession [which is] commonly or customarily held” in the Metropolitan Police

Area? It has throughout been common ground that each Critical Mass cycle ride constitutes a procession, in respect of which it is open to the police to exercise the powers granted to them by s 12 of the 1986 Act. While that proposition might be open to doubt, I am prepared to proceed on the basis that it is correct. The narrow issue is, in fact, an amalgam of two questions: (i) is the Critical Mass ride that takes place each month the same procession and (ii) is that procession "commonly or customarily held" in the Metropolitan Police Area. The two questions are not the same, but they are closely interrelated. To identify one procession with another it is necessary to identify common features of each. The fact that the Critical Mass ride takes place at regular monthly intervals and starts at the same place are common features that are relevant to the question of whether one can identify each event as being the same procession. They are also relevant to the question of whether the procession is commonly or customarily held in the Metropolitan Police Area.

[13] Mr Pannick QC accepted that over the last ten years a procession has set off from the same place within the Metropolitan Police Area and at the same time at regular monthly intervals. He accepted that if one described this occurrence as an event, it was one that occurred commonly or customarily. He accepted, as he had to, that the group of cyclists that set off on each occasion constituted a procession. His argument was, however, that it was not the same procession that set off every month but, on each occasion, a different procession. This was because, unless the procession followed the same route, it could not be described as the same procession.

[14] Mr Pannick sought to support his submission both by reference to authority and by reference to the purpose of the relevant provision. The former consisted of the following passages in the judgment of Lord Goddard CJ in *Flockhart v Robertson* [1950] 1 All ER 1091 at 1093, [1950] 2 KB 498 at 502, 503:

"A procession is not a mere body of persons: it is a body, of persons moving along a route. Therefore the person who organizes the route is the person who organizes the procession. That is how I approach this case.

It seems to me clear that, at any rate from the time when these people reached Piccadilly Circus, the defendant was

organizing the route for the procession to follow, and that they followed it ...

He was organizing the procession because, although he did not organize the body of people, he organized the route. There is no other way of organizing a procession, because a procession is something which proceeds. By indicating or planning the route a person is in my opinion organizing a procession."

[15] I can readily accept that a procession must move along a route. I can also accept that if at regular intervals a procession takes place along the same route, that fact alone will be material to the question of whether it is the same procession that takes place on each occasion. I do not accept, however, that you can only identify one procession with another if each follows the same route. If there are sufficient similar features of processions that take place at regular intervals, albeit over different routes, it can be natural to describe what occurs as being the same procession.

[16] I am in no doubt that the Critical Mass cycle rides that take place month after month have so many common features that any person would consider that each month the same procession takes place and, giving the English language its natural meaning, that it is a procession that is "commonly or customarily held" in the Metropolitan Police Area. I would identify the common features as follows:

- The procession is made up of cyclists;
- The procession starts at the same place;
- The procession takes place in the Metropolitan Police Area;
- The procession starts at 6 pm on the last Friday of every month;
- Those who join the procession do so with a common intention;
- The procession is recognised and publicised by a single name, "Critical Mass".
- The procession chooses its route on a follow-my-leader basis.

[17] There is a difficulty about the last common feature. It is, as I shall explain in due course, Mr Pannick's submission that s 11 requires the processions to which it applies to have a pre-determined route, so it is questionable whether it is appropriate to treat the element of spontaneity as a factor that brings Critical Mass within the exception in s 11(2). If it were the case, however, that both the leader and the route that he followed were planned in advance, this would not affect my conclusion that it is natural to describe Critical Mass as a procession "commonly or customarily held" in

the Metropolitan Police Area.

[18] Must one, as Mr Pannick suggests, depart from the natural meaning of s 11(2) in order to give it a construction that makes sense, having regard to its statutory purpose? In order to demonstrate the purpose of s 11 of the 1986 Act Mr Pannick referred to both the *Green Paper Review of the Public Order Act 1936 and related legislation* (Cmnd 7891) published in April 1980 and the *White Paper Review of Public Order Law* (Cmnd 9510) published in May 1985. These demonstrate that an object of the legislation was to give the police advance notice of marches and processions so as to enable them to take any necessary measures to prevent them from resulting in public disorder and, possibly, traffic disruption.

[19] Mr Pannick submitted that in order to achieve this purpose it was necessary for the police to know the proposed route of the procession, which was one of the matters that had to be set out in the notice required by s 11. The reason for the exception in the first part of s 11(2) was to obviate the need to give the police information that they would already have. If, however, a procession “commonly or customarily held” could follow a different route on each occasion, the police would need to be informed of the route before each procession. For this reason the exception could only sensibly apply to processions that had the same route, and should be so construed.

[20] There are flaws in this argument. It is of value for the police to have advance notice of when and in what police area a procession is to be held, even if they do not know the route that it will follow. The evidence adduced in this case shows that, because the police know when Critical Mass takes place and where it starts, they are usually able to police it without difficulty. Furthermore there is a more significant reason why s 11(2) is not robbed of utility if it is given a meaning that is capable of embracing processions that do not follow the same route. This is that most customary processions do follow the same route. The spontaneity of Critical Mass is an unusual feature. In most cases, the exclusion will apply to processions whose routes are known to the police.

[21] Section 11 does not require notice to be given of every procession that is capable of creating a disturbance. The fact that, on their natural meaning, the words of s 11(2) are wide enough to exclude some processions in respect of which the police do not have all the information that they would wish is no reason to give those words an unnatural meaning. They

should be given their natural meaning so as to apply to Critical Mass as a procession that is commonly or customarily held. ...’ *Kay v Metropolitan Police Comr* [2008] UKHL 69, [2009] 2 All ER 935 at [12]–[21], per Lord Phillips of Worth Matravers

COMMUNICATE

Canada [Copyright Act, RSC 1985, c C-42, s 3(1)(f).] ‘3. The provision at issue in this appeal is s 3(1)(f) of the *Copyright Act*, which states that copyright owners have the sole right

... in the case of any literary, dramatic, musical or artistic work, to *communicate* the work to the public by telecommunication ...

‘4. The focus of this appeal is on the meaning of the word “communicate” in s 3(1)(f), a term which is not defined in the *Act*. The Society of Composers, Authors and Music Publishers of Canada (SOCAN), which administers the right to “communicate” musical works on behalf of copyright owners, applied to the Board for a tariff under this provision to cover downloads of musical works over the Internet. The Entertainment Software Association and the Entertainment Software Association of Canada (collectively, ESA), which represent a broad coalition of video game publishers and distributors, objected to the tariff, arguing that “downloading” a video game containing musical works did not amount to “communicating” that game to the public by telecommunication under s 3(1)(f). Instead, a “download” is merely an additional, more efficient way to deliver copies of the games to customers. The downloaded copy is identical to copies purchased in stores or shipped to customers by mail, and the game publishers already pay copyright owners reproduction royalties for all of these copying activities.

‘5. We agree with ESA. In our view, the Board’s conclusion that a separate, “communication” tariff applied to downloads of musical works violates the principle of technological neutrality, which requires that the *Copyright Act* apply equally between traditional and more technologically advanced forms of the same media: *Robertson v Thomson Corp* [2006] 2 SCR 363, at para 49. The principle of technological neutrality is reflected in s 3(1) of the *Act*, which describes a right to produce or reproduce a work “in any material form whatever”. In our view, there is no practical difference between buying a durable copy of the

work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet. The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user.

...
'12. In our view, the Board improperly concluded that the Internet delivery of copies of video games containing musical works amounts to "communicating" the works to the public. This view is evidenced by the legislative history of the *Copyright Act*, which demonstrates that the right to "communicate" is historically connected to the right to perform a work and not the right to reproduce permanent copies of the work.' *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada* [2012] SCJ No 34, 2012 SCC 34 at paras 3–5, 12, per Abella and Moldaver JJ

COMPANY

[For 7(1) Halsbury's Laws of England (4th Edn) (2004 Reissue) para 201 see now 14 Halsbury's Laws of England (5th Edn) (2016) para 1 and para 1 n 1.]

Abbreviation of name

[The Companies Act 1985, s 27(4) is not reenacted in the Companies Act 2006.]

Associated company

[Note that the Income and Corporation Taxes Act 1988, s 416(1) is repealed by the Corporation Tax Act 2010, ss 1177, 1181(1), Sch 1 Pt 1 paras 1, 40, Sch 3 Pt 1 and replaced by s 449 of the 2010 Act with effect, for corporation tax purposes, for accounting periods ending on or after 1 April 2010 and, for income tax and capital gains tax purposes, for the tax year 2010–11 and subsequent tax years. The new definition is given below.]

For the purposes of this Part [Part 10: Close Companies (ss 438–465)], a company is another's 'associated company' at a particular time if, at that time or at any other time within the preceding 12 months:

- (a) one of them has control of the other, or
 - (b) both are under the control of the same person or persons.
- (Corporation Tax Act 2010, s 449)

Close company

[Note that the Income and Corporation Taxes Act 1988, s 414 is repealed by the Corporation Tax Act 2010, ss 1177, 1181(1), Sch 1 Pt 1 paras 1, 40, 41, Sch 3 Pt 1 and replaced by s 439 of the 2010 Act with effect, for corporation tax purposes, for accounting periods ending on or after 1 April 2010 and, for income tax and capital gains tax purposes, for the tax year 2010–11 and subsequent tax years. The new definition is given below.]

- (1) For the purposes of the Corporation Tax Acts, a 'close company' is a company in relation to which condition A or B is met.
 - (2) Condition A is that the company is under the control—
 - (a) of 5 or fewer participators, or
 - (b) of participators who are directors.
 - (3) Condition B is that 5 or fewer participators, or participators who are directors, together possess or are entitled to acquire—
 - (a) such rights as would, in the event of the winding up of the company ('the relevant company') on the basis set out in section 440, entitle them to receive the greater part of the assets of the relevant company which would then be available for distribution among the participators, or
 - (b) such rights as would, in that event, so entitle them if there were disregarded any rights which any of them or any other person has as a loan creditor (in relation to the relevant company or any other company).
 - (4) For exceptions to this section, see sections 442 to 447 (companies which are not to be close companies).
 - (5) Section 451 (section 450: rights to be attributed etc) applies for the purposes of subsection (3) and section 440 as it applies for the purposes of section 450.
 - (6) See also section 441 (treatment of some persons as participators or directors for the purposes of subsection (3)).
 - (7) For the meaning of—
 - (a) 'control', see sections 450 and 451,
 - (b) 'director', see section 452, and
 - (c) 'loan creditor', see section 453.
- (Corporation Tax Act 2010, s 439)

Investment company

[The Companies Act 1985, s 266(1), (2), (2A) has been repealed. See now the Companies Act 2006, s 833, as follows.]

- (1) In this Part [Part 23: Distributions (ss 829–

853)] an 'investment company' means a public company that—

- (a) has given notice (which has not been revoked) to the registrar of its intention to carry on business as an investment company, and
 - (b) since the date of that notice has complied with the following requirements.
- (2) Those requirements are—
- (a) that the business of the company consists of investing its funds mainly in securities, with the aim of spreading investment risk and giving members of the company the benefit of the results of the management of its funds;
 - (b) that the condition in section 834 is met as regards holdings in other companies;
 - (c) that distribution of the company's capital profits is prohibited by its articles;
 - (d) that the company has not retained, otherwise than in compliance with this Part, in respect of any accounting reference period more than 15% of the income it derives from securities.
- (3) Subsection (2)(c) does not require an investment company to be prohibited by its articles from redeeming or purchasing its own shares in accordance with Chapter 3 or 4 of Part 18 out of its capital profits.
- (4) Notice to the registrar under this section may be revoked at any time by the company on giving notice to the registrar that it no longer wishes to be an investment company within the meaning of this section.
- (5) On giving such a notice, the company ceases to be such a company.
- (Companies Act 2006, s 833)

Joint stock company

[The Companies Act 1985, s 683 has been repealed. See now the Companies Act 2006, s 1041, as follows.]

- (1) For the purposes of section 1040 (companies authorised to register under this Act) 'joint stock company' means a company—
 - (a) having a permanent paid-up or nominal share capital of fixed amount divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in one way and partly in the other, and
 - (b) formed on the principle of having for

its members the holders of those shares or that stock, and no other persons.

- (2) Such a company when registered with limited liability under this Act is deemed a company limited by shares.
- (Companies Act 2006, s 1041)

Limited and unlimited companies

[The Companies Act 1985, s 1 has been repealed. See now the Companies Act 2006, s 3, as follows.]

- (1) A company is a 'limited company' if the liability of its members is limited by its constitution.

It may be limited by shares or limited by guarantee.

- (2) If their liability is limited to the amount, if any, unpaid on the shares held by them, the company is 'limited by shares'.
- (3) If their liability is limited to such amount as the members undertake to contribute to the assets of the company in the event of its being wound up, the company is 'limited by guarantee'.
- (4) If there is no limit on the liability of its members, the company is an 'unlimited company'.

(Companies Act 2006, s 3)

Oversea company

[The Companies Act 1985, s 744 has been repealed by the Companies Act 2006, which does not re-enact the definition.]

Public company

[The Companies Act 1985, s 1 has been repealed. See now the Companies Act 2006, s 4, as follows.]

- (1) A 'private company' is any company that is not a public company.
- (2) A 'public company' is a company limited by shares or limited by guarantee and having a share capital—
 - (a) whose certificate of incorporation states that it is a public company, and
 - (b) in relation to which the requirements of this Act, or the former Companies Acts, as to registration or re-registration as a public company have been complied with on or after the relevant date.
- (3) For the purposes of subsection (2)(b) the relevant date is—

- (a) in relation to registration or re-registration in Great Britain, 22nd December 1980;
- (b) in relation to registration or re-registration in Northern Ireland, 1st July 1983.
- (4) For the two major differences between private and public companies, see Part 20. (Companies Act 2006, s 4)

Subsidiary company

[The Companies Act 1985, s 736 has been repealed. See now the Companies Act 2006, s 1159, as follows.]

- (1) A company is a 'subsidiary' of another company, its 'holding company', if that other company—
 - (a) holds a majority of the voting rights in it, or
 - (b) is a member of it and has the right to appoint or remove a majority of its board of directors, or
 - (c) is a member of it and controls alone, pursuant to an agreement with other members, a majority of the voting rights in it,
 or if it is a subsidiary of a company that is itself a subsidiary of that other company.
 - (2) A company is a 'wholly-owned subsidiary' of another company if it has no members except that other and that other's wholly-owned subsidiaries or persons acting on behalf of that other or its wholly-owned subsidiaries.
 - (3) Schedule 6 contains provisions explaining expressions used in this section and otherwise supplementing this section.
 - (4) In this section and that Schedule 'company' includes any body corporate.
- (Companies Act 2006, s 1159)

Trading company

[Note that the Income and Corporation Taxes Act 1988, s 229 is repealed by the Corporation Tax Act 2010, ss 1177, 1181(1), Sch 1 Pt 1 paras 1, 15, Sch 3 Pt 1 with effect, for corporation tax purposes, for accounting periods ending on or after 1 April 2010 and, for income tax and capital gains tax purposes, for the tax year 2010–11 and subsequent tax years. The new definition is given below.]

'Trading company' means a company other than an excluded company which is—

- (a) a company whose business consists wholly or mainly in the carrying on of a trade or trades, or

- (b) the holding company of a trading group, and
- 'trading group' means a group the business of whose members, when taken together, consists wholly or mainly in the carrying on of a trade or trades.

(Corporation Tax Act 2010, s 90(1))

[The Taxation of Chargeable Gains Act 1992, s 212(7) is repealed by the Offshore Funds (Tax) Regulations 2009, SI 2009/3001, with effect from the tax year 2009–10. The Taxation of Chargeable Gains Act 1992, Sch A1 is repealed by the Finance Act 2008, s 8(2), Sch 2 paras 23, 45 in relation to chargeable gains accruing or treated as accruing in the tax year 2008–09 or any subsequent tax year.]

Unregistered company

[The Insolvency Act 1986, s 220 is substituted by the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941, as from 1 October 2009. The new definition is given below.]

For the purposes of this Part [Part V: Winding up of Unregistered Companies (ss 220–229)] 'unregistered company' includes any association and any company, with the exception of a company registered under the Companies Act 2006 in any part of the United Kingdom.

(Insolvency Act 1986, s 220 (as substituted by the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941))

COMPELLED

Canada [Canadian Charter of Rights and Freedoms, s 13. Protection against self-incrimination for witness who is 'compelled' to testify.] '101 One of the Crown's main submissions is that the respondent was not "compelled" to testify at his examination for discovery in the civil action against him in the sense described in *Henry* [*R v Henry* 2005 SCC 76, [2005] 3 SCR 609]. The Crown argues that the respondent was not subjectively compelled, because he freely decided to attend the discovery proceeding ..., and that he was not objectively compelled, because he chose to file a statement of defence and to therefore put himself "within the grasp of the procedural rules ... that would, only then, compel his evidence" ...

'102 Although Binnie J. did not fully

canvass what constitutes "compelled" evidence in the *Henry* sense, he did note that an accused who chooses to testify freely at his or her first trial and then at a retrial is not "compelled" and so does not qualify for s. 13 protection (para. 43). He also stated parenthetically that "[f]or present purposes, evidence of compellable witnesses should be treated as compelled even if their attendance was not enforced by a subpoena" (para. 34 (emphasis added)).

'103 Binnie J.'s observation that evidence from an accused who decides to testify is "voluntary" simply means that, because accused persons have a right not to be called to testify in their own defence under s. 11(c) of the *Charter*, any accused who chooses to testify waives his or her right not to be compellable. In contrast, a witness who voluntarily gives evidence at someone else's trial is not giving evidence "voluntarily" within the meaning of *Henry* even if the witness decides to testify on his or her own volition, for example, to assist the accused. The difference is this: An accused who testifies voluntarily is waiving a constitutional right by choosing to testify. Any other witness can otherwise be compelled, meaning the witness is statutorily compellable regardless of whether he or she "volunteers" to take the stand. This view is confirmed by Binnie J.'s observation that "evidence of compellable witnesses should be treated as compelled even if their attendance was not enforced by a subpoena."

'104 Therefore, whether the respondent freely decided to attend the discovery proceeding is irrelevant. Whether a witness was compelled should not be determined on a subjective standard. It would be unprincipled to give a lesser degree of *Charter* protection to a witness who testifies willingly than to a witness who must be subpoenaed or otherwise forced to give evidence, if both could have been statutorily compelled to testify in any event. Therefore, to determine whether the *quid pro quo* is engaged in a particular case, the court should consider whether the witness was statutorily compellable and not whether the witness felt subjectively compelled to testify. The relevant question is this: Was the respondent statutorily compelled to give evidence in the proceeding?

'105 The Crown's second argument on compulsion is that the respondent was not objectively compelled because he chose to file a statement of defence, and therefore that he voluntarily put himself within the grasp of the powers of civil discovery.

'106 This argument must also fail. First, as noted by the intervenor Advocates' Society, the

integrity of the civil discovery process could be undermined if courts considered that those who defend civil actions are not "compelled" for the purposes of s. 13. Parties facing criminal proceedings might then find it advantageous not to co-operate in any civil action, thereby forcing the other party to obtain a court order compelling their testimony on discovery.

'107 More importantly, however, there is a principled reason why a defendant who gives evidence in a civil discovery proceeding is "compelled" for the purpose of s. 13. Again, the relevant question to ask is: Was the respondent *statutorily compelled* to give evidence in the proceeding? In this case, rule 31.04(2) of the *Rules of Civil Procedure* is the statutory authority that compels a defendant in a civil action to be examined for discovery *whether or not the defendant files a statement of defence*:

31.04 ...

(2) A party who seeks to examine a defendant for discovery may serve a notice of examination under rule 34.04 or written questions under rule 35.01 only after,

- (a) the defendant has delivered a statement of defence and, unless the parties agree otherwise, the examining party has served an affidavit of documents; or
- (b) the defendant has been noted in default.

'108 Therefore, failing to file a statement of defence does not allow the respondent to "avoid coming within the grasp of the procedural rules ... that would, only then, compel his evidence", as the Crown asserts ... Had the respondent failed to file a statement of defence, the plaintiff could have noted him in default and then, under rule 31.04(2)(b), obliged him to be examined for discovery. I note that whether the plaintiff actually took the step of noting the respondent in default is irrelevant. Just as it does not matter for the purposes of s. 13 that a witness who can be statutorily compelled to testify chooses to testify uncoerced, it does not matter that a plaintiff does not resort to the available statutory powers to compel a defendant to be examined for discovery. In either case, there is a statutory route by which to compel the witness to give evidence. This is what makes a witness compellable. Whether or not that route is actually taken does not change the fact that it was available and *could have been taken*.

'109 I conclude, therefore, that the respondent was statutorily compellable, and therefore

“compelled” within the meaning of *Henry* and for the purposes of s. 13.’ *R v Nedelcu* 2012 SCC 59, [2012] 3 SCR 311 at paras 101–109, per LeBel J

COMPENSATED

Canada [Canadian International Trade Tribunal Act, RSC, 1985 (4th Supp), c 47, s 30.15.] [45] With respect, I do not agree with Evans JA when he states that the term “compensated,” as used in relation to paragraph 30.15(2)(e), is a generic word. In my view, compensated means given compensation and compensation is a term with an established legal meaning. The principles of compensation are well understood in the law relating to damages for breach of contract. In my view, it is appropriate to have general reliance on those principles, since, after all, the procurement process that underlies the complaint in issue is essentially contractual in nature and the complaint at issue relates to “designated contracts.”’ *Canada (Attorney General) v Envoy Relocation Services* [2008] 1 FCR 291, 283 DLR (4th) 465, [2007] FCJ No 626, 2007 FCA 176 at [45], per Ryer JA (dissenting)

COMPENSATION IN RESPECT OF THE GRANT

[Electricity Act 1989, Sch 4, para 7: compensation payable to the owner of land in respect of the grant of a wayleave for an electric power line.] [17] The tribunal’s view was that fair “compensation in respect of the grant” of the wayleave (under para 7(1)) was, precisely, the loss of the price which would otherwise have been payable under the pylon land contract. Applying Lord Nicholls’ three conditions [in *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 1 All ER 846 at 852–853, [1995] 2 AC 111 at 126, PC], it was caused by the grant of the wayleave, because it was the grant which caused the pylon land contract to fall away. The loss of the contract price was not too remote because the loss of those contractual rights was the direct result of the grant of the wayleave. Compensation quantified by reference to the contract price gave AWE no more, and no less, than its loss, regardless of whether the development value of the pylon land had risen or (as happened) fallen between the dates of the contract and the grant of the wayleave. The whole of the contract price was payable because the residual value of the pylon land, subject to the wayleave, was nominal. The tribunal’s analysis may be summarised as a

straightforward application of the language of para 7(1), interpreted in accordance with the principle of equivalence.

“[23] I can find nothing in the terms of para 7 of Sch 4, interpreted in the light of the principle of equivalence, which gives any support to Mr Purchas’ main submission that compensation for the loss of contractual rights caused by the grant of a wayleave falls outside the scope of the compensation afforded by the Act. On the contrary, the right to compensation under para 7(1) is conferred in the most general terms. The only limitation which may be said to flow from the language used is that the loss for which compensation is claimed must be loss suffered by the claimant in his capacity as owner or occupier of the land, rather than in some wholly unrelated capacity. Thus for example, that limitation would exclude compensation for loss incurred by betting on the outcome of an application to the Secretary of State under para 6 for the grant of a wayleave, even if the bet was placed and lost by someone who happened to be the owner or occupier of the land in question. In this case by contrast, the loss of a contractual right to proceeds of the sale of the relevant land under a conditional contract, where the contract falls away because of the grant of the wayleave, is in my view fairly and squarely a loss suffered by AWE in its capacity as owner of the land. It was by the transfer of the land (had there been no wayleave) that the purchase money would have been acquired. Even if the rights of a contracting seller of land may, for various chancery purposes, be described as personalty rather than realty (as Mr Reed demonstrated), it is a right inseparable from the seller’s status as owner of the land in question.’ *National Grid Electricity Transmission plc v Arnold White Estates Ltd* [2014] EWCA Civ 216, [2014] 3 All ER 626 at [17], [23], per Briggs LJ

COMPILATION

Copyright

Australia [30] Mr Golvan SC for the appellant sought leave to amend its statement of claim to raise an allegation that its label was a “literary work”. The definition of that term in s 10(1) [of the Copyright Act 1968 (Cth)] includes.

- (a) a table, or compilation, expressed in words, figures or symbols.

The appellant says its label is a “compilation”.

... ‘[32] The application to amend should be refused, primarily for the reason that the proposed amendment lacks arguable merit. The notion of compilation involves a collecting and putting together or arranging or organising of disparate data. That is not the case with the appellant’s label. It is simply a photograph and a description of an object. It conveys the one message.’ *Woodtree Pty Ltd v Zheng* [2007] FCA 1922, (2007) 74 IPR 484, BC200710705 at [30], [32], per Heerey J

COMPLETION

Of contract for sale of land

[For 42 Halsbury’s Laws of England (4th Edn) (Reissue) para 262 see now 23 Halsbury’s Laws of England (5th Edn) (2016) para 246.]

COMPOSITION

[For 3(2) Halsbury’s Laws of England (4th Edn) (2002 Reissue) para 863 see now 5 Halsbury’s Laws of England (5th Edn) (2013) para 856.]

COMPULSORY ACQUISITION

[For 8(1) Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 1 see now 18 Halsbury’s Laws of England (5th Edn) (2009) para 501.]

COMPULSORY PAYMENT

[Note that 9(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 1104 is not reproduced in 22 Halsbury’s Laws of England (5th Edn) (2012).]

CONDITION (STIPULATION)

In lease

[For 27(1) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 133 see now 62 Halsbury’s Laws of England (5th Edn) (2016) para 126.]

Conditions precedent and subsequent

[For 50 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 420 see now 102 Halsbury’s Laws of England (5th Edn) (2010) para 129.]

CONDUCT (NOUN)

[Under the Police Reform Act 2002, s 12, references to a complaint are references to any complaint about the ‘conduct’ of a person serving with the police.] ‘[33] Consideration of the issue which I have to resolve seems to me to break down into two distinct questions. The first is whether Mr Jordan’s complaint related to the “conduct” of the chief constable. If it did not so relate, there was no basis on which the police authority could be required to record it. The second question is whether, if the complaint did relate to conduct, it was excluded from the obligation to record because it related wholly to the “direction and control” of the North Yorkshire Police. This is, fortunately, not one of those cases in which a complaint may be of a hybrid kind, relating in part to pure direction and control matters and in part to other, recordable matters.

... ‘[37] What is, as it seems to me, the more difficult question is whether the complaint related to a matter of direction and control of the force. One curious feature of the case is that the North Yorkshire local guidance on complaints about direction and control classifies a decision not to prosecute a particular individual for a particular crime as not being a decision as to direction and control. That situation is very close to the one with which I am concerned, that of a decision not to have a reinvestigation under the supervision of the chief constable of circumstances which have already been the subject of an investigation: yet that is said to be a direction and control matter.

‘[38] Mr Beggs, in his submissions in reply, reduced the police authority’s case to these three propositions. First, the commission had to make what was essentially a factual assessment. Secondly, Mr Harvey, as the decision-maker, was either right or wrong in his conclusion: there was no room for the exercise of discretion. I agree thus far. Thirdly, and controversially, according to my note of what Mr Beggs said:

“In this case, on these facts, this was a direction and control matter because it related to the deployment of the Chief Constable’s resources—to his decision not to deploy men [sic] to investigate a complaint that had already been investigated by other agencies.”

‘[39] I would not accept this analysis. It is not easy to produce a comprehensive, yet accurate, definition of the concept of direction and control. I think, however, that it is essentially

concerned with matters which are of a general nature. On this basis, a decision by a chief officer which is confined to a particular subject falls outside the scope of direction and control. The national and local guidance from which I have quoted at some length earlier in this judgment appears to me to be fully supportive of a general/particular dividing line. If this is the right approach, then the decision of the commission cannot be faulted.

[40] Mr Beggs accepted that a complaint about a decision not to investigate or prosecute in a particular case *might* relate to conduct falling outside the scope of direction and control, for example, if it were alleged that the decision had been made for some improper motive. It seems to me that the legislation should be interpreted, if possible, in the manner least burdensome to those who have to work with it. The general/particular distinction to which I have referred is relatively easy for the commission and others who have to characterise complaints to understand and apply without delving too deeply into the nature of a complaint at the initial stages of the complaints procedure. A distinction under which some complaints about decisions not to investigate or prosecute in a particular case would be regarded as relating to conduct only, and others as relating to direction and control, would be far more difficult to operate.

[41] Mr Beggs also raised what might be called (although he was innocent of using the expression) a floodgates argument: if the impugned characterisation is to stand, it “will inevitably bring a whole new category of complaint under the Schedule 3 umbrella” (written submissions, para 11). Persons dissatisfied with a decision not to commence an investigation, or with a decision after investigation that there should be no prosecution, could overload the system by making pointless requests to chief officers have the matter reconsidered. In my judgment, Ms Lang fairly answered the point when she said that I was concerned with the recording of a complaint which is, in essence, a matter of registration. If the complaint is repetitious or an abuse of the complaints procedure, it can be disposed of on an application for dispensation to the commission, and the availability of the dispensation procedure mitigates any fear that the system may become clogged up in the manner suggested.

[42] Accordingly, I have concluded that the commission was right to reject the argument that Mr Jordan’s complaint related to a matter of direction and control.’ *R (on the application of*

North Yorkshire Police Authority) v Independent Police Complaints Commission (Chief Constable of North Yorkshire Police and another, interested parties) [2010] EWHC 1690 (Admin), [2011] 3 All ER 106 at [33], [37]–[42], per Judge Langan QC

CONFLICT OF LAWS

[For 8(3) Halsbury’s Laws of England (4th Edn) (Reissue) para 1 see now 19 Halsbury’s Laws of England (5th Edn) (2011) para 301.]

CONFUSION

[For 35 Halsbury’s Laws of England (4th Edn) (Reissue) para 1239 see now 80 Halsbury’s Laws of England (5th Edn) (2013) para 824.]

CONNECTED WITH THE TRANSFER

[Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246, reg 7(1).] [1] The claim is for automatic unfair dismissal. The appeal is about the construction and application of reg 7(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246 (TUPE). Some employees, including the claimant, were dismissed by the administrators of the transferor employer prior to a TUPE transfer. The dispute is whether the reason for the dismissal of the claimant was “connected with the transfer” so as to make the dismissal automatically unfair. The court is faced with differences of approach by the Employment Appeal Tribunal (EAT) in a series of conflicting rulings since 1994 on the similarly worded reg 8(1) in the previous manifestation of TUPE in 1981 (SI 1981/1794).

...
[43] In my judgment, the natural and ordinary meaning of the language of reg 7(1) does not require a particular transfer or transferee to be in existence or in contemplation at the time of the dismissal.

[44] The exercise under reg 7(1) only has to be carried out if there has been both a dismissal, which is claimed to be automatically unfair, and a relevant transfer. If, on the one hand, no relevant transfer ever takes place, there is no basis for making a claim for automatic unfair dismissal for a transfer-related reason. The regulation would simply not be engaged.

[45] If, on the other hand, a dismissal and a relevant transfer do take place, the regulation could be engaged. The ET is then required by

the regulation to look to the fact of dismissal and, as a matter of the objective assessment of the evidence, to determine the reason for it and whether that reason was “connected with” the transfer. As a matter of ordinary English and of plain common sense a dismissal prior to the transfer could have been for a reason “connected with the transfer”, even though that particular transfer or transferee was not known, identified or contemplated at the date of dismissal. It is a common experience of life that an event (A) may sensibly be considered to be “connected with” a later event (B), even though it was not known, contemplated or foreseen at the time of event (A) that event (B) would happen. This approach gives straightforward effect to the words “the transfer” in reg 7(1), rather than requiring the substitution of other words such as “transfer” simpliciter, or “a transfer”, or “any transfer”. It puts the weight of the analysis instead on the breadth of the words “connected with”. Subject to that possible difference in analysis, however, the approach is the same as that in the *Harrison Bowden* case [*Harrison Bowden Ltd v Bowden* [1994] ICR 186, EAT] and *Morris’s* case [*Morris v John Grose Group Ltd* [1998] IRLR 499, [1998] ICR 655, EAT] which, as Beatson J said in the *CAB Automotive* case [*CAB Automotive Ltd v Blake* [2007] UKEAT/0298/07, EAT] at para 32, is more consistent than that in the *Ibex Trading* case [*Ibex Trading Co Ltd v Walton* [1994] IRLR 564, [1994] ICR 907, EAT] with the broad scope of the Directive which TUPE implements.

[46] The issue for the ET under reg 7(1) was whether it could properly conclude, on the evidence available and using the industrial experience of its members, that the dismissal of the claimant was “connected with” the relevant transfer. The ET held that it was. There was evidence for that finding. The administrators achieved within four weeks or so what they set out to achieve. In reaching its conclusion the ET made no error of law.⁷ *Spaceright Europe Ltd v Baillavoine* [2011] EWCA Civ 1565, [2012] 2 All ER 812 at [1], [43]–[46], per Mummery LJ

CONSCIOUS MALADMINISTRATION

Australia [75] The reference by the majority in *Futuris* [*Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146; 247 ALR 605; [2008] HCA 32] (at [55]) to s 13 of the Public Service Act does not, for example, mean that any failure by a Commonwealth public servant to comply with any Australian law constitutes

“conscious maladministration”. In that sense, I disagree with Mr Denlay’s submission that the content of conduct which amounts to “conscious maladministration” is “informed” by s 13(4) of the Public Service Act. Rather, I take the point made in *Futuris* (at [55]) to be this. Conduct which purports to be the making of an assessment but which is proved to be not that but instead a deliberate failure not to administer the governing legislation according to its terms results not in an “assessment” any formal defect in the making of which is, by virtue of s 175 of the ITAA [Income Tax Assessment Act 1936 (Cth)], none the less an act of the commissioner within jurisdiction but rather in an administrative act which is not an “assessment” at all. Section 175 has no application to such an act. Like any Commonwealth statute, s 175 of the ITAA36 must be construed subject to the Constitution and to the limits of legislative competence: s 15A of the Acts Interpretation Act 1901 (Cth). The jurisdiction to control by the grant of the remedies for which s 75(v) of the Constitution makes provision is vested by the Constitution in the High Court and may not be removed by parliament (save in compliance with the manner and form permitted by s 128 of the Constitution). One does not therefore adopt a construction of s 175, where another is open, which would exceed that limitation on Commonwealth legislative competence. It is that same jurisdiction which is relevantly vested in this court by s 39B of the Judiciary Act.

[76] Conduct by an officer of the Commonwealth which constitutes a deliberate failure to administer a law according to its terms, conduct which is tainted by an ulterior or improper purpose, “conscious maladministration” has never been lawful under the system of government established and maintained under the Constitution: *Futuris* at [11]. The relevance of the reference to s 13 of the Public Service Act in *Futuris* (at [55]) is that, included within this contemporary statement of “The APS Code of Conduct”, is an intolerance of conduct amounting to such conscious maladministration. That intolerance is not unique to our times but rather, as is also stated by the majority in their reasons, has formed part of the ethos of the Commonwealth public service from its inception. That ethos, in turn, reflected an ethos which by then was regarded as a feature of good public administration in the United Kingdom and its colonies. It is in this sense only that the content of conscious maladministration is informed by s 13 of the Public Service Act.

[77] As to the content of the type of conduct that constitutes conscious maladministration

and thus jurisdictional error amenable to constitutional writs, the majority in *Futuris* (at [11]) highlight an affinity between the tort of misfeasance in public office and public law. They draw attention to what was said in the High Court in *Sanders v Snell* (1998) 196 CLR 329; 157 ALR 491; [1998] HCA 64 at [42] and, in turn to the approval there given to the nature of that tort as discussed in *Northern Territory v Mengel* (1995) 185 CLR 307 at 345; 129 ALR 1 at 17. That is that it is an intentional tort, the precise limits of which are still undefined but which requires proof of an intention to cause harm or of an intention to act in excess of an officer's power.

'[78] There is another common law affinity with public law which, in my opinion, offers assistance when describing that type of conduct which will constitute conscious maladministration amenable to a constitutional writ. That affinity comes from the common law offence of misconduct in public office. As recently explained by Redlich JA (with whom Ashley JA and Hansen AJA agreed) in *R v Huy Vinh Quach* [2010] VSCA 106 at [46] (*Huy Vinh Quach*), after a comprehensive review of authority, the elements of this common law offence are:

- (1) a public official;
- (2) in the course of or connected to his public office;
- (3) wilfully misconducts himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty;
- (4) without reasonable excuse or justification; and
- (5) where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.

'[79] In an illuminating article, Finn P, "Official Misconduct" (1978) 2 *Crim LJ* 307, pp 307-8, cited with approval both by Redlich JA in *Huy Vinh Quach* at [22] and, as his Honour there acknowledges, by Doyle CJ in *Question of Law Reserved* (No 2 of 1996) (1996) 67 SASR 63 at 64, Dr P D Finn (as his Honour then was) opined of this common law offence:

By at least the middle of the 18th Century the common law had evolved a general, though ill-defined, offence variously described as "official misconduct", "breach of official trust", or "misbehaviour in a public office". To this day the precise metes and bounds of this offence remain

uncertain ... Its object is simply to ensure that an official does not, by any wilful act or omission, act contrary to the duties of his office, does not abuse intentionally the trust reposed in him.

In this same article (at 308), Dr Finn refers to what he describes as the "seminal formulation" of the offence by Lord Mansfield in *R v Bembridge* (1783) 22 State Tr 1 at 155-6 (*Bembridge*):

Now, there are two principles which seem to me clearly applicable to this prosecution; the first I will venture to lay down is, that if a man accepts an office of trust and confidence, concerning the public, especially when it is attended with profit, he is answerable to the king for his execution of that office; and he can only answer to the king in a criminal prosecution, for the king cannot otherwise punish his misbehaviour, in acting contrary to the duty of his office ... There is another principle, too, which I think applicable to this prosecution, and that is this; where there is a breach of trust, a fraud, or an imposition in a subject concerning the public, which, as between subject and subject, would only be actionable by a civil action, yet as that concerns the king and the public (I use them as synonymous terms), it is indictable.

'[80] Having regard to *Bembridge*, there is a long recognised affinity between misconduct in public office giving rise to a civil action and that amenable to prosecution on indictment. That there is also an affinity with when a constitutional writ may be granted in public law should be unsurprising given the heritage of the system of government established and maintained by the Constitution. The application for the constitutional writ seeks the setting aside of the manifestation of executive power exercised for ulterior or improper purposes, the indictment seeks the punishment of the public officer who has so acted and the claim in tort seeks compensation for loss and damage occasioned by such action.

...
'[105] It does not follow from the existence of a discretion to receive, in court, in a criminal or civil case evidence obtained illegally by a government agency that what does or does not constitute conscious maladministration is a matter of discretion. *Pearce* [*Pearce v Button* (1985) 8 FCR 388; 60 ALR 537] is though relevant in this sense. In the exercise of the

discretion which he found existed, Pincus J (at FCR 403; ALR 552) regarded it as relevant to take into account that the customs officers concerned “did not consciously break the law or consciously demand more of the bank, in particular, than they thought the law entitled them to”. That, with respect, is a pithy expression of why the conduct of those officers did not constitute “conscious maladministration” of, in that case, Australian customs legislation. It might be paraphrased as a way of describing why, on the facts which I have found, there was no conscious maladministration by those officers who interviewed Mr Kieber abroad in this case. They did not consciously break any Australian law or consciously obtain from Mr Kieber more than they thought Australian law entitled them to. The same may be said in respect of those who made the amended assessments (or, more accurately, it has not been proved that they consciously used information which they knew was unlawfully obtained).

[106] Such conclusions have this corollary. Mr Denlay’s submissions assumed that, if the existence of a breach of s 400.9 of the Criminal Code were demonstrated, that also demonstrated conscious maladministration. I do not accept that this follows. There was no conscious breach at any stage. If, contrary to my conclusions as to the effect of ss 166 and 263 of the ITAA36 and s 400.9 itself, s 400.9 were applicable, the absence of a conscious breach would not, in the circumstances of this case, warrant a finding of conscious maladministration. That would also mean that the application should be dismissed. A like approach is evident in New Zealand in a case in which *Futuris* was considered: *Westpac* (leave to appeal subsequently refused: *Westpac Banking Corporation v Comr of Inland Revenue* [2009] NZSC 36).

[107] *Westpac* has another role to play in relation to litigation of the present type. The observation by the Court of Appeal (at [62]) that, “it is perfectly clear that allowing collateral challenge to assessments through judicial review can provide scope for gaming and diversionary behaviour” is no less applicable in this country than in New Zealand. Of course a jurisdiction conferred must be exercised if invoked but it by no means follows that a judicial review challenge of the present kind should generally be heard separately from a taxation appeal. Further, when the content of what is necessary under our law to constitute “conscious maladministration” is appreciated, one might expect that it would take very singular facts indeed to be raised, *prima facie*,

by a taxpayer in relation to the making of the assessment concerned before it became appropriate for a court in which an assessment debt recovery proceeding was pending to defer giving judgment in respect of that assessment when the same had been certified by the commissioner in accordance with s 177 of the ITAA36.’ *Denlay v Comr of Taxation* [2010] FCA 1434, (2010) 276 ALR 675 at [75]–[80], [105]–[107], per Logan J

CONSENT

Canada [Criminal Code, RSC 1985, c C-46, ss 672.58, 672.62(1)(a): consent of treating hospital to treatment order.] ‘1. When an accused person has been found unfit to stand trial and the other statutory requirements have been met, the court may make a disposition order directing that treatment be carried out for a specified period not exceeding 60 days and on such conditions as the judge considers appropriate for the purpose of making the accused fit to stand trial. The disposition order may not be made, however, without the consent of either the person in charge of the hospital where the accused is to be treated or the person to whom responsibility for the treatment of the accused has been assigned. (For ease of reference, we will refer to this as the hospital’s consent.)

‘2. The main issue on appeal is whether, as the appellant contends, the court may make a disposition order directing that treatment begin immediately even though the hospital or treating physician does not consent to that disposition. In our view, the answer to this question is “no” in all but the rare case in which a delay in treatment would breach the accused’s rights under the *Canadian Charter of Rights and Freedoms*, and an order for immediate treatment is an appropriate and just remedy for that breach.

‘3. Thus, while we would dismiss the appeal, we respectfully disagree with our colleague Karakatsanis J. that the hospital’s consent relates only to the treatment ordered in the disposition and not to the disposition order itself. As we see it, that reading of the relevant provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, cannot be reconciled with its unambiguous text. The *Code* specifically distinguishes between consent to treatment and consent to the disposition and explicitly requires that a disposition may not be made without the hospital’s consent. The hospital consent is required for the disposition order in its entirety, not simply to the treatment aspect of it. Read

any other way, the appeal provisions relating to dispositions are incoherent. Moreover, the interpretation that we favour is consistent with the purpose of the scheme and the broader context in which it exists.’

‘4. The specific provisions of the *Criminal Code* dealing with UST accused that are relevant to this appeal are ss. 672.58 and 672.62. As we shall see, these provisions make clear that while the court may not make a disposition — which may include not only the treatment, but also the period of treatment and other conditions which the court considers appropriate — without the hospital’s consent, the accused’s consent is dispensed with in relation *only* to the treatment to “be carried out pursuant to a disposition”.

‘12. On the further appeal to this Court, the appellant raises two main questions concerning the scope of the hospital’s required consent:

1. Does the consent requirement relate to the timing of carrying out the order or just to the treatment itself?
2. If the consent requirement relates to the timing of carrying out the order, does the s. 672.58 order violate s. 7 of the *Charter*?

‘13. In our view, the meaning of the relevant provisions, supported by an understanding of their full context, leads to the conclusion that the hospital or person in charge of treatment must consent to all the terms of a disposition ordering treatment and, if there is no consent, the order cannot be made. The terms of the order include when it is to be carried out and therefore consent relates to timing.

‘22. The ordinary meaning of the word “consent” in the context of medical treatment is understood to be voluntary agreement to a medical course of action made with an appreciation of all material information and risks. The starting date of treatment is a material fact, going to the availability of the necessary bed and staff ready to execute the treatment order safely.

‘40. We conclude that the text, context and purpose of the provisions show that the hospital’s consent is required in relation to all the aspects of the disposition order made under s. 672.58 and, absent that consent, the court may not make the order ...’ *R v Conception* [2014] SCJ No 60, [2014] 3 SCR 82 at paras 1–4, 12–13, 22, 40, per Rothstein and Cromwell JJ

Effective consent

‘[2] The use of gametes for fertility treatment and research is regulated by the Human Fertilisation and Embryology Act 1990 (“HFE Act”). This established the HFEA as the UK’s independent regulator in this field. One of the HFEA’s responsibilities is to issue licences to centres to provide fertility treatment. They can provide services using a person’s gametes only where that person consents. Consent means “effective consent” and so the HFE Act provides that, before treatment, a person must be given “such relevant information as is proper”, and offered counselling. Effective consent to treatment and the disclosure of relevant information are cornerstones of this carefully calibrated legislation.

‘[21] The HFE Act does not set out what information has to be given before a person’s consent is effective. That indicates, first, that the content of an effective consent will vary from case to case and also over time as medical science and ethics and the legal duties of treatment providers develop, and, second, that in the event of dispute the content of such information may be a matter for the courts to refine in accordance with their conventional role of interpreting statutes to give effect to Parliament’s intention, and with assistance from any expert evidence as to best practice where relevant.’ *R (on the application of M and another) v Human Fertilisation and Embryology Authority* [2016] EWCA Civ 611, [2017] 3 All ER 77 at [2], [21], per Arden LJ

CONSEQUENT UPON

New Zealand [Crime insurance policy: insurance against direct financial loss consequent on dishonest acts of employees committed with the clear intent of causing loss to employer.] ‘[110] Insurance policies invariably require a causal connection between the specified peril and the loss. However, the quality of that connection varies. It may be the close and direct connection of proximate cause signalled by words such as “caused by”. In comparison, expressions such as “arising out of” are regarded as being much broader, not requiring such a close causal nexus. The expression “consequent upon”, used in this operative clause, is one that carries a both causative and sequential connotation but does not require a close causal connection.’ *Marac Finance Ltd v Vero Liability Insurance Ltd* [2013] NZHC 2525, [2014] 2 NZLR 93

at [110], per Courtney J

CONSERVATION

[Wildlife and Countryside Act 1981, s 28, and duty under s 28G(2) to further the conservation and enhancement of the geological features in Site of Special Scientific Interest (the SSSI).] [16] The submission that English Nature's approach, to allow natural processes (in this case coastal erosion) to proceed freely, would result in the destruction rather than the conservation of those geological features is based upon two misconceptions: (i) that the geological features in question are confined to the sediments and did not include the exposure; and (ii) that 'conservation' in this context means preservation of the status quo.

... [18] Even if it is assumed that "conservation" in s 28G(2) means "preservation", allowing nature to take its course will "preserve" the exposure, while hindering those processes would harm it because that which is obscured will cease to be exposed. It is therefore, unnecessary to consider in any detail the meaning of "conservation" in s 28G(2), but since the interested party has sought guidance on this aspect of the appeal, I will deal with the issue. There is no definition of "conservation" in the 1981 Act, and the parties were not able to point to a definition in any other enactment. Mr Balogh referred to the Convention concerning the Protection of the World Cultural and Natural Heritage adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) meeting in Paris on 16 November 1972 (Paris, 23 November 1972; TS 2 (1985); Cmnd 9424), and to dictionary definitions. The former is, understandably, expressed in such general terms as to be of no material assistance, and the latter are of no assistance because we are not concerned with the meaning of "conservation" in isolation or in the abstract, but with the meaning of "conservation" in a particular statutory context: nature conservation. Whatever may be the meaning of conservation in other contexts, one would have thought that allowing natural processes to take their course, and not preventing or impeding them by artificial means from doing so, would be a well recognised conservation technique in the field of nature conservation. "Conservation" is not necessarily the same as "preservation", although in some, perhaps many, circumstances preservation may be the best way to conserve.

Whether that is so in any particular case will be a matter, not for the lawyers, but for the professional judgement of the person whose statutory duty it is to conserve.' R (*on the application of Boggis*) v *Natural England* (*Waveney District Council, interested party*) [2009] EWCA Civ 1061, [2010] 1 All ER 159 at [16], [18], per Sullivan LJ

CONSIDERED SEPARATELY

Australia [Patents Act 1990 (Cth), s 7(2): an invention is to be taken to involve an inventive step when compared with the prior art base unless the invention would have been obvious to a person skilled in the relevant art in the light of the common general knowledge as it existed in the patent area before the priority date of the relevant claim, whether that knowledge is 'considered separately' or together with either of the kinds of information mentioned in s 7(3), each of which must be considered separately.] [5] Sections 7(2) and 7(3) are central to these appeals against the decision of the Full Court. They defined the condition on satisfaction of which an invention would not be taken to involve an inventive step. Relevantly, that condition was satisfied if the invention would have been obvious to a person skilled in the relevant art in light of the common general knowledge considered separately or together with prior art information publicly available in a single document before the priority date of the patent. The single document had to contain prior art information which could reasonably be expected to have been ascertained, understood and regarded by the skilled person, before the priority date, as relevant to work in the relevant art in the patent area. In this Court, AstraZeneca's primary argument was for a construction of ss 7(2) and 7(3) which would preclude the use, in the imputed ascertainment of the relevant single document, of other prior art information not forming part of the common general knowledge. Its second argument was that the Court could not decide the question of want of inventive step on the basis of a single avenue of approach based on common general knowledge and the relevant single document.

... [21] The reasons of the Full Court on that argument were given by Jessup J, with whom the other Judges agreed. His Honour, directing his remarks to s 7(3), said:

... It is, in my view, wholly within the scheme of the subsection that [the skilled

person] might well sort through all manner of information with a view to finding something that is “regarded as relevant”. There is nothing in the provision which would place an embargo upon the skilled person using combinations of sources of information along the road to that destination.

That approach was correct. The words “considered separately” in s 7(2) qualify the way in which prior art information complying with s 7(3) must be used, in conjunction with common general knowledge, in determining obviousness under the alternative operation of s 7(2). They preclude the use of a combination of unrelated documents, not forming part of the common general knowledge, for the purposes of that determination. Section 7(2) says nothing about how the relevance requirement in s 7(3) is to be satisfied.’ *AstraZeneca AB v Apotex Pty Ltd* (Matter No S54/2015) [2015] HCA 30, (2015) 323 ALR 605 at [5], [21], per French CJ

CONSOLIDATED FUND

[For 34 Halsbury’s Laws of England (4th Edn) (Reissue) para 952 see now 78 Halsbury’s Laws of England (5th Edn) (2010) para 1028.]

CONSPIRACY

[For 11(1) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 66 see now 25 Halsbury’s Laws of England (5th Edn) (2016) para 78.]

CONSPIRES

Australia [Criminal Code (Cth), s 135.4.] ‘[54] The effect of the holding in *LK* [*R v LK* (2010) 241 CLR 177; 266 ALR 399; [2010] HCA 17 at [59], [72] and [107]] is that: the physical element of the offence of conspiracy created by s 135.4 of the Code is to be found in s 135.4(5); and the word “conspires” is to be understood by reference to the common law, subject to express statutory modification by other provisions in s 135.4 and elsewhere in the Code.

‘[55] The common law meaning of “conspires” being picked up subject to express statutory modification, the reasoning of the House of Lords in *Doot* [*Director of Public Prosecutions v Doot* [1973] AC 807, HL] is not in all respects applicable to the offence of conspiracy created by s 135.4 of the Code. The

question answered in *Doot* (whether an agreement made outside territorial jurisdiction can be tried as a conspiracy) is answered in respect of s 135.4 by ss 15.4 and 135.5. The passage in the speech of Lord Pearson quoted in the joint reasons for judgment must be qualified: the first sentence by s 135.4(9)(c); the last sentence by s 135.4(12)(b).

‘[56] Subject to s 135.4(9) and (12), the central proposition for which *Doot* is authority at common law is nevertheless applicable to the physical element of the offence of conspiracy created by s 135.4 of the Code that is to be found in s 135.4(5): the physical element of conspiracy may be satisfied by continuing adherence to an existing agreement. Viscount Dilhorne put it this way [at 822–823]:

When there is agreement between two or more to commit an unlawful act all the ingredients of the offence are there and in that sense the crime is complete. But a conspiracy does not end with the making of the agreement. It will continue so long as there are two or more parties to it intending to carry out the design.

He went on to refer to conspiracy as a “continuing offence” at common law. That proposition was endorsed as part of the common law of Australia in *Savvas v R* [(1995) 183 CLR 1 at 8; 129 ALR 319 at 323–4; [1995] HCA 29].

‘[57] The question on which the fate of the first argument of the appellant turns is whether the express statutory requirement of s 135.4(9)(a) (that a person “must have entered into an agreement with one or more other persons” to be guilty of the offence created by s 135.4) modifies the content given to the word “conspires” in s 135.4(5) by the application of that common law proposition so as to make the act of entering into an agreement part of the physical element of the offence created by s 135.4. In my view, it does not.

‘[58] The focus of the text of s 135.4(9)(a) is not on the act of entering into an agreement with one or more other persons. It is rather on the existence of an agreement entered into with one or more other persons.

‘[59] That focus is confirmed by reference to the legislative history to which attention was drawn in *LK*. In recommending the retention of the offence of conspiracy, the Interim Report of the Review of Commonwealth Criminal Law Committee chaired by Sir Harry Gibbs observed that the word “conspires” then appearing in s 86 of the Crimes Act appeared to import common law principles of conspiracy and quoted in full

the following “frequently cited definition of conspiracy at common law”:

A conspiracy consists not merely in the intention of two or more but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means.

The subsequent report of the Criminal Law Officers Committee of the Standing Committee of Attorneys-General made clear that the prototype for s 135.4(9)(a) was to be read in juxtaposition to the prototype for s 135.4(9)(b) and that they were in combination directed to teasing out the essential distinction made in that common law definition. They were explained as having been drafted so as to “clearly separate the agreement component of the conspiracy from the intent to commit an offence pursuant to that agreement”.

‘[60] When that focus is appreciated, s 135.4(9)(a) can be seen to be directed not to modifying the content given to “conspires” by the common law but to reinforcing that content by making clear that a person who “conspires” is necessarily a person who “agrees”. In so doing, it is consistent with the physical element of conspiracy being satisfied by continuing adherence to an existing agreement.

‘[61] I am unable to dismiss the first argument of the appellant quite as emphatically as did the primary judge in the observation quoted in the joint reasons for judgment. That is because I am unable to read any part of s 135.4 as addressed to transitional considerations.

‘[62] However, for the reasons I have given, I think the better view to be that s 135.4(9)(a) does not modify the common law meaning of “conspires” in s 135.4(5) so as to make the act of entering into an agreement part of the physical element of the offence created by s 135.4. Consistently with s 135.4(9)(a), a person “conspires” within the meaning of s 135.4(5) by continuing to adhere to an existing agreement.’ *Agius v R* [2013] HCA 27, (2013) 298 ALR 165 at [54]–[62], per Gageler J

CONSTITUTION (OF CORPORATION)

[Conflict of laws rules governing legal capacity of companies and other bodies.] ‘[48] [I]t seems

to me that the concept of a corporation’s “constitution” must be given a broad, “internationalist” interpretation. It is not a question of just trying to find some document, like a royal charter, or the memorandum and articles or some other written description of what the corporation is and can do. For the purposes of this English conflict of laws rule it is necessary to examine all the sources of the powers of the corporation under consideration. This will include any constitutional documents but also relevant statutes and other rules of law of the country where the corporation was created.’ *Haugesund Kommune v Depfa ACS Bank (Wikborg Rein & Co, Part 20 defendant)* [2010] EWCA Civ 579, [2011] 1 All ER 190 at [48], per Aikens LJ

CONSTITUTIONAL LAW

[For 8(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 1 see now 20 Halsbury’s Laws of England (5th Edn) (2014) para 1.]

CONSTRUCTIVE DISMISSAL

Canada ‘30. When an employer’s conduct evinces an intention no longer to be bound by the employment contract, the employee has the choice of either accepting that conduct or changes made by the employer, or treating the conduct or changes as a repudiation of the contract by the employer and suing for wrongful dismissal. This was clearly stated in *Farber* [*Farber v Royal Trust Co* [1997] 1 SCR 846], at para. 33, the leading case on the law of constructive dismissal in Canada. See also *In re Rubel Bronze and Metal Co. and Vos*, [1918] 1 K.B. 315, at p. 322. Since the employee has not been formally dismissed, the employer’s act is referred to as “constructive dismissal”. The word “constructive” indicates that the dismissal is a legal construct: the employer’s act is treated as a dismissal because of the way it is characterized by the law (J. A. Yogis and C. Cotter, *Barron’s Canadian Law Dictionary* (6th ed. 2009), at p. 61; B. A. Garner, ed., *Black’s Law Dictionary* (10th ed. 2014), at p. 380).

‘31. The burden rests on the employee to establish that he or she has been constructively dismissed. If the employee is successful, he or she is then entitled to damages in lieu of reasonable notice of termination. In *Farber*, the Court surveyed both the common law and the civil law jurisprudence in this regard. The solutions adopted and principles applied in the two legal systems are very similar. In both, the

purpose of the inquiry is to determine whether the employer's act evinced an intention no longer to be bound by the contract.

'32. Given that employment contracts are dynamic in comparison with commercial contracts, courts have properly taken a flexible approach in determining whether the employer's conduct evinced an intention no longer to be bound by the contract. There are two branches of the test that have emerged. Most often, the court must first identify an express or implied contract term that has been breached, and then determine whether that breach was sufficiently serious to constitute constructive dismissal: J. R. Sproat, *Wrongful Dismissal Handbook* (6th ed. 2012), at p. 5-5; P. Barnacle, *Employment Law in Canada* (4th ed. (loose-leaf)), at ss. 13.36 and 13.70. Typically, the breach in question involves changes to the employee's compensation, work assignments or place of work that are both unilateral and substantial: see, e.g., G. England, *Individual Employment Law* (2nd ed. 2008), at pp. 348-56. In the words of McCardie J. in *Rubel Bronze [In re Rubel Bronze and Metal Co and Vos]* [1918] 1 KB 315, at p. 323, "The question is ever one of degree."

'33. However, an employer's conduct will also constitute constructive dismissal if it more generally shows that the employer intended not to be bound by the contract. In applying *Farber*, courts have held that an employee can be found to have been constructively dismissed without identifying a specific term that was breached if the employer's treatment of the employee made continued employment intolerable: see, e.g., *Shah v. Xerox Canada Ltd.* (2000), 131 O.A.C. 44; *Whiting v. Winnipeg River Brokenhead Community Futures Development Corp.* (1998), 159 D.L.R. (4th) 18 (Man. C.A.). This approach is necessarily retrospective, as it requires consideration of the cumulative effect of past acts by the employer and the determination of whether those acts evinced an intention no longer to be bound by the contract.' *Potter v New Brunswick Legal Aid Services Commission* [2015] SCJ No 10, [2015] 1 SCR 500 at paras 30-33, per Wagner J

CONSUMER

(2) 'Consumer' means—

- (a) a person who purchases, uses or receives, in Great Britain, goods or services which are supplied in the

course of a business carried on by the person supplying or seeking to supply them, or

- (b) a person who purchases, uses or receives relevant postal services in Northern Ireland.
- (3) 'Consumer' includes both an existing consumer and a future consumer.
- (4) For the purposes of subsection (2)—
 - (a) a person who uses services includes, in relation to relevant postal services, an addressee;
 - (b) 'goods' includes land or an interest in land;
 - (c) 'business' includes a profession and the activities of any government department, local or public authority or other public body.

Consumers, Estate Agents and Redress Act 2007, s 3

CONSUMER MATTERS

(5) 'Consumer matters' means—

- (a) the interests of consumers, and
- (b) any matter connected with those interests.

Consumers, Estate Agents and Redress Act 2007, s 3

CONTEMPLATION

Canada [Income Tax Act, RSC 1985, c 1 (5 Supp), s 248(10).] '43. In *Trustco*, this Court accepted that the scheme of the Act provides for an expansive approach to the series issue. The starting point is the common law series taken from English where "each transaction in the series [is] pre-ordained to produce a final result" (*OSFC Holdings Ltd v Canada*, 2001 FCA 260, [2002] 2 FC 288, at para 24). This common law series is expanded by s 248(10) of the Act which deems any "related transactio[n]" which is completed "in contemplation of" a series to be part of that series. Section 248(10) provides: 248 ...

(10) For the purposes of this Act, where there is a reference to a series of transactions or events, the series shall be deemed to include any related transactions or events completed in contemplation of the series.

'44. The parties have agreed that the sale of VHH Holdings to Big City and the subsequent

amalgamation were part of a series. However, the agreed facts do not address whether the redemption transaction was part of this series. The question which must be answered is whether the redemption which gave rise to the tax benefit can be considered to be a "related transaction" which was done "in contemplation of" the prior series of transactions.

...
 '53. However, "contemplation" is defined by *The Oxford English Dictionary* (2nd ed. 1989) vol III, at p 811, as "[t]he action of contemplating or mentally viewing; the action of thinking about a thing continuously; attentive consideration, study." This definition does not require that the thing contemplated is either in the future or the past. Copthorne relies on the definition of "contemplation" in *Webster's Third New International Dictionary* (1986), at p 491, which includes "the act of looking forward to an event: the act of intending or considering a future event". As I have said, contemplation often does involve looking forward. However, these words are not exhaustive of the Webster definition. More general words precede, which are not limited to looking forward: "an act of the mind in considering with attention: continued attention to a particular subject ...: something for which such consideration is asked ...: the act of viewing steadfastly and attentively: the viewing of something ... for its own sake".

'54. The text and context of s 248(10) leave open when the contemplation of the series must take place. Nothing in the text specifies when the related transaction must be completed in relation to the series. Specifically, nothing suggests that the related transaction must be completed in contemplation of a subsequent series. The context of the provision is to expand the definition of a series which is an indication against a narrow interpretation.

...
 '56. The fact that the language of s 248(10) allows either prospective or retrospective connection of a related transaction to a common law series and that such an interpretation accords with the Parliamentary purpose, impels me to conclude that this interpretation should be preferred to the interpretation advanced by Copthorne.' *Copthorne Holdings Ltd v Canada* [2011] SCJ No 63, [2011] 3 SCR 721 at paras 43–44, 54, 56, per Rothstein J

CONTEMPT OF COURT

[For 9(1) Halsbury's Laws of England (4th Edn) (Reissue) para 402 see now 22 Halsbury's Laws

of England (5th Edn) (2012) para 2.]

CONTENTIOUS BUSINESS

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

CONTINUANCE OF INJURY OR DAMAGE

New Zealand [Mental Health Act 1969, s 124(4).] '[7] Section 124(1) of the MHA 1969 provides an immunity against civil or criminal liability in respect of acts done in pursuance or intended pursuance of the Act, unless those acts were done by a person acting in bad faith or without reasonable care.

'[8] Section 124(2) bars civil or criminal claims in respect of acts done in pursuance or intended pursuance of the Act, unless a High Court judge gives leave to proceed. To grant leave, the judge must be satisfied that there are substantial grounds for the contention that the relevant person acted in bad faith or without reasonable care.

'[9] Section 124(4) is central to this appeal, and provides the time limitation within which to bring a leave application:

- (4) Leave to bring such proceedings shall not be granted unless application for such leave is made within six months after the act complained of, or, in the case of a continuance of injury or damage, within six months after the ceasing of such injury or damage: Provided that in estimating the said period of six months no account shall be taken of any time or times during which the person injured was detained, whether lawfully or unlawfully, as a mentally disordered person, or was ignorant of the facts that constitute the cause of action, or of any time or times during which any defendant was out of New Zealand.

...

'[11] However, the main issue in this case is whether leave was precluded because the period of six months referred to in s 124(4) of MHA 1969 had expired.

'[12] Having found that the time bar in s 124(4) applied (which accords with the reasoning in *Crown Health Financing Agency v P* [[2009] 2 NZLR 149, CA]), MacKenzie J held that in cases of a continuance of injury or

damage, leave cannot be given unless application is made "within six months after the ceasing of such injury or damage". The Judge considered at para [8] that this provision contemplates a case where the cause of injury or damage is ongoing, not the situation where the cause of damage has ceased but effects of the damage continue.

[20] We have noted, at para [12] above, that the High Court Judge construed the "continuance of injury or damage" formula as applying to cases where the cause of injury or damage is ongoing, not where the cause of the damage has ceased to be operative but the effect of the damage is ongoing.

[21] Ms Ablett-Kerr took issue with the Judge's construction of the legislation. She suggested that the natural and ordinary meaning of the phrase is that which has been provided in the MHA 1969: that the six-month time period starts to run from the cessation of the injury or damage, rather than the cessation of the act causing injury or damage, as MacKenzie J implicitly contended. She said this was consistent with the established principle that legislative provisions, particularly procedural ones, which purport to restrict the normal rights of subjects to access the courts should be interpreted strictly. As authority, she relied on *Vermeulen v Attorney-General* (High Court, Whangarei, A 76/85, 6 March 1986), where Barker J held at p 8 that a six-month period in a similarly worded provision (s 129(4) of the Health Act 1956) had not begun to run where the damage was still continuing.

[22] By way of response, before the High Court and this Court, Ms Jagose advanced certain textual arguments and submitted that the substantial weight of authority favours MacKenzie J's interpretation: that "continuance of injury or damage" refers to situations where the "cause" of injury is ongoing, rather than where the "effect" or ongoing damage continues.

[23] As to the textual argument, the Crown suggests that s 124 can be divided into two parts: a "trigger" to identify when the six-month time period begins and a "postponement", allowing for particular time periods not to be included in the assessment of the six-month time period. Those periods are where a prospective plaintiff is detained as a mentally disordered person or was ignorant of the facts that constitute the cause of action, or where a prospective defendant was out of New Zealand. Ms Jagose argues that the reference in s 124(4) to "the act complained of" is referable to the act in respect of which the claim is brought in

s 124(1) and (2). The Crown submits that the reason for this focus on the act complained of is that s 124 is a preliminary provision where a court must consider the complaint, particularly whether there is evidence for any contention of bad faith or lack of reasonable care. Where the complaint indicates "a continuance of injury or damage", the "trigger" is the ceasing of the infliction of that injury or damage. Ms Jagose maintains that this analysis is also consistent with the orthodox approach to time periods in limitation statutes which commence to run on the accrual of a cause of action in tort, subject to any relevant "postponement".

[24] The foregoing textual approach is also consistent with the weight of judicial authority. In considering limitation time bars in a similar form to s 124(4), courts in England and Australia have consistently interpreted "continuance of injury or damage" as meaning that the tortious act (or omission) complained of must be continuing. The Crown, along with MacKenzie J, relied on the following authorities in this respect: *Carey v Metropolitan Borough of Bermondsey* (1903) 20 TLR 2 (CA); *Huyton and Roby Gas Company v Liverpool Corporation* [1926] 1 KB 146 (CA); and *Cox v Taylor* (1966) 114 CLR 629.

[25] The authority particularly relied upon by MacKenzie J and Ms Jagose was *Carey*, where Earl Halsbury LC held, in relation to s 1 of the Public Authorities Protection Act 1893 (UK), that "it was not unreasonable to provide that, if there was a continuance of an act causing a damage, the injured person should have a right to bring an action at any time within six months of the ceasing of the act complained of". Although Atkin LJ in *Huyton* expressed some discomfort with the *Carey* approach, opining at p 157 that it was "difficult to suppose that the word 'damage' means not the harmful effect of the act complained of but the act itself", he ultimately deferred to the decision in *Carey*, where continuance of injury or damage was held to mean the continuance of the act which caused the damage.

[26] That approach is consistent with the recent judgment of Lord Hoffmann in *A v Hoare* [2008] 2 WLR 311 (HL) at p 318, holding that, in the construction of a statute, regard should be had to the way in which a word or phrase has been construed by the courts in earlier statutes.

[27] To the extent that *Vermeulen* is authority for a more generous analysis than the *Carey* line of cases, Ms Jagose submits that that case was wrongly decided.

[28] The implications of deferring time running in a limitation period while damage

continues, rather than commencing time running when the act which causes the damage ceases, are immense. This policy concern, which has confronted the drafters of modern limitation statutes and law reformers alike, has given rise to an awareness that “guillotine” or long-stop provisions may be desirable in certain statutory contexts. For instance, the University of Alberta Institute of Law Research and Reform proposed a shorter limitation period based on discoverability together with a longer long-stop period for all situations save for a few specific exceptions (“Limitations” (Report for Discussion, No 4, 1986)). See also the New Zealand Law Commission, “Tidying the Limitation Act” (NZLC R61, 2000), pp 6–7, where an ultimate cut-off point ten years after the date on which the cause of action arose was advocated, although it was acknowledged that an “appropriate long-stop date cannot be a matter of exactitude”.

[29] The view which MacKenzie J took is in accord with a line of authority which has stood for over 100 years now. We are not persuaded that we should set that line of authority aside, particularly given that this is an area of the law where policy questions are largely left for resolution in the legislative rather than the judicial arena (see A McGee, *Limitation Periods* (5th ed, 2006), p 21). The Supreme Court of New Zealand has not seen it appropriate to institute such an exercise at the judicial level. In *Murray v Morel & Co Ltd* [2007] 3 NZLR 721, Tipping J held at para [76]:

“Piecemeal attempts by the Courts to cure the difficulties with the present outdated legislation have already created their own difficulties and have produced a distinct lack of harmony in the area being addressed. The surgery now required is beyond the proper province of the Courts.”

[30] We prefer to determine the meaning to be accorded to a “continuance of injury or damage” by recourse to the text of s 124 and the line of authority headed by *Carey*, rather than by analogical recourse to the debate around limitation periods. We agree with the Crown’s argument that Mr Longman’s approach to the “trigger” makes a nonsense of the time bar and means that time will seemingly never start to run for those who allege permanent mental injury. Thus, we agree with the Crown’s interpretation of a “continuance of injury or damage”, which limits the province of the “trigger” to situations where the cause of damage, rather than ongoing damage, continues.’ *Longman v Residual Health Management*

Unit [2008] NZCA 363, [2009] 2 NZLR 424 at [7]–[9], [11]–[12], [20]–[30], per Hammond J

CONTRACT

[For 9(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 601 see now 22 Halsbury’s Laws of England (5th Edn) (2012) para 201.]

Contract of record

[For 9(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 605 see now 22 Halsbury’s Laws of England (5th Edn) (2012) para 215.]

Contract made by deed

[For 9(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 616 see now 22 Halsbury’s Laws of England (5th Edn) (2012) para 216.]

Contract for the sale or other disposition of an interest in land

[Law of Property (Miscellaneous Provisions) Act 1989, s 2(1): ‘A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each’. Whether an oral agreement to compromise a boundary dispute came within s 2(1).] [24] In *Joyce v Rigolli* [2004] EWCA Civ 79, [2004] 1 P & CR D55, which concerned an oral boundary agreement whereby both parties in fact gave up some land (indeed, one of the parties, Mr Rigolli, consciously did so), the Court of Appeal held that Megarry J’s reasoning in regard to the interpretation of ‘contract to convey’ in s 10(1) of the 1925 Act applies equally to the interpretation of ‘contract for the sale or other disposition’ in s 2(1) of the 1989 Act.

...

[29] In my view, *Joyce v Rigolli* is binding authority for the proposition that an oral demarcation agreement, that is an agreement to demarcate an unclear boundary described in title documents or delineated on a plan, is not void by virtue of s 2(1) of the 1989 Act even though the agreement has a disposing effect, because the words “a contract for” in s 2(1) refer to an agreement which has a disposing purpose.

[30] The appellants submit that this interpretation of s 2(1) does not apply where more than a trivial amount of land is disposed

of. I do not agree. As we have seen, the Court of Appeal in *Joyce v Rigolli* applied the reasoning of Megarry J in *Neilson v Poole* [(1969) 20 P & CR 909, 210 EG 113], and it was no part of Megarry J's reasoning that a contract to demarcate which has a disposing effect is a contract to convey where more than a trivial amount of land is disposed of. Moreover, Arden LJ's interpretation of s 2(1), at para [31] of her judgment, was not dependent upon the fact that only a trivial amount of land was disposed of; indeed, she only mentioned this, at para [32] of her judgment, in connection with the fact that there was a conscious transfer of land. In my view, therefore, Arden LJ was of the opinion that a demarcation agreement which has a disposing effect does not fall foul of s 2(1) unless it has a disposing purpose *and* more than a trivial amount of land is disposed of. It is clear that Sir Martin Nourse was of the same opinion: he not only agreed with Arden LJ's reasoning but also said that there were two ways of looking at the boundary agreement in that case, one being that it only had a disposing effect, the other being that the *de minimis* principle applied.

'[31] The appellants also submit that this interpretation of s 2(1) applies only to boundary agreements, and in relation to any other type of agreement, such as the compromise agreement in the present case, the correct interpretation of s 2(1) is that it applies if the agreement has a disposing effect even if not a disposing purpose.

'[35] As a matter of interpretation, I reject the appellants' submission that s 2(1) distinguishes between demarcation agreements and other types of agreement. Parliament has not impliedly enacted that a demarcation agreement need not comply with s 2(1): s 2(5) expressly excepts certain types of contract from the scope of the section, but demarcation agreements are not mentioned, and I do not think it is possible to imply a further exception. The reason why a demarcation agreement does not have to be in writing is simply because, as the Court of Appeal held in *Joyce v Rigolli*, the words "a contract for" in s 2(1) refer to an agreement which has a disposing purpose, whereas a demarcation agreement does not have a disposing purpose. It may have a disposing effect, but this is "not the acid test", as Arden LJ put it. But if a disposing effect is not the acid test in relation to a boundary agreement, I do not see how it can be the acid test in relation to other agreements. After all, s 2(1) refers generally to "a contract" and "land", without distinguishing between boundary agreements

and other agreements, or between a boundary and any other land, and I do not see how, even on a purposive interpretation, one can give the word "for" one meaning in relation to boundary agreements and a different meaning in relation to other agreements.

...
'[37] I conclude that the compromise agreement is not an agreement "for the sale or other disposition of an interest in land" within the meaning of s 2(1) of the 1989 Act, so that despite being oral it is a valid contract.' *Yeates v Line* [2012] EWHC 3085 (Ch), [2013] 2 All ER 84 at [24], [29]–[31], [35], [37], per Kevin Prosser QC

Contract of insurance

Canada '4.... The ASRA Program [Programme d'assurance stabilisation des revenus agricoles] is not a contract of insurance but simply an innominate contract under the civil law. It cannot be subject to the rule of interpretation based on the reasonable expectations of the insured that applies to a contract of insurance as defined in the *Civil Code of Québec* ("CCQ"). While it is true that the contract must be interpreted having regard to the public interest and to La Financière's social objective, it is nonetheless governed exclusively by private law, not by public law. For the purpose of determining the compensation payable to its participants, the ASRA Program gives La Financière a discretion to determine how to calculate any other income they have received from government sources. La Financière exercised that discretion in accordance with the requirements of good faith and contractual fairness, which means that the appellants are not entitled to the amounts they claim.

...
'55. In our view, the ASRA Program is not a contract of insurance and cannot be subject to the rules applicable to such contracts. It does not have the three main characteristics of a contract of insurance set out in art 2389 CCQ, namely (i) an obligation on the client to pay a premium or assessment; (ii) the occurrence of a risk; and (iii) an obligation on the insurer to make a payment to the client if the insured risk occurs. ...' *Ferme Vi-Ber Inc v Financière Agricole du Québec* [2016] SCJ No 34, 2016 SCC 34 at paras 4, 55, per Wagner and Gascon JJ

Executed contract

[For 9(1) Halsbury's Laws of England (4th Edn) (Reissue) para 606 see now 22 Halsbury's Laws of England (5th Edn) (2012) para 205.]

Executory contract

[For 9(1) Halsbury's Laws of England (4th Edn) (Reissue) para 606 see now 22 Halsbury's Laws of England (5th Edn) (2012) para 205.]

Illegal contract

[For 9(1) Halsbury's Laws of England (4th Edn) (Reissue) para 869 see now 22 Halsbury's Laws of England (5th Edn) (2012) para 452.]

Simple contract

[For 9(1) Halsbury's Laws of England (4th Edn) (Reissue) para 618 see now 22 Halsbury's Laws of England (5th Edn) (2012) para 218.]

Void contract

[For 9(1) Halsbury's Laws of England (4th Edn) (Reissue) para 607 see now 22 Halsbury's Laws of England (5th Edn) (2012) para 207.]

Voidable contract

[For 9(1) Halsbury's Laws of England (4th Edn) (Reissue) para 607 see now 22 Halsbury's Laws of England (5th Edn) (2012) para 207.]

CONTRAVENTION

Australia [Migration Act 1958 (Cth), s 261A: automatic forfeiture of things used in contravention of the Act.] '[51] The ordinary meaning of "contravene" when used in an Act is given by s 22(1)(j) of the Acts Interpretation Act, which provides:

22(1) In any Act, unless the contrary intention appears:

- ...
(j) *Contravene* includes fail to comply with.

Because it was not an offence to contravene s 42(1), if s 261A is construed as operating to effect an automatic forfeiture upon the commission of an offence, the ship will not have been forfeit to the Commonwealth for a contravention of s 42(1). However, the opposite will obtain, if s 261A is construed as operating on

any contravention of the Act: including a non-criminal failure to comply with any provision of the Act such as s 42(1).

...
[60] The chapeau to s 22(1) of the Acts Interpretation Act qualified the meaning of the terms defined with the words "unless the contrary intention appears". Thus the real question here is whether "contravene" was used in s 261A of the Migration Act in a sense where a contrary intention appeared. I am of opinion that it was. First, the heading to Div 13A suggests that it was. Second, the use of the remedy of forfeiture by the parliament brings about the consequence that a person is deprived of his or her or its property. Third, s 261A can result in a completely innocent person forfeiting property if it were used by someone else or involved in the relevant contravention: compare *Saeed v Minister for Immigration and Citizenship* (2010) 267 ALR 204; 115 ALD 493; [2010] HCA 23 at [15] (*Saeed*) per French CJ, Gummow, Hayne, Crennan, and Kiefel JJ.

...
[70] The word "contravention" can include a disobedience which consists merely in abstaining from doing an act, a failure to perform a positive requirement, as well as disobedience of a negative command: *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Amalgamated Engineering Union, Australian Section* (1953) 89 CLR 636 at 649; [1953] ALR 821 at 826 per Dixon CJ, Webb, Fullagar and Kitto JJ. The word "contravention" can mean both an offence and a mere non-trivial breach of a norm set by an enactment.

[71] The question is in what sense did the parliament intend to use the word when it employed it in s 261A. That sense can be elucidated by considering the heading to Div 13A in which the section was found. It suggested that its provisions dealt with the consequences of offences against the Act as opposed to every non-conformity with any of its provisions, whether criminal or civil. The consequence of forfeiture on an innocent owner of property that others use, without his or her or its knowledge or approval, can be draconian and unjust.

[72] The word "contravention" is used variously in legislation to signify both the commission of an offence as well as a non-compliance with some provision or norm set out in the Act, whether by a person's acts or omissions. "Contravention" is not a word that signifies one single discrete legal concept. As Bray CJ suggested in *Dimella Constructions*

Pty Ltd v Stocker (1976) 14 SASR 215 at 221–2 (*Dimella*) the word “contravention” can be used in statutes to link civil liability to the actual existence of criminality liability. He held that a person entitled to be acquitted of an offence on the ground of an honest and reasonable mistake of fact had not contravened criminally or civilly a legislative prohibition by doing the proscribed act. That was because the parliamentary intention, disclosed there, was to “tie up civil irrecoverability with criminal liability”: *Dimella* at 221 and see too per Jacobs and King JJ at 224. The sense in which “contravention” is used in s 261A(1) is not self-evident from the terms of the section itself. Therefore, the context in which the word is used in Div 13A may provide assistance in ascertaining which of the different meanings of “contravention” the parliament intended be given effect in providing for automatic forfeiture.

...
[80] Here, the construction of s 261A must be approached by considering the context in which it appears in the Act itself, including the heading to Div 13. I am of opinion that the heading makes clear that the purpose for which s 261A was enacted is accurately described in the heading to Div 13A, namely to provide an automatic forfeiture in respect of offences of the kind referred to in the section. It is not simply to provide automatic forfeiture for any contravention at all of the Act, even if there be no contravention of the criminal law. This construction is confirmed by the second reading speech and explanatory memorandum.

...
[90] For these reasons and the additional reasons given by Besanko J whose reasons I have had the privilege of reading, the primary judge erred in construing s 261A(1) as relating to any contravention, including the civil contravention which he found namely, a contravention of s 42(1) in the use of the appellant’s ship to have him and the other 52 unlawful non-citizens travel to Australia without visas.’

...
[182] As an ordinary English word, *contravention* is capable of a wide meaning and one which includes breaches of statutory rules of conduct or norms as well as offences. A dictionary definition of the verb “contravene” is as follows:

1.v.t 1. go counter to; infringe (a law, rule, etc);

Historical Principles, 3rd ed, Clarendon Press, Oxford, 1993.

[183] Furthermore, s 22(1)(j) of the AIA provides that, unless the contrary intention appears, “contravene includes failure to comply with”.

[184] There are many examples in Commonwealth legislation of the words “contravene” or “contravention” being used to describe breaches of sections which do not constitute criminal offences, although usually some form of civil penalty or relief attends the breach: see, for example, ss 52, 80, 82 and 87 of the Trade Practices Act 1974 (Cth); Pt 9.4B of the Corporations Act 2001 (Cth).

[185] There are authorities too which make it clear that, depending on the statutory context, contravention may have a wider meaning than offence. It is sufficient to refer to *Dimella Constructions Pty Ltd v Stocker* (1976) 14 SASR 215; *Banwell v Erceg* [1984] 1 NSWLR 90; *Re Venice Nominees Pty Ltd (rec and mgr apptd) (in liq)* (1992) 108 FLR 237 at 242 per Miles CJ; *Re Centennial Coal Co Ltd* (2006) 226 ALR 341; 56 ACSR 698; [2006] NSWSC 62 at [15] per Barrett J.

...
[206] The matters to which I have referred suggest that the word *contravention* in s 261A should be construed as being limited to offences, and as not including a breach of s 42(1). Any remaining uncertainty or ambiguity should be resolved in favour of a narrow construction of the word having regard to two important principles of construction. First, parliament should not be taken to deprive a person of an existing property right unless it expresses its intention in clear and unmistakable language: *Coco v R* (1994) 179 CLR 427 at 437–8; 120 ALR 415 at 419–20 per Mason CJ, Brennan, Gaudron and McHugh JJ; *Bropho v Western Australia* (1990) 171 CLR 1 at 17–18; 93 ALR 207 at 214–15 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ. Second, the forfeiture of property is a penalty and a section providing for forfeiture should be strictly construed: *Jeffrey v DPP (Cth)* (1995) 121 FLR 16 at 19; (1995) 79 A Crim R 514 at 517–18 per Cole JA; *Studman v DPP (Cth)* (2007) 177 A Crim R 34; [2007] NSWCA 285 at [7] per McClellan CJ at CL. Even if this second “principle” comes to be applied in a different way in the future, it remains a relevant consideration: see *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; 260 ALR 1; [2009] HCA 41 at [55]–[57] per Hayne, Heydon, Crennan and Kiefel JJ.

...
 '[208] In my respectful opinion, the primary judge erred in concluding that the word *contravention* in s 261A includes a breach of s 42(1) of the Act.' *Tran v Commonwealth* [2010] FCAFC 80, (2010) 271 ALR 1 at [51], [60], [70]–[72], [80], [90], per Rares J, and at [182]–[185], [206], [208], per Besanko J

CONTRIBUTION

[For 16(2) Halsbury's Laws of England (4th Edn) (Reissue) para 458 see now 47 Halsbury's Laws of England (5th Edn) (2014) para 58.]

Insurance

[For 25 Halsbury's Laws of England (4th Edn) (2003 Reissue) paras 496–497 see now 60 Halsbury's Laws of England (5th Edn) (2011) paras 233–234.]

CONTRIBUTORY

[Note. The reference to 7(3) Halsbury's Laws of England (4th Edn) (2004 Reissue) para 2463 et seq should be to 7(4) Halsbury's Laws of England (4th Edn) (2004 Reissue) para 703 et seq.]

[For 7(4) Halsbury's Laws of England (4th Edn) (2004 Reissue) para 703 et seq see now 17 Halsbury's Laws of England (5th Edn) (2011) para 661 et seq.]

CONTROL

[Under the Sexual Offences Act 2003, s 53(1) a person commits an offence if he intentionally controls any of the activities of another person relating to that person's prostitution and he does so for or in the expectation of gain.] '[1] The main point in this appeal concerns the meaning of the word "control" in s 53(1) of the Sexual Offences Act 2003, which created a new offence of controlling the activities of a prostitute for gain in place of the previous statutory offence of living on the earnings of prostitution.

...
 '[20] In our judgment, "control" includes but is not limited to one who forces another to carry out the relevant activity. "Control" may be exercised in a variety of ways. It is not necessary or appropriate for us to seek to lay down a comprehensive definition of an ordinary English word. It is certainly enough if a defendant instructs or directs the other person to

carry out the relevant activity or do it in a particular way. There may be a variety of reasons why the other person does as instructed. It may be because of physical violence or threats of violence. It may be because of emotional blackmail, for example, being told that "if you really loved me, you would do this for me". It may be because the defendant has a dominating personality and the woman who acts under his direction is psychologically damaged and fragile. It may be because the defendant is an older person, and the other person is emotionally immature. It may be because the defendant holds out the lure of gain, or the hope of a better life. Or there may be other reasons.

'[21] Sex workers are often vulnerable young women with disturbed backgrounds, who have never known a stable relationship or respect from others and are therefore prey to pimps. It is all too easy for such a person to fall under the influence of a dominant male, who exploits that vulnerability for financial gain. Exploitation of prostitution for financial gain is the broad mischief against which s 53 is aimed, whether or not it involves intimidation of the prostitute or prostitutes concerned. At one stage it was submitted by Mr Gerasimidis that some degree of absence of free will on the part of the prostitute is an essential ingredient of control. But on the reflection he withdrew that submission and, in our judgment, he was right to do so. If, for example, a group recruits young women from overseas and puts them to work in organised prostitution in the United Kingdom, we do not see any ground for saying that the prosecution would have to prove absence of free will in order to be able to show that the organisers were controlling the activities of the women for gain.

'[22] Although, as we have stressed, we do not seek to substitute alternative words for the word "control" which Parliament has used, our approach to the interpretation of the word in its statutory content is consistent also with its ordinary English usage. The Concise Oxford Dictionary defines "in control of" as "directing an activity". It defines the noun "control" as "power of directing, command". By contrast, it does not include the words "compel, force or coerce", although they would doubtless be forms of control.' *R v Massey* [2007] EWCA Crim 2664, [2008] 2 All ER 969 at [1], [20]–[22], per Toulson LJ

Effective control

New Zealand [Under the Proceeds of Crime Act 1991, s 43(3)(b), one of the criteria for the

grant of a restraining order is that there are reasonable grounds for believing that the property is subject to the 'effective control' of the respondent.] '[24] With respect to the concept of effective control, the legislative intent expressed in s 43(3) and (4) and s 29 of the Act suggests that the court is not to be limited in its inquiries by legal or equitable rights of ownership. This proposition derives support from the commentary on s 29 of the Act in *Adams on Criminal Law – Sentencing* (looseleaf ed), which states at para PC29.01 that:

"This section is intended to enable the Court to go behind any corporate structure, trust, family relationship, or the like disguising the true and effective control of property by a particular person. In such situations, the Court is to determine whether particular property is to be treated as the property of offenders not by reference to their legal or equitable rights, but by reference to the degree to which they are able to treat the property as their own: *DPP v Walsh* [1990] WAR 25 (1990) 43 Crim R 266. In other words, as expressed in *Connell v Lavender* (1991) 7 WAR 9, the question is whether the defendant in fact has the power to regulate possession, use, or disposition of the property in question (that is, the de facto power to give or refuse consent to a proposed course of action in relation to it)."

'[25] *Director of Public Prosecutions v Walsh* [1990] WAR 25 involved a doctor who fraudulently forged his patients' signatures to vouchers that he then billed to, inter alios, the Australian Health Insurance Commission. As part of his sentence, the Judge ordered that he pay \$303,423.78 in reparation to the Commonwealth. He did not make this reparation and, as a result, the Director of Public Prosecutions applied under the Proceeds of Crime Act 1987 (Cth) to obtain a declaration that properties owned by the defendant be made available to satisfy that order. That Act required under s 28(3) that the properties be under the effective control of the defendant for such an order to be made. Seaman J, giving the judgment of the Supreme Court of Western Australia, accepted at p 34 the submission that effective control:

"... means that degree of control which results in Walsh being able to treat these properties as his own at the date on which an order under s 28(3) might be made."

'[26] In *Connell v Lavender* (1991) 7 WAR 9 the Supreme Court of Western Australia again considered the issue of effective control. That case involved a search warrant pursuant to the Crimes (Confiscation of Profits) Act 1988 (WA), seeking to gather information with a view to an application for a confiscation order or a restraining order. A specific definition of effective control was provided in that Act. However, the Court first considered the general meaning of effective control, Rowland J finding at p 22:

"In my opinion, the ordinary meaning of 'control' is de facto control or control in fact. The question then is: what effect does the adjective 'effective' have upon the meaning?... In my opinion, 'effective control' in the context of the statute means de facto control. The expression contemplates control that is practically effective, in the sense that the person concerned has in fact the capacity to control the possession, use, or disposition of the property."

The definition of effective control contained in the relevant legislation in *Connell v Lavender* was wider than that expressed at p 22.

'[27] These cases support the proposition that, when considering the issue of tracing the proceeds of crime, the court is entitled to consider the real, de facto position of the respondent in relation to the property. The intent is that the respondent should not profit from his crime purely because of the legal structure by which he chooses to organise his assets. In order to determine whether the respondent had effective control of the property, the court must ask whether in fact the respondent had the capacity to control, use, dispose of or otherwise treat the property as his own.' *Solicitor-General v Bartlett* [2008] 1 NZLR 87 at [24]–[27], per Stevens J

Of company

[For the Income and Corporation Taxes Act 1988, s 840 see now the Corporation Tax Act 2010, s 1124; and for the Income and Corporation Taxes Act 1988, s 416(2) see now the Corporation Tax Act 2010, s 450.]

Under the control of a government institution

Canada [Appeal from a Federal Court decision dismissing an application for judicial

review of a decision by the Canadian Human Rights Commission to disclose a final audit report containing findings about compliance with the Employment Equity Act 1995 by the Canadian Imperial Bank of Commerce (the appellant CIBC). The CIBC argued that since the Employment Equity Act 1995, s 34 prohibits the release of the information which it provided to the Commission without its consent, it had the power to decide if the information was to be released. This argument turned on the meaning of the phrase 'under the control of a government institution' found in the Access to Information Act 1985 ('ATIA'), s 4.] '[23] The CIBC's argument on this issue turns on the meaning of "under the control of a government institution," a phrase which is found in section 6 of the ATIA ... and section 4 [as am by SC 1992, c 1, s 144, Sch VII, item 1(F); 2001, c 27, s 202], reproduced below:

4.

(1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is

(a) a Canadian citizen, or

(b) a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*,

has a right to and shall, on request, be given access to any record under the control of a government institution.

'[24] The CIBC's argument, briefly stated, is that since section 34 prohibits the release of the information which it provided to the Commission without its consent, it has the power to decide if the information is to be released. As a result, the information is not within the control of the government institution.

'[25] The CIBC relies upon *Andersen Consulting v Canada* [2001] 2 FC 324 (TD) (*Andersen Consulting*) for the proposition that where material in the Crown's hands is subject to a limitation as to the use to which it may be put, that material is not within the control of a government institution. In *Andersen Consulting*, the limitation was the implied undertaking which, it will be recalled, is the rule which precludes the use of information obtained in the course of the discovery process in civil litigation for any purpose other than the litigation itself.

'[26] As there is no statutory definition of control, the Commission relies upon *Canada Post Corp v Canada (Minister of Public Works)* [1993] 3 FC 320 (TD) for the proposition that records which are in the possession of the

government are within its control.

'[27] The application Judge noted the introductory words of section 4, "notwithstanding any other Act of Parliament," and interpreted them to mean that the "provisions of the ATIA take precedence over other statutory provisions restricting disclosure, except for those provisions included in Schedule II of the ATIA": see reasons for decision, at paragraph 47. The broad exemption of the statutory provisions listed in Schedule II arises from section 24 of the ATIA:

24. (1) The head of a government institution shall refuse to disclose any record requested under this Act that contains information the disclosure of which is restricted by or pursuant to any provision set out in Schedule II.

'[28] Section 34 of the EEA does not appear in Schedule II of the Act. The application Judge concluded from this that Parliament intended the ATIA to apply to information in the Commission's hands, notwithstanding the privilege created by section 34.

'[29] Finally, the application Judge distinguished *Andersen Consulting* on the basis that while the implied undertaking kept the control over the documents in question out of the Crown's hands, in the present case, the legal obligations created by the EEA and the ATIA put the control over the final report into the Commission's hands. No legal restriction such as section 34 of the EEA operated to remove control of the final report from the Commission.

'[30] The application Judge concluded that exempting the information protected by section 34 of the EEA from the operation of the ATIA would deprive the broad language of section 4 ("notwithstanding any other Act of Parliament") of any practical significance.

'[31] The CIBC attacked the application Judge's conclusion by pointing to the *Treasury Board Manual: Access to Information Policy and Guidelines* [Chapter 2-00 "Guidelines - General"] which define "under the control" as follows:

Under the control (relever de) — A record is under the control of a government institution when that institution is authorized to grant or deny access to the record, to govern its use and, subject to the approval of the National Archivist, to dispose of it.

'[32] In addition, the CIBC pointed to other statutory dispositions which limit the use to

which information gathered under the EEA may be put. ...

[34] The CIBC also revisited the *Andersen Consulting* case and pointed out that the key to the reasoning in that case was the distinction between, on the one hand, a unilateral limitation imposed by one party or a mere contractual limitation on the use which may be made of information and, on the other hand, a condition imposed by the law itself on the government institution which receives a document. In this case, the CIBC argued that the Commission received the CIBC information subject to the limits imposed by section 34 so that the case fell squarely within the principle set out in *Andersen Consulting*.

[35] In addition, the CIBC challenged the application Judge's reasoning with respect to section 4 of the ATIA by pointing out that the latter only applies if the information in question is under the control of the government institution. As a result, the question of whether a record is under the control of the government institution must be answered without regard to section 4. The application Judge erred to the extent that he reasoned that the final report was under government control because section 4 applied "notwithstanding any other Act of Parliament".

[36] As a preliminary matter, I am satisfied, on the basis of the colour coded material filed by the CIBC that the bulk of the information contained in the final report was information provided to the Commission in the course of the EEA audit, and was not drawn from public sources. To that extent, there is a factual foundation for the argument that the final report is caught by the privilege created by section 34 of the EEA. In my view, the application Judge erred when he concluded that it was sufficient that the information in the final report be of the same sort as information in the public record. As will be seen later, the test is whether the information itself can be found in the public record.

[37] The question as to whether records are under the control of a government institution has arisen on a few occasions. The jurisprudence was summarized by Hugessen J in *Andersen Consulting*, as follows at paragraph 14:

While there appears to be virtually no jurisprudence under the *National Archives of Canada Act*, the cases under the *Access to Information Act* have taken a generous view of the sense to be given to the concept

of control. In particular, it has been held that an obligation of confidentiality imposed by the originator of the document (*Baldasaro, Blacklock and Tucker v Canada* (1986) 4 FTR 120 (FCTD)), by the governmental recipient (*Canada (Information Commissioner) v Canada (Immigration and Refugee Board)* (1997) 4 Admin LR (3d) 96 (FCTD)), or by a party entering into contractual relations with the government (*Canada Post Corp v Canada (Minister of Public Works)* [1995] 2 FC 110 (CA)), do not operate to remove such documents from being in the "control" of a government department within the meaning of that statute.

[38] In short, an expectation of confidentiality arising from the dealings between the source of the record and the government institution is not sufficient to withdraw a record from the control of the government institution.

[39] *Andersen Consulting* is not an ATIA case. *Andersen Consulting* deals with section 5 of the *National Archives of Canada Act*, RSC, 1985 (3rd Supp), c 1, which prohibits the destruction or disposition of records "under the control of a government institution." It is the use of this phrase in both the *National Archives of Canada Act* and ATIA which invites the application of the reasoning in that case to the facts of the present dispute.

[40] The difficulty with the CIBC's argument is that it confounds control of the record and control of the information. If one were to draw an analogy, one might think of the difference between ownership of a book and ownership of the copyright in the content of the book. The owner of a book has the control of the physical volume, even though he or she may not be authorized to reproduce the work contained in that book.

[41] In the same way, the Commission has control of the final report, considered as a record, even if there may be limits on the use which it may make of the information contained in the report. The fact that section 34 imposes certain limits on the Commission's ability to disseminate the information contained in the record is not a reason for concluding that the record itself is not under the control of the Commission. While the application Judge did not employ this reasoning, he came to the same conclusion and so, there is no reason to interfere with his conclusion on this issue.' *Canadian Imperial Bank of Commerce v Canada (Chief Comr, Human Rights Commission)* [2008] 2 FCR 509, 283 DLR (4th) 513, [2007] FCJ No

1113, 2007 FCA 272 at [23]–[32], [34]–[41], per Pelletier JA

CONVERSION

[For 16(2) Halsbury's Laws of England (4th Edn) (Reissue) para 701 see now 47 Halsbury's Laws of England (5th Edn) (2014) para 138.]

CONVERTED FOR A SPECIFIC USE IN FARMING

Canada [Highway Traffic Act, RSO 1990, c H.815, s 1(1).] '15. Turning to the statutory definition of a "self-propelled implement of husbandry", there is no dispute that the appellant's vehicle is self-propelled. The appellant says that it comes within the exception because he "converted" it "for a specific use in farming" namely, the irrigation function needed for his farming operations.

'16. The New Shorter Oxford Dictionary defines "convert" as "to change into something different; to change in character or function; to transform." This definition suggests two things when applied to the statutory language in this case. First, the change must be significant enough to transform the vehicle into something different.

'17. Second, since the change must be enough to change the essential character of the vehicle, that suggests that the change must have an objective quality and that the subjective intention of the end user is not enough. The need for change that is objectively apparent for a vehicle to be "converted for a specific use" is also consistent with the other ways that the statutory definition provides for a vehicle to come within this exception. For example, a vehicle that is "manufactured" or "designed" for a specific use in farming has an objectively discernable character or function that does not depend at all on the particular use intended by the end user. Thus, I do not agree with the appellant that the use intended by the appellant is what matters.

'18. However, I also do not agree with the Crown that the exception requires that the vehicle be capable only of the specific use in farming for which it was manufactured or converted. Section 7(2) of the HTA requires that a self-propelled implement of husbandry requires a permit when operated on a highway other than in relation to a specific use for which it was manufactured or converted. Such a provision would be unnecessary if the exception required that the vehicle be incapable of any use

(including its former use) other than the specific use that qualifies it for the exception.

'19. In my view, to be "converted for a specific use in farming" a vehicle must be changed significantly enough that, viewed objectively, its essential character or function has been transformed for that specific use, although it may retain some limited capacity for other functions. The transformation cannot just be for general use in farming, it must be for a specific use.' *R v Vanberlo* [2010] OJ No 1307, 2010 ONCA 242, 94 MVR (5th) 11, Ont CA, at paras 15–19, per S T Goudge JA

CONVEYANCE

Conveyance on sale

Australia '[4] The issue on this appeal by the Commissioner of State Taxation for South Australia (the commissioner) is whether an instrument identified as a deed of retirement dated 23 December 2004 (the retirement deed) was a "conveyance on sale" within the meaning of s 60 of the Stamp Duties Act 1923 (SA) (the Act) and thereby was charged with stamp duty pursuant to s 4 of the Act.

'[5] Section 4 of the Act is a provision which attracts the general principle that stamp duty is levied on instruments, not on the underlying transactions to which they give effect, so that it is a matter, in the present case, of ascertaining the subject matter with which the retirement deed deals according to its terms.

... '[16] Stamp duty is charged in respect of the instruments specified in Sch 2 to the Act: s 4. The litigation has been conducted on the footing that duty is chargeable on the retirement deed as a "[c]onveyance or transfer on sale of any property" under cl 3(1) of Sch 2. Section 60 of the Act contains definitions of "conveyance" and "conveyance on sale". The respondents, having regard to the provenance of the retirement deed as a schedule to the sale and purchase agreement, presented their case on the basis that if the commissioner were correct that the retirement deed was a "conveyance", there was no further point that this instrument nevertheless was not a "conveyance on sale".

'[17] The term "conveyance" is defined in s 60 as including every instrument "by which or by virtue of which or by the operation of which ... any ... personal property or any estate or interest in any such property is assured to, or vested in, any person". The term "interest" is

defined in s 2(1) as including any inchoate equitable interest.

[18] The reasoning of the Full Court turned upon the proposition that the retirement deed did not effect any transfer of the one-sixth interest of Mrs Doris Henschke in the assets of the partnership; rather, that interest had ceased, because it was “satisfied” by the payment made under cl 2 of \$5,885,298, “in full satisfaction of all claims she has against the Partnership”.

[19] However, the commissioner submits, perhaps more emphatically than before the Full Court, that this characterisation of the retirement deed gives insufficient weight to its effect upon the legal relationship between the parties. Section 20(1) of the Partnership Act had required that all interests in property brought into the partnership conducted under the 1986 Partnership Agreement be held and applied by the partners exclusively for the purposes of that partnership. Upon the retirement of Mrs Doris Henschke as provided in cl 1 of the retirement deed, this partnership was dissolved, albeit without a “general” dissolution in the sense described above. The legal effect of the succeeding clauses of the retirement deed was to constitute a new partnership between Cyril Henschke, Henschke Cellars and Mr Stephen Henschke in the shares specified in cl 5 and otherwise on the same terms as those of the 1986 Partnership Agreement. The contract which had been expressed in the 1986 Partnership Agreement was discharged by accord and satisfaction, as described by Dixon J in *McDermott v Black* [(1940) 63 CLR 161 at 183–4; [1940] HCA 4]. The assets previously committed to the dissolved partnership were, by reason of the operation of the retirement deed, to be held and applied, in accordance with s 20(1) of the Partnership Act, for the purposes of the second partnership.

[20] The commissioner submits that it follows that the retirement deed was an instrument, in the terms of the definition of “conveyance” in s 60 of the Act, by which, or by virtue of which, or by the operation of which, personal property vested in the members of the second partnership. That submission should be accepted.’ *Comr of State Taxation v Cyril Henschke Pty Ltd* (ACN 007 691 018) [2010] HCA 43, (2010) 272 ALR 440 at [4]–[5], [16]–[20], per French CJ, Gummow, Hayne, Heydon and Kiefel JJ

CONVOCATION

[For 14 Halsbury’s Laws of England (4th Edn) para 442 see now 34 Halsbury’s Laws of

England (5th Edn) (2011) para 152.]

CO-OPERATIVE

[For 1(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 580 note 3 see now 1 Halsbury’s Laws of England (5th Edn) (2008) para 1317.]

COPARCENARY

[For 39(2) Halsbury’s Laws of England (4th Edn) (Reissue) paras 224–225 see now 87 Halsbury’s Laws of England (5th Edn) (2017) paras 192–193.]

COPYRIGHT

[For 9(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 3 see now 23 Halsbury’s Laws of England (5th Edn) (2016) para 503.]

CORPORATE MANSLAUGHTER— CORPORATE HOMICIDE

- (1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised—
 - (a) causes a person’s death, and
 - (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.
- (2) The organisations to which this section applies are—
 - (a) a corporation;
 - (b) a department or other body listed in Schedule 1;
 - (c) a police force;
 - (d) a partnership, or a trade union or employers’ association, that is an employer.
- (3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1).
- (4) For the purposes of this Act—
 - (a) ‘relevant duty of care’ has the meaning given by section 2, read with sections 3 to 7;
 - (b) a breach of a duty of care by an organisation is a ‘gross’ breach if the conduct alleged to amount to a breach

of that duty falls far below what can reasonably be expected of the organisation in the circumstances;

- (c) ‘senior management’, in relation to an organisation, means the persons who play significant roles in—

- (i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organised, or
- (ii) the actual managing or organising of the whole or a substantial part of those activities.

- (5) The offence under this section is called—

- (a) corporate manslaughter, in so far as it is an offence under the law of England and Wales or Northern Ireland;
- (b) corporate homicide, in so far as it is an offence under the law of Scotland.

- (6) An organisation that is guilty of corporate manslaughter or corporate homicide is liable on conviction on indictment to a fine.

- (7) The offence of corporate homicide is indictable only in the High Court of Justiciary.

(Corporate Manslaughter and Corporate Homicide Act 2007, s 1)

CORPORATION

Corporation aggregate

[For 9(2) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 1109 see now 24 Halsbury’s Laws of England (5th Edn) (2010) para 312.]

Corporation sole

[For 9(2) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 1111 see now 24 Halsbury’s Laws of England (5th Edn) (2010) para 314.]

CORROBORATION

[For 11(2) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 1141 see now 28 Halsbury’s Laws of England (5th Edn) (2015) para 539.]

CORRUPT PRACTICE

[For 15(3) Halsbury’s Laws of England (4th Edn) (2007 Reissue) para 707 see now 38A

Halsbury’s Laws of England (5th Edn) (2013) para 704.]

CORRUPTLY

See also BRIBE

[Prevention of Corruption Act 1906, s 1 (now repealed).] ‘[1] In this appeal the appellants (“the prosecution”) challenge the ruling made by a judge of the Crown Court in relation to what the prosecution has to prove under s 1 of the Prevention of Corruption Act 1906 (“the 1906 Act”). The respondents (“the defendants”) are indicted with conspiracy, “corruptly to give agents” of the tax authorities of a State in the Commonwealth a substantial sum of money as an inducement to show favours to a company in relation to the calculation of tax owed by that company to the tax authorities.

‘[2] The judge held that it was necessary for the prosecution to prove that the agents of the tax authorities did not have the consent of the tax authorities, as their employer or principal, to receive the sum of money or other consideration.

...
‘[8] Before turning to the detail of the 1906 Act and some Commonwealth authority, it is necessary briefly to set out the nature of the issue.

- (i) It was contended by Mr Andrew Edis QC on behalf of the prosecution that the prosecution had to prove the ingredients set out in the statute—the defendant was an agent, he accepted the consideration, that this was for the prohibited purpose and that it was done corruptly. It was for the jury, looking at all the facts, to determine whether the payment or other advantage made or accepted was made “corruptly”. There might be submissions of law on the evidence adduced in the course of the prosecution case as to whether a jury, properly directed, was entitled to find that the payment had been made or received corruptly, but it was not necessary to provide a gloss to that term. It was not necessary to show that it was contrary to the interests of his principal or that the payment had been made without the knowledge and consent of the principal.

- (ii) On behalf of the defendants it was contended by Mr Hugo Keith QC that

the term “corruptly” connoted secrecy. As the 1906 Act had been formulated in terms of principal and agent, it must follow that a payment could not be secret if it was made with the knowledge and consent of the principal. Thus it must be for the prosecution to prove, as part of its case, the specific ingredient of lack of knowledge or informed consent by the principal; in essence the element of corruption was the doing of the act prohibited without having first made full disclosure to the principal and obtaining his informed consent.

...

‘[24] The issue before us is one of statutory construction. In our judgment the words are clear. It has to be shown that the payment was made corruptly and for the prohibited purpose. In *R v Wellburn* (1979) 69 Cr App R 254 this court made clear what is thought was meant by the term “corruptly”:

“The recorder directed the jury as follows: ‘Corruptly is a simple English adverb and I am not going to explain it to you except to say that it does not mean dishonestly. It is a different word. It means purposefully doing an act which the law forbids as tending to corrupt’.

“In directing the jury as he did the recorder adopted the words used by Willes J. when giving his opinion to the House of Lords in *Cooper v. Slade* (1858) 6 H.L.Cas. 746, which was a case concerned with the Corrupt Practices Prevention Act 1854. What Willes J. said was adopted and followed by the Court of Criminal Appeal in *Smith* (1960) 44 Cr.App.R. 55; [1960] 2 Q.B. 423 (see Lord Parker C.J. at p. 62 and p. 429 respectively) in which the indictment charged an offence under the Public Bodies Corrupt Practices Act 1889.

“In our judgment the recorder was right to follow the construction of the word ‘corruptly’ which was approved in *Smith* (supra). Nothing is to be gained by using variations for statutory words in ordinary usage unless the context so requires and it does not do so in the 1906 Act. A jury will have no difficulty in deciding whether an accused has corruptly accepted or obtained a gift. The mischief aimed at by the modern statutes dealing with corruption is to prevent agents and public servants being put in positions of temptation.’

‘[25] The language of the Act does not require

anything more than proof that the payment for the prohibited purpose was made corruptly. There is self-evidently no language requiring that the payment for the prohibited purpose has to be paid or received secretly and without the knowledge and informed consent of the principal. Nor is there anything in the word “corruptly” taken by itself that implies that the payment has to be secret or without the knowledge and informed consent of the principal. It is an ordinary word with an ordinary meaning and nothing in the word itself can justify engrafting the suggested ingredient onto it.

...

‘[44] For the reasons we have set out, the prosecution does not have to prove as an ingredient of the offences under s 1 of the 1906 Act that the principal did not know of the payment and did not give his informed consent. The prosecution need do no more than prove that the payment made for the prohibited purpose was made corruptly.

‘[45] For example, in determining whether the payment was made corruptly in the case of transactions between commercial agents and principals, any evidence relating to what was disclosed to the principal and what the principal knew and any informed consent may, as we have stated, be highly material to the issue of whether they acted corruptly. In such cases, the evidential inquiry may give rise to the factual issue of identifying the actual principal who is entitled to give informed consent after full disclosure. In the case of an overseas body corporate this may raise difficult factual inquiries in the light of the applicable law as determined by the judge. These are, however, all matters of evidence that may go to the issue of whether the payment for the prohibited purpose in transactions between commercial agents and commercial principals was made or received corruptly. However, by way of a contrary example, where there was a payment to a public official in the UK for the prohibited purpose, evidence as to knowledge and consent will, for the reasons we have given, not arise. What the Crown has to prove remains the same in each case—that the payment for the prohibited purpose was made corruptly; evidence as to the informed consent of the actual principal may or may not be material or highly material depending on the facts of the case.’ *R v J* [2013] EWCA Crim 2287, [2014] 3 All ER 301 at [1]–[2], [8], [24]–[25], [44]–[45], per Lord Thomas CJ

COSTS

[For 12(1) Halsbury's Laws of England (4th Edn) (Reissue) para 807 see now 29 Halsbury's Laws of England (5th Edn) (2014) para 310.]

[For 10 Halsbury's Laws of England (4th Edn) (Reissue) paras 2, 19, 22 see now 12A Halsbury's Laws of England (5th Edn) (2015) paras 1688, 1702, 1704 respectively.]

Of appeal

[For 10 Halsbury's Laws of England (4th Edn) (Reissue) para 1 et seq see now 12A Halsbury's Laws of England (5th Edn) (2015) para 1702 et seq.]

Of reference to arbitration

[For 2(3) Halsbury's Laws of England (4th Edn) (Reissue) paras 67–70 see now 2 Halsbury's Laws of England (5th Edn) (2017) para 570 et seq.]

COSTS OF AND INCIDENTAL TO THE PROCEEDINGS

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

COUNTERCLAIM

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 407 see now 11 Halsbury's Laws of England (5th Edn) (2015) para 367 et seq.]

Original counterclaim

[Limitation Act 1980, s 35.] '[16] Section 35 of the Limitation Act 1980 deals with the circumstances in which claims which would otherwise be statute-barred may be brought in existing proceedings. Section 35 sets out a general rule (to which there is a specific exception): and then defines circumstances in which the general rule may be disapplied.

'[17] Section 35(1) provides that "a new claim made in or by way of third party proceedings" does not have the benefit of relation back. "Third party proceedings" are proceedings brought by a party against someone not already a party. So that section operates simply by reference to the court record. The doctrine of relation back applies in all cases other than third party proceedings.

'[18] Section 35(3) then provides that the court shall not allow a new claim (which might

benefit from relation back) to be made in the course of any action after the expiry of any limitation period which would affect a new action to enforce that claim. The specific exception to that general rule is that it does not apply to "an original set-off or counterclaim". This expression is defined to mean: "A claim made by way of set-off or (as the case may be) by way of counterclaim by a party who has not previously made any claim in the action".

'[19] For the insurers it is argued that they are squarely within this exception. Following the order of Floyd J they are now "a party". They have not previously made any claim in the action: the claim they now make is therefore "original". The new additional claim is made by way of counterclaim because it is a claim for a remedy (damages) brought by an existing defendant against an existing claimant in an existing action.

'[20] The Law Society submits that the insurers' new additional claim is not an "original counterclaim" within the meaning of s 35(3). Mr David Edwards QC readily acknowledged that the claim was "original" (in at least two senses): but he submitted that it was incapable of being a *counterclaim*, because there was no claim made by the Law Society against the insurers to which the additional claim could run "counter". He submitted that it was implicit in the concept of a counterclaim that some claim should have been brought against the party now counterclaiming, and that the whole rationale for permitting "an original set-off or counterclaim" to be advanced notwithstanding any limitation difficulties was that a party against whom a claim was being made should be free to deploy any weapon in defence: the price a claimant had to pay for bringing proceedings was to forgo any available limitation point that could be taken against the party he chose to sue. Mr Edwards submitted that the argument was encapsulated in the Glossary definition of the term "counterclaim" used in the CPR which is "A claim brought by a defendant in response to the claimant's claim ...". (He did not, of course, suggest that the definition was of itself an aid to the construction of s 35 of the 1980 Act.)

'[21] Attractive as is the argument of Mr Edwards, I consider that upon its true construction s 35(3), in referring to "an original ... counterclaim", is referring to any cause of action that might be asserted by an existing defendant against a claimant, there being no warrant in the words of the section itself for adopting a more restrictive meaning. The counterclaim is essentially a procedural

device. The nature of the cause of action on which the counterclaim is founded is not integral to the concept of “counterclaim”. All that matters is that all the parties requisite to assert the cause of action are on one side of the record and one of the persons against whom the cause of action may be asserted is on the other side of the record. Although I approach the question as one of broad principle, the conclusion I have reached is at least consistent with the decision in *Hodson v Mochi* (1878) 8 Ch D 569n. (I was not referred to this case: but since I am not relying upon it as an authority I have not invited further argument.)

‘[22] I therefore hold that the insurers’ counterclaim is “an original counterclaim” for the purposes of s 35(3) of the Limitation Act 1980, notwithstanding that the Law Society is suing as subrogee or assignee of the claims of the clients, and notwithstanding that the Law Society seeks no explicit relief against the insurers (simply wanting them to be bound by the outcome of the action against the solicitors). Whether the re-amendment advancing this original counterclaim should be allowed is a procedural question.’ *Law Society v Wemyss* [2008] EWHC 2515 (Ch), [2009] 1 All ER 752 at [16]–[22], per Norris J

COUNTY PALATINE

[For 8(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 307 see now 20 Halsbury’s Laws of England (5th Edn) (2014) para 135.]

COUPON

[For the Income and Corporation Taxes Act 1988, s 18, Sch D see now the Corporation Tax Act 2009, s 975(3).]

COURT

[For 10 Halsbury’s Laws of England (4th Edn) (Reissue) para 301 see now 24 Halsbury’s Laws of England (5th Edn) (2010) para 606.]

Court of law

New Zealand [Limitation Act 1950, s 4.] ‘[3] The key issue is whether the [Disputes] Tribunal is a “Court of law” for the purposes of s 4 of the 1950 Act.

...
‘[24] The starting point is the plain meaning of “Court of law” in the definition of “action”.

‘[25] The meaning of an enactment must be ascertained from its text and in light of its purpose. In determining purpose, regard must be had to the immediate and general legislative context, and the social, commercial or other objectives of the enactment.

...
‘[27] A requirement that an action be commenced in a Court “of law” appears to have originated from a historical distinction in the way various actions could be commenced. In *WT Lamb & Sons v Rider* [[1948] 2 KB 331, CA, at 338], the UK Court of Appeal noted that the same phrase contained in the Limitation Act 1939 (UK) was included because many of the actions dealt with by that statute were commenced by originating summons and not by writ. Defining actions by reference to those filed in a Court of law ensures a broad range of claims are captured by the limitation regime.

‘[28] The requirement also reflects the public interest in enforcement of limitation periods. Limitation periods operate to reduce the volume of stale claims that might otherwise be filed in Court. They therefore promote the expeditious resolution of all disputes the subject of Court proceedings, and the efficient operation of the justice system.

‘[29] The institutional and functional aspects of a Court of law provide the machinery by which limitation periods may be enforced. Filing a claim in a Court of law provides certainty as to how a claim is to be commenced, and when a claim is brought. A Court of law also has the necessary processes by which a defendant is to be notified of such a claim.

‘[30] The general purpose of the 1950 Act, and the specific purpose underpinning the definition of “action”, set the yardstick by which to measure whether or not a Tribunal is a Court of law within the meaning of the 1950 Act.

‘[31] Tribunals have been described as hybrid institutions. They comprise both legal and non-legal features. Some of the non-legal features were identified by the Judge and relied on by the respondent on appeal, as being inconsistent with a “Court of law”. But Tribunals also have a number of legal features which are analogous to those of a Court of law.

‘[32] Tribunals are divisions of the District Court and form part of the Court structure. They are included within the definition of an inferior Court in s 2 of the Inferior Courts Procedure Act 1909. The fact that Tribunals are different to Youth Courts and Family Courts, which are also divisions of the District Court, is not disputed. But the degree of similarity or difference to

those Courts provides little assistance in determining whether Tribunals are to be regarded as Courts of law for the purposes of the 1950 Act. The appropriate measure is not a comparison to other divisions of the District Court, but whether Tribunals share sufficient attributes of a Court of law to meet the purposes of the 1950 Act.

[33] Other characteristics reinforce the Tribunal's status as part of the Court system. They have formal processes in place for the filing and notification of claims. Claims are aired in a hearing presided over by a Referee. Orders made by the Tribunal are enforced as if they were a District Court order. These features clothe the Tribunal with the institutional characteristics of a Court of law.

[34] The claims which the Tribunal may hear and determine are claims which might be brought in the District Court, and include claims advanced under the core contractual statutes. The policy reasons which underpin limitation statutes apply equally to these claims. That necessitates a liberal interpretation of what is meant by "Court of law" to ensure the capture of these claims.

[35] The absence of any requirement that Referees be legally trained may be seen to be at odds with the notion of a Court of "law". But the fact that claims are heard and determined by independent and impartial adjudicators, who must give reasons for their decisions, is broadly consistent with the operation of a Court. In my view, those features are more indicative of a "Court of law" for the purposes of the 1950 Act, than the qualifications of the Referees.

[36] The immunity given to Referees under s 58 DTA [Disputes Tribunals Act 1988] was relied on by the Judge as evidence that the Tribunal was not a Court of law. But that provision cuts both ways. The fact that Referees are afforded the same protection as Justices of the Peace exercising their criminal jurisdiction suggests that they are performing a broadly equivalent function. That is confirmed by s 58(2) which declares Tribunal proceedings to be judicial proceedings for the purposes of the privileges and immunities of those participating in them.

[37] The fact that the Tribunal is not bound by strict legal rights or obligations provides the strongest indication that a Tribunal is not to be regarded as a Court of "law". But the scope of that jurisdiction requires closer scrutiny. Tribunals exercise jurisdiction conferred by statute and are granted power to act under certain statutes. In the exercise of their general jurisdiction, Tribunals must still have regard to

the law in making their decision. In most cases regard to the law will result in a determination of the dispute according to the substantial merits and justice of the case.

[38] The "unfairness" ground of appeal is deemed to include a failure to have regard to any provision of any enactment brought to the attention of the Referee. That emphasises the importance of the law to the determinations which Referees make and suggests that the non-legal features of the Tribunal's jurisdiction are more tightly circumscribed than they might otherwise appear.

[39] Measured against the underlying purpose of the statutory requirement for a proceeding to be brought in a "Court of law", I consider that the legal characteristics of the Tribunal are sufficient to bring it within the meaning of "Court of law" as that phrase is used in the 1950 Act.' *Thomas v Morrhall* [2016] NZHC 2853, [2017] NZAR 1 at [3], [24]–[25], [27]–[39], per Edwards J

COURT MARTIAL

[For 2(2) Halsbury's Laws of England (4th Edn) (2005 Reissue) paras 480, 482, 448–449 see now 3 Halsbury's Laws of England (5th Edn) (2011) paras 633, 638.]

COVENANT

[For 13 Halsbury's Laws of England (4th Edn) (2007 Reissue) para 247 see now 32 Halsbury's Laws of England (5th Edn) (2012) para 448.]

[For 27(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 132 see now 62 Halsbury's Laws of England (5th Edn) (2016) para 125.]

For freedom from incumbrances

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 346 see now 23 Halsbury's Laws of England (5th Edn) (2016) paras 142, 181 on full title guarantee.]

For further assurance

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 347 see now 23 Halsbury's Laws of England (5th Edn) (2016) paras 142, 181 on full title guarantee.]

For quiet enjoyment

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 345 see now 23 Halsbury's Laws of England (5th Edn) (2016) paras 142, 181 on full title guarantee. See also 62 Halsbury's Laws of England (5th Edn) (2016) para 404.]

For right to convey

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 343 see now 23 Halsbury's Laws of England (5th Edn) (2016) para 157.]

Implied covenant

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) paras 338, 349 see now 23 Halsbury's Laws of England (5th Edn) (2016) para 181.]

CRIME

[For 11(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 1 see now 25 Halsbury's Laws of England (5th Edn) (2016) para 1.]

CRIME OF VIOLENCE

[Under the Criminal Injuries Compensation Scheme 2001 compensation is payable for 'criminal injury' which is defined in para 8 as an injury directly attributable to, *inter alia*, 'a crime of violence ...'.] '[12] Various attempts have been made to define what is meant by the phrase "a crime of violence" for the purposes of the schemes for compensation for criminal injury. Different views were expressed in *R v Criminal Injuries Compensation Board, ex p Clowes* [1977] 3 All ER 854, [1977] 1 WLR 1353. Eveleigh J said ([1977] 3 All ER 854 at 859, [1977] 1 WLR 1353 at 1359) that it referred to that kind of deliberate criminal activity in which anyone would say that the probability of injury was obvious. Wien J said ([1977] 3 All ER 854 at 862, [1977] 1 WLR 1353 at 1362) that it meant some crime which as applied to the facts of a case involved the possibility of violence to another person. Lord Widgery CJ said ([1977] 3 All ER 854 at 864, [1977] 1 WLR 1353 at 1364) that it was a crime which was accompanied by or concerned with violence. He described counsel for the board's submission that a crime of violence should mean a crime of which violence is an essential ingredient as a very neat and tidy package in which to put the problem.

... '[17] The question whether a criminal offence has been committed is a question for the tribunal, having informed itself as to what the law requires for proof of that offence, to determine as a matter of fact. The question whether the nature of the criminal act amounted to a crime of violence may or may not raise an issue of fact for the tribunal to determine. This will depend on what the law requires for proof of the offence. For example, some of the common law crimes known to the law of Scotland are quite loosely defined. The range of acts that fall within the broad definition may vary quite widely, so the question whether there was a crime of violence will have to be determined by looking at the nature of what was done. But in this case the words of the statute admit of only one answer. They speak for themselves.

'[18] To wound or inflict any grievous bodily harm on another person unlawfully or recklessly, foreseeing that physical harm to some other person will be the consequence of his act, is a crime in terms of s 20 of the [Offences against the Person Act 1861]. It is also a violent act. So too is the unlawful or reckless application of physical force of any kind to the person, directly or indirectly, so that they suffer injury—frightening or threatening someone so that they run into the road and are hit by a car, for example: see also *R v Martin* (1881) 8 QBD 54, [1881–5] All ER Rep 699, where the accused by unlawful conduct caused panic in the course of which a number of people were injured: *Ex p Warner* [1986] 2 All ER 478 at 482, [1987] QB 74 at 79 per Lawton LJ. The crime that s 20 defines will always amount to a crime of violence for the purposes of the scheme for compensation for criminal injury.' *R (on the application of Jones) v First-tier Tribunal* [2013] UKSC 19, [2013] 2 All ER 625 at [12], [17]–[18], per Lord Hope DP

CRIMINAL CAUSE OR MATTER

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

CRIMINAL CONDUCT

[Proceeds of Crime Act 2002, s 340.] '[5] In order to bring home any or all of these offences the Crown had to prove that the funds involved constituted "criminal property" within the meaning of s 340 of the POCA [Proceeds of Crime Act 2002], which also defines "criminal

conduct” for the purpose of these statutory offences. Section 340 provides in part as follows:

- “(2) Criminal conduct is conduct which—
(a) constitutes an offence in any part of the United Kingdom, or (b) would constitute an offence in any part of the United Kingdom if it occurred there.
- (3) Property is criminal property if—(a) it constitutes a person’s benefit from criminal conduct or it represents such a benefit (in whole or in part and whether directly or indirectly), and (b) the alleged offender knows or suspects that it constitutes such a benefit.
- (4) It is immaterial—(a) who carried out the conduct; (b) who benefited from it
...
- (5) A person benefits from conduct if he obtains property as a result of or in connection with the conduct.”

...
 ‘[6] The essence of the issue in this appeal may be put shortly. To establish guilt under s 327 or s 328, must the Crown prove what particular criminal conduct, or at least what type of criminal conduct, has generated the benefit which the alleged criminal property represents? Or is it enough if they can show, no doubt by reference to the large sums involved and the defendants’ want of any apparent means of substance (as well as any other relevant evidence), that the money in question can have had no lawful origin—even if they have no evidence of the crime or class of crime involved? The Crown say the latter suffices. In his terminating ruling the learned trial judge held that it did not. ...

...
 ‘[22] As Mr Bartlett submitted, what has to be proved in order to establish guilt under s 327 or s 328 of the POCA is that the defendant had dealt with what he knew or suspected was criminal property, that is (see s 340(3)) property which constitutes or represents a person’s benefit from conduct which constitutes an offence in any part of the United Kingdom. Does that import a requirement to prove the particular offence, or class of offence, said to have been committed? The force of Mr Bartlett’s negative answer to this question rests, we consider, in the fact that the statutory words appear to contain no reference, certainly no express reference, to any need to *particularise* the crime or class of crime in question. However the respondents submit that authority,

including learning in the Court of Appeal, rules out the Crown’s position or at least creates very considerable obstacles in its way; and in fact demonstrates that at least the class or type of crime must be identified and proved.

...
 ‘[32] It is convenient first to measure the impact of *R v Gabriel* [[2006] EWCA Crim 229, [2007] 1 WLR 2272] and *R v K* [[2007] EWCA Crim 491, [2007] 2 Cr App Rep 128]. Neither was in terms concerned with the question we must answer, whether in a money laundering case the class of crime said to constitute “criminal conduct” has to be proved. However such a requirement might be thought to be implicit in, or at least consistent with, Gage LJ’s reasoning in [26] of *R v Gabriel*; and in *R v K* the “necessary inference” referred to in [34] is in context surely an inference as to the class of crime in question. In our view neither of these authorities offers material support for the Crown’s position in the present case, and both at least sit with (even if they do not march with) the contention the other way.

‘[33] The cases on the civil enforcement provisions, *Green*’s case [2005] All ER (D) 261 (Dec) and *Szepietowski*’s case [2007] All ER (D) 364 (Jul), with respect have more to tell us. In that context it is clear that the class of offence in question has to be proved. It is true, however, that the language of the material sections in Pt 5 of the POCA is different from that of s 340. In *Green*’s case Sullivan J specifically relied on particular features of those provisions, notably ss 241(3) and 242(2)(b) (see [18]–[21] of his judgment), in support of his conclusion that in seeking relief under Pt 5 the Director must identify at least in general terms the type of conduct relied on as constituting criminal conduct. Moore-Bick LJ in *Szepietowski*’s case (at [106]) placed some reliance on s 304. Part 7, and in particular s 340, contains no analogue to those provisions, and to that extent *Green*’s case and *Szepietowski*’s case are distinguishable from the present case.

‘[34] But there is more to be said about this learning. Neither Sullivan J nor the Civil Division of this court limited their reasoning to narrow considerations of language. Sullivan J expressed himself in more strategic terms in [25] of *Green*’s case, and his approach was taken up by Moore-Bick LJ at [102] of *Szepietowski*’s case. For convenience we repeat this extract from the latter passage:

“He [sc Sullivan J] concluded that Parliament had deliberately steered a careful course between requiring the

director to prove the commission of a specific criminal offence or offences by a particular individual or individuals and allowing her to make wholly unparticularised allegations of 'unlawful conduct' of the kind that would require a respondent to justify his lifestyle. I agree."

'[35] In earlier passages in his judgment Sullivan J (at [3]) had dwelt in some detail on materials placed before him 'in order to identify the particular legislative purposes of the Act and the mischief to which Pt 5 of the Act is addressed'. We need not go into the details of the documents. He acknowledged (at [5]) that—

"there is no real dispute as to the legislative purpose of the Act, the mischief to which Pt 5 was directed, or the context in which it was enacted. Although the terminology varies, all four documents recognise that 'a careful balance has to be struck between the civil rights of the individual and the need to ensure that the State has the tools to protect society by tackling crime effectively'."

'[36] This "careful balance" is plainly reflected in Sullivan J's conclusions as to the construction of Pt 5, in his more general remarks at [25], and in Moore-Bick LJ's indorsement of that view at [102] of *Szepietowski's* case. We have to decide whether a like approach should be adopted to the criminal provisions of Pt 7.

'[37] We have already referred to the linguistic differences between Pt 5 and s 340. In our judgment they are not so pressing as to yield a conclusion that the legislature in enacting Pt 7 intended, in the context of *criminal* measures, to strike the balance between civil rights and the protection of the public at a markedly different place from where, as authority shows, it lies in relation to Pt 5. Indeed it would be anomalous, not to say bizarre, if the Crown were not required to identify the class of crime in question in a criminal prosecution while the Director is so required in a civil enforcement suit. Sullivan J's description of the legislative purpose of the POCA, adopted by Moore-Bick LJ, is surely no less apt as a guide for the application of Pt 7 as it is for that of Pt 5.

'[38] In short, we do not consider that Parliament can have intended a state of affairs in which, in any given instance, no particulars whatever need be given or proved of a cardinal element in the case, namely the criminal conduct relied on. It is a requirement, to use Sullivan J's expression, of elementary fairness.' *Prosecution Appeal (No 11 of 2007)*; *R v W*

[2008] EWCA Crim 2, [2008] 3 All ER 533 at [5], [6], [22], [32]–[38], per Laws LJ

CRIMINAL PROPERTY

[Proceeds of Crime Act 2002, ss 329, 340. The question was whether stolen goods acquired by a thief or handler were 'criminal property' for the purposes of the offence of acquiring criminal property contrary to s 329(1)(a).] '[4] At the conclusion of the prosecution evidence the recorder rejected a submission of no case to answer, advanced on the basis that no evidence had been adduced by the prosecution that the motorcycle [a child's motorcycle stolen in the course of a burglary] was "criminal property" for the purposes of the 2002 Act. The applicant then gave evidence in support of his defence that he had bought the motorcycle for £20 and that at no stage did he suspect that it was criminal property. In his summing up, the recorder directed the jury that there was no dispute that the motorcycle was criminal property but the prosecution had to make them sure that the applicant knew or suspected that it was criminal property.

'[5] The basis of the application to this court was that the recorder was wrong to reject the submission of no case.

'[6] Section 329 of the 2002 Act reads: "(1) A person commits an offence if he—(a) acquires criminal property; (b) uses criminal property; (c) has possession of criminal property."

'[7] Relevant definitions are to be found in s 340:

"(3) Property is criminal property if—(a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly); and (b) the alleged offender knows or suspects that it constitutes or represents such a benefit ...

(5) A person benefits from conduct if he obtains property as a result of or in connection with the conduct ...

(8) If a person benefits from conduct his benefit is the property obtained as a result of or in connection with the conduct ...

(10) The following rules apply in relation to property—(a) property is obtained by a person if he obtains an interest in it ... (d) references to an interest, in relation to property other than land,

include references to a right (including a right to possession)."

'[8] The essential submissions made in the skeleton argument for the applicant were that the person who stole the motorcycle in the course of the burglary did not obtain an "interest" in it within the meaning of s 340(10)(a), since "interest" must mean a lawful interest, and did not therefore obtain property within the meaning of that provision; by working through the earlier provisions of s 340, it followed that the motorcycle in this case was not "criminal property"; and the applicant could not therefore have been guilty of acquiring criminal property even if he was the thief or a handler of the motorcycle.

'[9] Those arguments were met by written submissions from Mr Perry QC, for the Crown, contending that a thief does obtain an "interest", within the meaning of s 340(10), in the property he steals, because he obtains a right to possession of that property. Mr Perry relied on *Costello v Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381, [2001] 3 All ER 150, [2001] 1 WLR 1437. In that case the claimant was found to be in possession of a motor car which was to his knowledge stolen. The police seized the car from him pursuant to s 19 of the Police and Criminal Evidence Act 1984 and retained it pursuant to s 22 of the 1984 Act since the owner was unknown. The claimant brought an action against the chief constable for delivery up and damages. The Court of Appeal held that the statutory provisions vested in the police no title to the property seized but only a temporary right to retain it for specified purposes; and that when that right expired, the police were obliged to return the car to the claimant since he had a possessory title in it even though it was stolen. Lightman J, with whom the other members of the court agreed, expressed his conclusion on that issue as follows (at [31]):

"In my view on a review of the authorities, (save so far as legislation otherwise provides) as a matter of principle and authority possession means the same thing and is entitled to the same legal protection whether or not it has been obtained lawfully or by theft or by other unlawful means. It vests in the possessor a possessory title which is good against the world save as against anyone setting up or claiming under a better title. In the case of a theft the title is frail, and of likely limited value (see eg *Rowland v Divall* [1923]

2 KB 500, [1923] All ER Rep 270), but none the less remains a title to which the law affords protection... This conclusion is in accord with that long ago reached by the courts that even a thief is entitled to the protection of the criminal law against the theft from him of that which he has himself stolen (see eg Smith and Hogan *Criminal Law* (9th edn, 1999) p 522."

'[10] Mr Perry submitted that, applying that principle to the facts of the present case, the applicant clearly acquired criminal property and was properly convicted of an offence contrary to s 329 of the 2002 Act. The motorcycle was stolen in the course of a burglary. The thief obtained an interest in it, namely a right to possession. It followed that the motorcycle was property obtained by him as a result of criminal conduct and constituted his benefit from such conduct. It was therefore criminal property.

'[12] ... In our judgment there is no answer to Mr Perry's submissions. The stolen motorcycle was property obtained by the thief, within the meaning of s 340(10)(a), since the thief obtained a right to possession of it and, by s 340(10)(d), an interest includes a right to possession; and it was self-evidently obtained as a result of or in connection with criminal conduct. It therefore constituted the thief's benefit from criminal conduct. It follows that the first part of the definition of criminal property, in s 340(3)(a), was satisfied. The second part, in s 340(3)(b), depended on whether the applicant knew or suspected that it constituted or represented such a benefit. That was an issue that the recorder properly left to the jury and that the jury decided against the applicant. The recorder, who did not have the benefit of Mr Perry's argument, based his rejection of the submission of no case on a construction of s 340(10) that Mr Perry has not sought to uphold; but his instincts were sound and his conclusion was correct. His directions to the jury captured the substance of the matter accurately and no complaint has been made about them.' *R v Rose; R v Whitwam* [2008] EWCA Crim 239, [2008] 3 All ER 315 at [4]–[10], [12], per Richards LJ

CROWN LANDS

Australia [Valuation of Land Act 2001 (Tas), s 11(1); whether seabed and waters were lands or Crown lands.] '[2] The respondent ("the Council") seeks to levy rates on eight marine

farming leases over parts of the seabed and waters within Macquarie Harbour on the west coast of Tasmania pursuant to Pt 9 of the Local Government Act 1993 (Tas) (the LGA). To that end, it requested the appellant ("the Valuer-General") to value the leases in accordance with s 11(1) of the VLA [Valuation of Land Act 2001]. In substance, s 11(1) of the VLA provides that the Valuer-General must value all lands within each valuation district, including any Crown lands that are liable to be rated in accordance with Pt 9 of the LGA. The Valuer-General declined to value the leases on the basis that, in the Valuer-General's opinion, the leases are not over "lands" or "Crown lands that are liable to be rated" within the meaning of s 11(1).

...
 '[10] "Crown land" is defined in s 2 of the Crown Lands Act 1976 (Tas) (the CLA). Section 2 provides that in the CLA, unless the contrary intention appears:

"Crown land means land which is vested in the Crown, and which is not contracted to be granted in fee simple; and includes land granted in fee simple which has revested in the Crown by way of purchase or otherwise."

Unlike in the VLA, "land" is expressly defined in the CLA to include the sea. It provides [s 2]:

"land includes land covered by the sea or other waters, and the part of the sea or those waters covering that land."

'[11] It was accepted that Macquarie Harbour is vested in the Crown in right of the State of Tasmania and that it is "Crown land" within the meaning of the CLA.

...
 '[16] In view of the foregoing legislative provisions, this appeal turns on whether the meaning of "Crown lands" in s 11(1) of the VLA is restricted by what is said to be the ordinary signification of "land", and as such excludes the seabed and waters above it, or whether "Crown lands" in s 11(1) means "Crown land" as defined in the CLA, and hence "includes land covered by the sea or other waters, and the part of the sea or those other waters covering that land".

...
 '[46] In the result, it is to be concluded that "Crown lands" in s 11(1) of the VLA means "Crown land" within the meaning of the CLA and so includes the seabed and so much of the sea as lies above it. ...' *Coverdale v West Coast*

Council [2016] HCA 15, (2016) 330 ALR 424 at [2], [10]–[11], [16], [46], per French CJ, Kiefel, Keane, Nettle and Gordon JJ

CRUEL AND UNUSUAL PUNISHMENT

See also INHUMAN OR DEGRADING PUNISHMENT

Canada [Canadian Charter of Rights and Freedoms, s 12.] '[14] The test for whether a particular sentence constitutes cruel and unusual punishment is whether the sentence is grossly disproportionate: *R v Smith* [1987] 1 SCR 1045. As this Court has repeatedly held, to be considered grossly disproportionate, the sentence must be more than merely excessive. The sentence must be "so excessive as to outrage standards of decency" and disproportionate to the extent that Canadians "would find the punishment abhorrent or intolerable": *R v Wiles* [2005] 3 SCR 895, 2005 SCC 84, at para 4, citing *Smith* at p 1072 and *Morrisey* [*R v Morrissey* [2000] 2 SCR 90, 2000 SCC 39] at para 26. ...' *R v Ferguson* [2008] 1 SCR 96, [2008] SCJ No 6, 290 DLR (4th) 17, 2008 SCC 6 at [14], per McLachlin CJ

CURATE

[For 14 Halsbury's Laws of England (4th Edn) para 704 see now 34 Halsbury's Laws of England (5th Edn) (2011) para 465.]

CUSTODY

Legal custody

'[9] In *E v DPP* [2002] EWHC 433 (Admin), [2002] Crim LR 737 the appellant was a 14-year-old boy who had been remanded by the youth court into secure local authority accommodation to attend a hearing in four days' time. He was not in fact detained by the local authority because secure accommodation could not be found. He was nevertheless brought to the court on the date to which he had been remanded by a member of the local authority's youth offending team. He left court before his case was called on. He was subsequently re-arrested and in due course convicted in the youth court of escape from lawful custody. He appealed on the ground that he had not at the material time been in custody. The Divisional Court dismissed his appeal. Forbes J, delivering the leading judgment, said this:

“[19] I agree with Mr Spackman’s submission that whether a person can be said to be in custody at any particular time is a question of fact to be decided by reference to the circumstances of each individual case. ‘Custody’ is an ordinary English word, which should be given its ordinary and natural meaning, subject, of course, to any special meaning given to it by statute. In the Shorter Oxford English Dictionary the word ‘custody’ is defined in the following terms, amongst others: ‘Confinement, imprisonment, durance’.

[20] As it seems to me, for a person to be in custody, his liberty must be subject to such constraint or restriction that he can be said to be confined by another in the sense that the person’s immediate freedom of movement is under the direct control of another. Whether that is so in any particular case will depend on the facts of that case.”

...

“[12] Those appear to us to be the only relevant authorities. It seems to us that the definition of “custody” adopted by Forbes J in *E v DPP* [2002] Crim LR 737 is plainly authoritative and helpful.

“[13] We should however also refer to s 13(2) of the Prison Act 1952, which reads as follows:

“A prisoner shall be deemed to be in legal custody while he is confined in, or is being taken to or from, any prison and while he is working, or is for any other reason, outside the prison in the custody or under the control of an officer of the prison and while he is being taken to any place to which he is required or authorised by or under this Act ... to be taken, or is kept in custody in pursuance of any such requirement ...”

That provision is not formally definitive of the meaning of the phrase “lawful custody” for the purpose of the offence of escape from lawful custody. Nevertheless it is a useful pointer to the general understanding of the concept of custody, and it seems to us wholly consistent with the formulation adopted by Forbes J in *E v DPP*.

“[14] In our view the conception underlying the decisions in the cases to which we have referred, and also s 13(2) of the 1952 Act, is that a person may be in custody, notwithstanding that he is not physically confined, provided that he is nevertheless under the direct control of—that is in the charge of—a representative of authority. ...’ *R v Montgomery* [2007] EWCA Crim 2157, [2008] 2 All ER 924 at [9],

[12]–[14], per Underhill J

CUSTODY OR CONTROL

[The Insolvency Act 1986, Sch B1 para 99, which applies where a person ceases to be the administrator of a company, provides that the former administrator’s remuneration and expenses ‘shall be—charged on and payable out of property of which he had custody or control immediately before cessation’ where ‘cessation’ means the time when the former administrator ceased to be the company’s administrator.] [11] The principal issue on this part of the application is the proper interpretation and application of that part of para 99 as imposes the charge on “property of which [the administrator] had custody or control immediately before cessation”. The word “property” is defined in s 436 of the 1986 Act, subject to the context, as including:

“money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property ...”

“[12] Counsel for the Liquidators contended that the formula “custody or control” necessarily constituted a sub-category of all the property, as defined, of the company at the time of cessation. He suggested that the qualification for that sub-category is that the administrator should have taken the necessary steps to obtain that custody or control of any specific item of property to which it is amenable. He suggested that a car in a locked garage in another city or a claim for a refund of which the administrator is unaware could not be property of which the administrator had custody or control. I did not understand his submission to go so far as to require that such custody or control should have been fully obtained; only that the administrator should have done something to achieve that state of affairs.

“[13] This submission was opposed by all the respondents on the ground that such a construction was unworkable, inequitable and unwarranted by the words of para 99 or authority. It was said to be unworkable because it is too imprecise. How much control is required? In relation to, for example, a chose in action what control is required over and above its enforceability? If some action is required to be taken by the administrator, how much? It was said to be inequitable, not only because of its

imprecision but also because the property rights of those entitled to the benefit of the charge would depend on the diligence and priorities of the administrator. It was said to be unwarranted partly because of its statutory derivation and partly because of a dictum of Lord Diplock in *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* [1975] 2 All ER 537 at 540, [1976] AC 167 at 177. In that passage Lord Diplock considered the effect of an order for compulsory winding up of a company. He said that upon the making of the order—

“(1) The custody and control of all the property and choses in action of the company are transferred from those persons who were entitled under the memorandum and articles to manage its affairs on its behalf, to a liquidator charged with the statutory duty of dealing with the company’s assets in accordance with the statutory scheme (s 243). Any disposition of the property of the company otherwise than by the liquidator is void (s 227).”

That is to be contrasted with the reference in the next paragraph to the statutory duty of the liquidator to collect the assets of the company and to apply them in the discharge of its liabilities.

“[14] I prefer the submissions for the respondents. First, the concept of a liquidator or other fiduciary taking custody or control of an asset is of long standing and in the nature of a term of art. Section 94 of the Companies Act 1862 required the liquidator to “take into his ... Custody, or under his ... Control, all the Property, Effects, and Things in Actions to which the Company is or appears to be entitled”. In the event of a vacancy in the office of liquidator “the Property of the Company shall be deemed to be in the Custody of the Court”, s 92. Similar terminology is to be found in s 150 of the Companies (Consolidation) Act 1908 and the Companies Act 1948. The equivalent provision is now contained in s 144 of the 1986 Act in these terms:

“(1) When a winding-up order has been made, or where a provisional liquidator has been appointed, the liquidator or the provisional liquidator (as the case may be) shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled ...”

By contrast s 143 imposes on the liquidator the function “to secure that the assets of the

company are got in, realised and distributed to the company’s creditors”. Similarly para 67 of Sch B1 requires the administrator on his appointment to “take custody or control of all the property to which he thinks that the company is entitled”.

“[15] The contrast is not between having and not having custody or control but between the custody or control of the directors and that of the liquidators or administrators. This contrast is apparent in the passage from the speech of Lord Diplock I have already quoted. In addition I accept the other submissions of the respondents on this point. If it were necessary for the administrators to have taken some steps to obtain custody or control of the item of property in question there would be much uncertainty. And why should the property rights of chargees depend on the diligence, choice or order of priorities determined by the administrator. In all cases the property right remains vested in the company but its custody and control passes from the directors to the administrators or liquidators on appointment and without the need for any further action on their part.

“[49] For all these reasons: (1) I conclude that the relevant test of custody or control to be applied pursuant to para 99 of Sch B1 is entitlement to that property or to the property from which it is derived. ...’ *Re MK Airlines Ltd* [2012] EWHC 1018 (Ch), [2012] 3 All ER 681 at [11]–[15], [49], per Sir Andrew Morritt C

CUSTOM

[For 12(1) Halsbury’s Laws of England (4th Edn) (Reissue) paras 601, 606 see now 32 Halsbury’s Laws of England (5th Edn) (2012) paras 1, 6.]

Of country

[For 1(2) Halsbury’s Laws of England (4th Edn) (2007 Reissue) para 290 see now 1 Halsbury’s Laws of England (5th Edn) (2008) para 353.]

CUSTOMS DUTIES

[For 12(2) Halsbury’s Laws of England (4th Edn) (2001 Reissue) para 1 see now 30 Halsbury’s Laws of England (5th Edn) (2012) para 1.]

CY-PRÈS

[For 5(2) Halsbury’s Laws of England (4th Edn) (2001 Reissue) para 201 see now 8 Halsbury’s

Laws of England (5th Edn) (2015) para 209.]	has been replaced by Part 6 (ss 61–116) of the
[Note that Part IV of the Charities Act 1993	Charities Act 2011.]

D

DAILY

[For 45(2) Halsbury's Laws of England (4th Edn) (Reissue) para 213 see now 97 Halsbury's Laws of England (5th Edn) (2015) para 313.]

DAMAGE

Caused by ship

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

[For 43(1) Halsbury's Laws of England (4th Edn) (Reissue) para 793 et seq see now 93 Halsbury's Laws of England (5th Edn) (2008) para 110 et seq.]

Pecuniary damage

[For 12(1) Halsbury's Laws of England (4th Edn) (Reissue) para 809 see now 29 Halsbury's Laws of England (5th Edn) (2014) para 312.]

DAMAGES

[For 12(1) Halsbury's Laws of England (4th Edn) (Reissue) para 802 see now 29 Halsbury's Laws of England (5th Edn) (2014) para 304.]

Additional damages

New Zealand [Copyright Act 1994, ss 120 and 121.] '[15] In issue is whether the phrase "additional damages" is confined to a financial award which is additional to compensatory (or nominal) damages or extends to a financial award which is "additional" to any other relief granted.

'[16] The judgment in *Cala Homes [Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd (No 2)]* [1996] FSR 36 addressed ss 96 and 97 of the Copyright, Designs and Patents Act (that is, the British analogues to ss 120 and 121 of our Copyright Act 1994). Laddie J had directed an account of profits against an infringing party and in issue before him was whether the plaintiffs could also seek additional damages.

'[17] As already noted, Laddie J was not impressed by an argument based on the speech of Lord Westbury in *Neilson v Betts* [(1871) LR 5 HL 1]. Having dismissed that argument, he then went on to refer to the Gregory Committee and in particular the passage of its report which we have already set out. He noted that prior to the judgment of the House of Lords in *Rookes v Barnard* [1964] AC 1129, the expression "exemplary damages" tended to be used imprecisely. He then went on at p 42:

"In any event, what was being suggested and what the 1956 Act did was to create a judicial discretion to award ahead of statutory damages over and above the remedies otherwise normally available to a successful plaintiff. Furthermore those damages would be available where 'existing remedies' gave inadequate relief. There is nothing in the Report which suggests that it was intended that the statutory damages should be restricted to cases where the plaintiff had sought an enquiry as to damages and not an account.

The better view appears to be that the 1956 Act created a form of relief which was *sui generis* to copyright law."

'[18] Laddie J then discussed the reasons for the shift in language between the Copyright Act 1956 (UK) and ss 96 and 97 of the 1988 Act and particularly the dropping of the condition that additional damages could only be awarded if effective relief would not otherwise be available. He concluded (by reference to the "Whitford Committee Report on the Reform of Copyright and Designs Law" (1977) Cmnd 6732) that the dropping of the precondition was intended as a quid pro quo for the 1988 Act's abolition of the entitlement to seek conversion damages. Having regard to that history, he concluded that there was no requirement to limit additional damages to cases where the plaintiff had elected to pursue damages rather than an account of profits.

'[19] Notably, Laddie J did not address the significance of the words "in assessing damages", which formed part of s 17(3) of the 1956 Act.

'[20] This judgment undoubtedly supports the arguments advanced by Mr Carruthers for Tiny Intelligence. Unfortunately for Tiny Intelligence, however, the judgment of Laddie J in *Cala Homes* was overruled by the House of Lords in *Redrow [Redrow Homes Ltd v Bett Brothers plc]* [1999] 1 AC 197; [1998] 1 All ER 385].

‘[21] The primary speech in *Redrow* was that of Lord Jauncey of Tullichettle. He started with s 17 of the 1956 Act. As to this section he said at p 204:

“Section 17(1) contemplated, *inter alia*, an action of damages for infringement. Subsection (2) provided that such damages should not be available against an innocent infringer. When subsection (3) referred to ‘assessing damages’ it referred back to the damages mentioned in subsection[s] (1) and (2), that is to say, normal compensatory damages for infringement. Subsection (3) made clear that it was only in assessing such damages that the court had power to award additional damages. There could thus have been no question of additional damages being awarded where an account of profits had been awarded. Additional damages in the subsection were damages additional to those being awarded under section 17(1).”

Lord Jauncey then referred to the background to the 1988 Act and in particular to the Whitford Committee Report, para [704]. He concluded that the dropping of the precondition that there would otherwise not have been an effective remedy did not suggest that additional damages could be awarded otherwise than in conjunction with normal compensatory damages. Both Lord Jauncey and Lord Clyde (who delivered the other substantive speech) were of the view that the dropping of the words “in assessing damages for the infringement” was a mere change in expression and did not have the effect of uncoupling the jurisdiction to award additional damages from an award of compensatory damages.

‘[22] It is true, as Mr Carruthers urged on us, that the 1988 Act chose to deal specifically with the interpretative impact of differences in wording between itself and the 1956 Act. Section 172(2), in particular, provided that:

- (2) A provision of this Part which corresponds to a provision of the previous law shall not be construed as departing from the previous law merely because of a change of expression.

It is also true that both Lord Jauncey and Lord Clyde drew some support for their position from provisions associated with remedies provided in relation to infringement of design rights in the 1988 Act, which have no counterparts in our statute.

‘[23] The significance of these points of distinction is best assessed by reference to the four considerations, set out at pp 208–209, which led Lord Clyde to reject the approach of Laddie J:

“In the first place the language used in the statute seems to me to point to the understanding that what is intended in section 97(2) is an enhancement of an award of damages and not the provision of a self-standing remedy. The use of the word ‘damages’ in sections 96(2) and 97(1) plainly refers to the ordinary remedy of damages and it is difficult to read the term ‘additional damages’ in section 97(2) as something quite separate and distinct. The phrase itself naturally reads as intending an addition to an award of damages rather than, as Laddie J put it, at p 40, ‘damages additional to the relief ordinarily available under section 96(2).’

Secondly, it seems to me that Chapter VI of the Act, which commences with section 96, sets out a statutory code for the remedies for infringement of copyright. This is reflected in particular in sections 96 and 97 by the repetition of the phrase ‘in an action for infringement of copyright’, in sections 96(2), 97(1) and 97(2). The provision in section 97(1) is tied in as part of the scheme and does not constitute a separate remedy. The initial list of remedies in section 96(2) is made by subsection (3) to have effect ‘subject to the following provisions of this Chapter.’ Thus structurally section 97(1) is a qualification to section 96 and it is natural to read section 97(2) as similarly related. In this way section 97 appears to contain respectively a derogation from and an embellishment to the provisions of section 96(2). That it is not as [a] matter of form directly included within section 96(2) does not mean that it is an independent self-standing remedy. *The corresponding provision of the Act dealing with design right, section 229, provides in subsection (2) for the list of remedies and in subsection (3) for the award of ‘additional damages.’ That the provision appears in the one context in a separate section and in the other in the same section suggests that the particular layout of sections 96 and 97 is not of consequence.*

In the third place, it seems to me quite clear that additional damages under the earlier legislation, section 17 of the

Copyright Act 1956, were intended to be an enhancement of an award of ordinary damages. In section 17(3) it was expressly provided that the court might make such an award 'in assessing damages for the infringement.' Those words have not been copied in the later form of the legislation in section 97. *But the significance which might otherwise have been attributed to the disappearance of those words in the Act of 1988 is materially diminished by the provisions of section 172. That section explains that Part I of the Act, into which sections 96 and 97 fall, is restating and amending the law of copyright. It then provides expressly in subsection (2) that a provision of Part I which corresponds to a provision of the previous law is not to be construed as departing from the previous law merely because of a change of expression. Subsection (3) expressly permitted reference to decisions under the former law to establish a departure from the previous law or to establish the true construction of Part I. The intention was plainly not only to amend but also to restate the former law, in what was no doubt hoped to be clearer language, and to preserve the existing jurisprudence.* The expression 'additional damages' remained unchanged. If it was to be transformed into some independent remedy compatible with an accounting that would have required clear words. On the contrary the retention of the expression and the evident intention to re-write without necessarily amending the law suggest that the concept of additional damages was not intended to be changed. Furthermore I find no indication in paragraph 704 of the report of the Whitford Committee, which deals with this matter, of the intention to make any basic change in the concept of additional damages. It was evidently desired to strengthen the deterrent element in a damages award with particular reference to flagrant infringements, especially since it was proposed to remove the provisions in section 18 of the Act regarding conversion damages. The whole context and substance of the discussion is one of damages. The intention at least of the Committee was evidently to widen the scope of the remedy and the deletion of the words in the former legislation restricting the award of additional damages to cases where 'effective relief would not be otherwise available' was not done in order to change the nature

of the award from being an enhancement of an award of damages.

Finally, I accept that, as counsel for the appellant explained, a distinction can be drawn between a 'benefit accruing to the defendant' such as is referred to in section 97(2) and the net profits which the defender might earn by the infringement. The latter would be caught by an action for accounting, but the former could extend to such matters as the acquisition of an enhanced position in the market which would not be included in a calculation of the net profits. But this additional content for the word 'benefit' does not seem to me to justify the conclusion that an award under section 97(2) was intended to be available when the pursuer opted to claim an accounting. The matter of a benefit accruing to the defender was among the express considerations to which the court was to have regard under the former provision in section 17(3)(b) of the Act of 1956 which was plainly in the context of an award for damages. That the remedy of an award under section 97(2) may not be available as an addition to an accounting of profits is wholly consistent with the basic principle that an award for damages is inconsistent with an accounting. Whether the character of an award of damages under section 97(2) is defined as exemplary damages, or, more probably, aggravated damages, it remains an award of damages. In the absence of any clear indication to the contrary I am not persuaded that Parliament intended to innovate upon the basic principle and allow a claim of this kind to be pursued alongside an accounting. But that is what the pursuers have sought to do in the present action." (Emphasis added.)

"[24] We have emphasised those parts of the speech which most obviously contain reasoning that is inapplicable to our statute. A substantial portion of the reasoning remains applicable. Furthermore, when the New Zealand Parliament enacted ss 120 and 121 of the 1994 Act, it presumably intended them to have the same meaning as ss 96 and 97 of the United Kingdom Act. If this was not the intention, why copy the language of those sections?

"[25] We note as well that a similar approach to that in *Redrow* has been adopted in Australia in relation to similarly expressed Australian legislation (s 115 of the Copyright Act 1968 (Aus); see *LED Builders Pty Ltd v Eagle Homes Pty Ltd* (1999) 44 IPR 24).

‘[26] Mr Carruthers advanced a number of arguments as to why we should construe s 121(2) of the 1994 Act as permitting a claim for additional damages in conjunction with a claim for an account of profits:

- (a) He noted the change in structure between s 24 of the 1962 Act and ss 120 and 121 of the 1994 Act, with a separating of the available remedies (as listed in s 120(2)) and the qualifications (s 121).
- (b) He stressed the dropping of the words in assessing damages for the infringement from the 1994 Act.
- (c) He contended that a limitation of additional damages to cases where compensatory damages are sought will have the result that flagrancy will sometimes go unpunished.
- (d) He relied on the New Zealand cases on additional damages (see *International Credit Control Ltd v Axelsen* [1974] 1 NZLR 695 (SCNZ), *Wellington Newspapers Ltd v Dealers Guide Ltd* [1984] 2 NZLR 66 (CA), *Thornton Hall Manufacturing Ltd v Shanton Apparel Ltd* [1989] 3 NZLR 304 (CA) and *Wilson v Broadcasting Corporation of New Zealand* [1990] 2 NZLR 565). The judgments do not give any indication that the power to award additional damages is confined to situations where damages are sought. Indeed, in *Axelsen Mahon J* plainly assumed that additional damages could be awarded on top of an account of profits and the same is true of *McMullin*, *Somers* and *Greig JJ* in the *Dealers Guide* case.

‘[27] We consider that points (a) and (b) are adequately addressed in the reasons given by Lords Jauncey and Clyde in *Redrow*. Point (c) has some force, but it is important to remember the gains made by a defendant can be captured in an award of additional damages. So there is no need to seek both an account of profits and additional damages. Point (d) is true as far as it goes, but none of the cases addressed the issue squarely and all were decided in relation to s 24 of the 1962 Act, which contained the words “in assessing damages” and plainly confined additional damages to cases where damages were sought.

‘[28] There is one additional point that we should make. Where there is a possibility that the plaintiff may seek additional damages, it is appropriate for the judge, when determining liability, also to make a finding as to flagrancy, thus permitting the plaintiff to make an informed choice between an account and damages (see *Condé Nast Publications Ltd v*

MGN Ltd [1998] FSR 427). This practice, which is well established in England, has much to commend it and takes a good deal of the sting out of the rather stark debate over an enforced election. In this case, the Judge did not make an express finding as to flagrancy in his first judgment (presumably because he was not asked to do so) but such a finding was probably implicit in the way in which the judgment was expressed.’ *Tiny Intelligence Ltd v Resport Ltd* [2008] NZCA 281, [2009] 1 NZLR 590 at [15]–[28], per William Young P

Aggravated damages

[For 12(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 811 see now 29 Halsbury’s Laws of England (5th Edn) (2014) para 322.]

Liquidated damages

[For 12(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 808 see now 29 Halsbury’s Laws of England (5th Edn) (2014) para 311.]

Liquidated damages and penalty distinguished

[For 12(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 1065 see now 29 Halsbury’s Laws of England (5th Edn) (2014) para 551.]

Nominal damages

[For 12(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 813 see now 29 Halsbury’s Laws of England (5th Edn) (2014) paras 319–320.]

Prospective damages

[For 12(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 810 see now 29 Halsbury’s Laws of England (5th Edn) (2014) para 314.]

Special damages

[For 12(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 812 see now 29 Halsbury’s Laws of England (5th Edn) (2014) para 317.]

Statutory damages

[For 12(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 814 see now 29 Halsbury’s Laws of England (5th Edn) (2014) para 302.]

Damages or compensation

New Zealand [Law Reform Act 1936, s 9. Whether an indemnity payable under a policy of insurance was ‘damages or compensation’ for reinsurance purposes.] ‘[5] Section 9(1) of the Law Reform Act 1936 provides:

- 9. Amount of liability to be charge on insurance money payable against that liability—**(1) If any person (hereinafter in this Part of this Act referred to as the insured) has, whether before or after the passing of this Act, entered into a contract of insurance by which he is indemnified against liability to pay any damages or compensation, the amount of his liability shall, on the happening of the event giving rise to the claim for damages or compensation, and notwithstanding that the amount of such liability may not then have been determined, be a charge on all insurance money that is or may become payable in respect of that liability.

‘[6] The analysis for which the policy holders contend is:

- Any person = Western Pacific.
- Contract of insurance = the reinsurance treaties.
- Liability to pay damages or compensation = the money Western Pacific must pay to the original insured for damage suffered to their buildings.

‘[7] The primary point of dispute is whether it can be said that the reinsurance policies indemnify Western Pacific as regards a liability Western Pacific has:

... to pay damages or compensation.

‘[8] The liquidators submit that this aspect of s 9 is not met because:

- (a) the liability of Western Pacific to the original insured under a general policy is not a liability to pay damages or compensation; and
- (b) reinsurance is reinsurance of the original subject matter and not an insurance of Western Pacific’s liability in relation to the policy.

‘[9] As regards the first point, I agree that it is not correct to describe Western Pacific’s obligation under the original policy as being an obligation to pay damages. That would more accurately describe a situation where Western Pacific was in breach of its contractual

obligation. However, compensation seems a readily applicable term.

‘[10] The liquidators read the section as if it says liability to pay compensation for a wrong, thereby limiting the scope of the section to situations where the insured has caused an injury to a third party. Support for s 9 being limited in scope could be found in the judgment of Blanchard J, writing for the Court in *Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd* [[2010] NZSC 49, [2010] 3 NZLR 713]. That case involved a conflict of laws issue, but in describing s 9 his Honour observed:

[1] The issue on this appeal is whether a New Zealand statutory provision, which gives someone who has suffered injury or damage the right to make a direct claim against the insurer of the person who caused the injury or damage, can apply in circumstances where the insured and the insurer were Australian companies, the insurance policy was arranged between them in that country and the insured has gone into liquidation there.

‘[11] There is no dispute here, however, as to what the usual role or use of s 9 has been. The issue here is whether the section can apply to a different situation, namely reinsurance. In that regard, all the section talks of is a liability to pay compensation, and I do not consider it is stretching that word to see it as applicable to the present situation. Western Pacific has agreed to indemnify its policyholders for loss they suffer within the terms of the original policy. That is, I consider, an obligation to compensate them. The reinsurance treaties have been triggered by Western Pacific’s liability to pay compensation to the Canterbury Policy Holders, and s 9 says those policy holders have a charge over the money.

‘[12] There is no doubt that compensation could have a narrower meaning which excluded the liability under the original policy. For example, *Black’s Law Dictionary* describes compensation as:

... payment of damages or other act that a court orders to be done by a person who has caused injury to another.

‘[13] However, a less technical meaning of the term usually involves the concept of “to make up for, or counterbalance”. That comfortably describes Western Pacific’s situation as regards its policy holders.

‘[14] In terms of other factors that might

influence the interpretation of s 9, Mr Barton refers to the practical difficulties that arise in a reinsurance situation. First, most individual policy holders who have suffered loss could not bring an action on their own, because their individual loss has not triggered the reinsurance. It is the pooling of the claims by the reinsured company that triggers the reinsurance. Next, the original insured would face the hurdle of the excess or retention that applies before the catastrophe reinsurance is triggered. And finally, most reinsurance will involve several individual reinsurers, who will be based in different jurisdictions.

‘[15] The response to these points must be that they are indeed practical difficulties, but they are not insurmountable conceptually. The fact that in a particular case it may be difficult or uneconomic to pursue a group action under s 9 does not mean s 9 should be interpreted so as to remove the option. Further, and more importantly, the issues do not arise here where the reinsurers accept their liability and arrangements are in place for the \$33m to be paid. Accordingly, I am of the view that on its plain terms s 9 can apply to this reinsurance situation.

‘[16] The second proposition relied on by the liquidators is an argument that s 9 is limited to liability insurance, and reinsurance is not a form of liability insurance so s 9 cannot apply. However, once one decides that the plain wording of s 9 fits the situation of the Canterbury Policy Holders, I do not consider a general proposition that s 9 does not apply to reinsurance advances matters.’ *Ruscoe v Canterbury Policy Holders* [2012] 2 NZLR 438 at [5]–[16], per Simon France J

DANGEROUS DOG

[For 2(1) Halsbury’s Laws of England (4th Edn) (2003 Reissue) paras 713–716 see now 2 Halsbury’s Laws of England (5th Edn) (2017) paras 221–229.]

DATA CONTROLLER

[Data Protection Act 1998, s 1(1): whether liquidators of a company which was a data controller were ‘data controllers’ within the meaning of s 1(1).] ‘[11] The relevant provisions of the 1998 Act may be summarised as follows. Section 1 contains definitions. “Data” extends to data held both in hardcopy and electronic form. “Data controller” is defined to mean—

“a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed.”

A “data processor”, in relation to personal data, means “any person (other than an employee of the data controller) who processes the data on behalf of the data controller”. “Processing” includes “obtaining, recording or holding the information or data”. A “data subject” is an individual who is the subject of personal data.

...
‘[17] The first question asks baldly whether the joint liquidators are “data controllers” for the purposes of the 1998 Act. They are in fact both registered as data controllers for the purposes of duties which they may undertake as liquidators or other office holders in respect of insolvent companies or individuals. Some of the duties of a liquidator are undertaken by him as principal in that capacity and not on behalf of the company of which he is the liquidator. For example, where he receives and adjudicates upon proofs of debts submitted by those claiming to be creditors of the company, he does so as the liquidator and not as an agent of the company. Data, some of which is likely to be personal, will be processed and retained by the liquidator in the course of performing those duties. It follows that he is required to register as a data controller. Registration as a data controller is a single event and covers all activities in relation to data coming within the 1998 Act, irrespective of the capacity in which he undertakes those activities. Accordingly, an insolvency practitioner will be registered once as a data controller, irrespective of the number of his appointments as an office-holder.

‘[18] The issue is not whether the joint liquidators are data controllers in respect of data processed by them when acting in their capacity as joint liquidators. The issue is whether they are data controllers as regards the data processed by the company in respect of the redeemed loans. The data was collected at a time when the company was carrying on business and was held by it at the time it went into liquidation. Section 5(1) of the 1998 Act provides that the Act applies to a “data controller” in respect of any data only if “(a) the data controller is established in the United Kingdom and the data are processed in the context of that establishment ...” The company was therefore a data controller in respect of the data because it was established in the United Kingdom and it processed the data in the

context of that establishment.

...
 '[20] The issue is whether the commencement of a liquidation and the appointment of a liquidator renders the liquidator, in place of or in addition to the company, a data controller in respect of data processed by the company. For this to be the case, the relevant decisions as regards the processing of such data must be taken by the liquidator as principal in his capacity as an office-holder rather than as agent of the company, thereby distinguishing him from the position of directors prior to the liquidation.

...
 '[34] The data to which this case relates belonged to or was under the control of the company when it went into liquidation. Ownership of data may be a complex subject, but it cannot be doubted that intellectual property rights in respect of the relevant data were vested in the company, which may also have been the owner of the paper files held by Acenden as the data processor. Those property rights and all rights to control the data remained vested in the company at and following its liquidation. It follows, in my judgment, that in exercising any rights in respect of the data, including those which define the role of a data controller, the liquidators would be acting as the agents of the company.

'[35] I will accordingly determine that the joint liquidators of the company are not data controllers within the meaning of s 1(1) of the 1998 Act in respect of the data processed by the company prior to its liquidation.

'[37] The declaration I am making on this application relates to voluntary liquidators, but I do not think that the position is different as regards liquidators in a compulsory winding up. ...' *Re Southern Pacific Personal Loans Ltd; Smith v Information Commissioner* [2013] EWHC 2485 (Ch), [2014] 1 All ER 98 at [11], [17]–[18], [20], [34]–[35], [37], per David Richards J

DATE

Australia '[6] The critical issue of construction of s 49(4) [of the of the Criminal Law Consolidation Act 1935 (SA)] concerns the import of the phrase "was on the date on which the offence is alleged to have been committed". The phrase is placed in a subsection stating that what follows shall be a defence to a charge under s 49(3) [of sexual intercourse with a person aged between 12 and 17 years]. The

phrase appears twice, in paras (a) and (b)(i), and thus has an impact upon each of the two defences just described.

'[7] An accused does not make allegations, particularly as to the date on which the alleged offence was committed. The passive voice is used in the expression "is alleged", but the better construction attaches the phrase to the elements of the charge against which s 49(4) provides for defences.

'[8] What then is conveyed in s 49(4) by the term "the date"? In answering that question it would be inappropriate to begin with what might follow from the general proposition that in reckoning time by days ordinarily the law takes no account of fractions of a day. A solar day of 24 hours is a division of time. Here, what is to be construed is the statutory expression "the date". It is true that in popular usage "date" may identify a particular day on the calendar. But the term "the date" encompasses more than that, including both a particular point in time at which, and a period of time within which an event or transaction occurs.

'[9] In *Hackwill v Kay* [[1960] VR 632 at 634], O'Bryan, Dean and Monahan JJ considered the authorities supporting the general proposition that an allegation in an indictment or information of a date as that of the commission of the offence is immaterial unless it be an essential element of the offence. Upon the proper construction of the statutory provision before them, their Honours concluded that the date was such an essential element.

...
 '[11] In the present case, the particulars of the offences identified the date alleged as "between the 31st day of January 1986 and the 28th day of February 1986 at Renmark or another place". This would have been sufficient to identify "the date" within the meaning of s 49(4) of the Act. The submission by the respondent is that no particular date was essential to its case other than that in 1989 when the complainant would have no longer been under the age of 17 as indicated by s 49(3). This should not be accepted. The above words in the particulars were an element of the offences charged.

'[12] Between the periods 31 January and 28 February 1986, the complainant undoubtedly was not above the age of 16 years and under the age of 17 years. There was no possibility of a defence based upon s 49(4). But if, as the appellant contended at trial, he had had sexual intercourse with the complainant only at a later date (in 1989), he had an immediate answer to the charges.

‘[13] The appellant submits as the first ground of appeal to this court that (a) the only offences with which the appellant was charged were offences which could not engage a defence under s 49(4); and (b) hence the date of the offences as alleged in the particulars had to be proved. That submission should be accepted.

‘[14] The trial miscarried in a serious respect because there was never any charge against the appellant alleging a date in 1989 as the date of the offences. To a charge in that form, there properly could have been propounded a defence based upon paras. (a) and (b)(ii) of s 49(4), namely upon the age of the complainant as 16 years or above and the belief of the appellant on reasonable grounds that the complainant was of or above 17 years of age.

‘[16] The appellant correctly submits that “the date” spoken of in s 49(4) is that alleged in the information upon which the trial (and any pre-trial proceedings) are conducted. The date might have been amended by the court pursuant to s 281(2) of the Act but the prosecutor did not seek such an amendment, nor the provision of alternative counts.’ *W v R* [2007] HCA 58, (2007) 241 ALR 199, BC200710770 at [6]–[9], [11]–[14], [16], per Gummow J

DATE OF DISCOVERABILITY

Australia [Limitation Act 1974 (Tas), s 5(3A): plaintiff precluded from recovering damages in an action instituted more than three years after the ‘date of discoverability’ of injury.] ‘[34] Section 2(1) of the Limitation Act provides that “the date of discoverability in the case of an action for damages for personal injuries or death means the date when the plaintiff knew or ought to have known that personal injury or death—

- (a) had occurred; and
- (b) was attributable to the conduct of the defendant; and
- (c) in the case of personal injury, was sufficiently significant to warrant bringing proceedings”.

‘[54] Incorporating the introductory words, par (c) refers to actual constructive knowledge that the person’s injury was sufficiently significant to warrant bringing proceedings. The definition deals with personal injury or death, but par (c) is confined to personal injury. It seems common ground that the word “warrant” is to be treated as synonymous with “justify”, as appears in the New South Wales equivalent.

‘[55] The difference in the parties’ positions

is that Allianz says that the required knowledge relates to the nature and extent of the injury. Mr Mercer says that the paragraph incorporates the question of significance assessed by reference to something broader than the injury itself. That is, it makes knowledge as to whether proceedings are generally justified, enabling all relevant considerations bearing on actions for damages to be taken into account. Allianz makes the point that such a position is inconsistent with the position of personal representatives of the deceased person. Only pars (a) and (b) relate to death. If par (c) operates as contended for by Mr Mercer, personal representatives of a deceased person are put in a completely different category, and a “date of discoverability” would occur without reference to the likely outcome of an action for damages for wrongful death.

‘[84] I accept Allianz’s arguments as to the construction of the definition. The fundamental point is that the provision is to fix a time at which time commences to run. The clear purpose of the provisions is to deal fairly with cases where the existence of some injury, or the seriousness of it, is not apparent for some time, particularly where it is of a progressive nature. It seems to me that against the backdrop of the rationale for the date of discoverability provisions, and on the wording of a definition as whole, it is the significance of the injury which is the focal point of par (c). It is the *injury* which must be known to be sufficiently significant to warrant bringing proceedings, although it is plain from *Baker-Morrison* [*Baker-Morrison v New South Wales* (2009) 74 NSWLR 454, [2009] NSWCA 35] and *Frizelle* [*Frizelle v Bauer* [2009] NSWCA 239] that in certain circumstances the knowledge referred to in par (c) will involve legal and medical information and evaluation. Whether or not a degree of impairment is required, as is the case under [the Workers Rehabilitation and Compensation Act 1988 (Tas),] s 138AB, is a good example. Relevant knowledge would include knowledge that the threshold exists and whether the injury has given rise, or might well give rise, to the particular degree.

‘[85] Of course, as Basten JA made clear in *Frizelle*, it is not every case which involves legal or medical evaluation. In *Baker-Morrison*, his Honour expressly said that the introductory words refer to knowledge of identified facts, “and not to an assessment of prospects of success in the prospective proceedings”. The possible need for medical and legal evaluation where such things as thresholds and other legal

factors bearing on the viability of an action, does not mean that knowledge of sufficient significance to warrant bringing proceedings extends to knowledge of all of the various favourable and adverse contingencies which will affect the ultimate outcome. Those matters are relevant to the decision as to whether to institute proceedings.

‘[86] I do not think that par (c) is to be read as saying that a person only knows or is taken to know that the injury is sufficiently significant to warrant bringing proceedings until they are in possession of all information enabling a full evaluation of the likely outcome of proceedings, and if relevant, a comparison to alternatives which may be available. In my view, par (c) does not mean knowledge that the injury is sufficiently significant to warrant bringing proceedings, in the sense that the anticipated outcome, assessed on the basis of the significance of the injury and all other factors which may affect the outcome, warrants proceedings *actually* being taken.’ *Allianz Australia Insurance Ltd v Mercer* [2016] TASFC 2, (2016) 330 ALR 157 at [34], [54]–[55], [84]–[86], per Porter J

DAY

[For 45(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 213 see now 97 Halsbury’s Laws of England (5th Edn) (2015) para 313.]

DE BONIS NON

[For 17(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 201 see now 103 Halsbury’s Laws of England (5th Edn) (2010) para 793.]

DEBENTURE

[For 7(2) Halsbury’s Laws of England (4th Edn) (2004 Reissue) para 1533 see now 15A Halsbury’s Laws of England (5th Edn) (2016) para 1482.]

[Note that the Companies Act 1985, s 744 has been repealed. See now the Companies Act 2006, s 738.]

DEBENTURE STOCK

[For 7(2) Halsbury’s Laws of England (4th Edn) (2004 Reissue) para 1542 see now 15A Halsbury’s Laws of England (5th Edn) (2016) para 1492.]

DEBT

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

Debt or other liquidated pecuniary claim

[Limitation Act 1980, s 29(5): where a right of action has accrued to recover ‘any debt or other liquidated pecuniary claim’ and the person liable acknowledges the claim, the right is to be treated as having accrued on the date of the acknowledgment.] ‘[5] Thus we have to decide, first, whether a solicitors’ claim for costs, billed but not yet fixed by assessment or agreement, is a claim such as falls within the terms of s 29(5) of the 1980 Act and secondly, if it does, whether the letter was an acknowledgment of that claim for the purposes of the section.

‘[6] There is authority in the High Court in favour of the judge’s reading of s 29(5), which he followed, as he had to. The point has never been considered in the Court of Appeal, despite the provision having been in the relevant form since the Limitation Act 1939. ...

‘[20] The statutory phrase speaks of “debt or other liquidated pecuniary claim”. The proposition that it should be a pecuniary claim is not surprising or problematical.

‘[21] The word “debt” can be used in a number of different senses. In terms of classification, a distinction is drawn between a claim in debt and a claim in damages. The distinction may be clear in terms of analysis, but it sometimes produces what seem to be odd distinctions in practice. For example whether a claim under a guarantee is in debt or in damages may depend on a close reading of the terms of the guarantee: see *Norwich and Peterborough Building Society v McGuinness* [2011] EWCA Civ 1286, [2011] All ER (D) 63 (Nov).

‘[22] That distinction had to be addressed in that case because a bankruptcy petition must be based on a liability which is a debt for a liquidated sum: see s 267(2)(a) of the Insolvency Act 1986. In the case last mentioned it was held that the debtor’s liability under the guarantee did create a debt, not merely a liability in damages.

‘[23] Closer to the present case, Proudman J in *Truex v Toll* [2009] EWHC 396 (Ch), [2009] 4 All ER 419, [2009] 1 WLR 2121, held that a solicitor’s claim for costs, not fixed by agreement, assessment or judgment, was not a debt on which a bankruptcy petition could be founded. ...

‘[24] If the debtor in question were the

subject of a bankruptcy order, the solicitor could prove for his claim as a bankruptcy debt under s 322 of the 1986 Act, but that is because “bankruptcy debt”, for purposes of proof, is defined at s 382 as including “any debt or liability to which [the bankrupt] is subject at the commencement of the bankruptcy”. For that purpose, therefore, distinctions between debt and damages, and between liquidated and unliquidated liabilities, are irrelevant.

‘[25] There is therefore some scope for debate as to the width of the word “debt” in this context. As for the word “liquidated”, I would take it that, in ordinary legal usage, this requires that the liability should be for an ascertained amount. Most liquidated claims would be for a debt. Obvious examples include the outstanding principal and unpaid interest (at a contractual rate) on a loan, and sums due by way of rent or hire, and the price of goods (if specified in the contract). Conventionally, unliquidated claims are normally in damages. Some damages claims, however, may be liquidated. A good example is a building contract which has a liquidated damages clause defining the builder’s liability if the work is not complete by the stipulated finishing date.

‘[47] For those reasons, despite the possible oddity of a quantum meruit claim being classified, for this purpose, as a liquidated claim, it seems to me that a claim by solicitors for remuneration, even though not yet fixed by assessment or otherwise, is within the phrase “debt or other liquidated pecuniary claim” in s 29(5)(a). I would hold that Judge Davies and Mr Crowley QC were right in their decisions to which I have referred. It seems to me that the better view is that a solicitor’s claim for professional fees, even though not yet fixed by agreement or assessment, did fall within s 23(4) of the 1939 Act and still does under s 29(5) of the 1980 Act.

‘[48] It is therefore a claim which is open to be acknowledged under that provision. I do not need to decide whether it qualifies as a “debt” or an “other liquidated pecuniary claim”. One way or the other it is within the statutory phrase.’ *Phillips & Co (a firm) v Bath Housing Co-operative Ltd* [2012] EWCA Civ 1591, [2013] 2 All ER 475 at [5]–[6], [20]–[25], [47]–[48], per Lloyd LJ

Provable debt

Australia ‘[7] In this court, Mr Foots argues that the costs order made against him was a

provable debt within the meaning of s 82 of the Bankruptcy Act as it was a debt or liability arising out of an obligation incurred before his bankruptcy. That “obligation” was said to arise from the judgment against him for the money sum awarded on 1 September 2005. Alternatively, Mr Foots submitted that the phrase “all debts and liabilities” in s 82 is broad enough to encompass an obligation that is incidental to a provable debt, even if the incidental obligation was not a necessary concomitant in law of the provable debt. However, Mr Foots did not submit that the costs order itself was a relevant “obligation” or that it was a “contingent” liability within the meaning of s 82.

‘[10] Section 82 limits provable debts both by subject-matter, in that they must answer the statutory descriptions, and temporally, in that they must arise before (not after) bankruptcy. At first glance, neither criterion is fulfilled in the present case: this particular costs order was incurred after bankruptcy, and the appellant was under no obligation to pay those costs beforehand.

‘[11] A second aspect of s 82 flows from the first. Contrary to the appellant’s submissions, there is no express or implied textual support for the notion of a debt being provable if it is incidental to, or consequent upon, a debt which is itself provable. Those debts which are provable are spelled out by the section: matters falling outside those categories are not provable.

‘[24] As already remarked, in this court, the appellant contended, first, that his exposure to an adverse costs order was, in the terms of s 82(1) of the Bankruptcy Act, a debt or liability arising from an “obligation” incurred prior to his bankruptcy, and, secondly, that it was a liability “incidental” to a provable debt.

‘Obligation incurred prior to bankruptcy?’

‘[35] What, then of the appellant’s first submission? This is, that his exposure to an adverse costs order arose from an “obligation” incurred prior to his bankruptcy. The submission should be rejected: no such obligation arose until the costs order was made. This conclusion is consistent both with the Australian authorities upon which Chesterman J had relied and the twentieth century English authorities regarding the proof of costs in bankruptcy, particularly *Re A Debtor* [[1911] 2 KB 652], *Re Pitchford* [[1924] 2 Ch 260] and *Glenister* [[2000] Ch 76, [1999] 3 All ER 452]. Each of these authorities emphasises the distinct nature

of the proof of a costs order and the proof of an underlying debt.

[36] The most that can be said, as Mummery LJ observed in *Glenister* [at Ch 84, All ER 458], is that “[o]nce legal proceedings have been commenced there is always a possibility or a risk that an order for costs may be made against a party”. But that risk is not a contingent liability within the sense of s 82(1). The order for costs itself is the source of the legal liability and there is no certainty that the court in question will decide to make an order. It should be remarked that in support of his reasoning in *Glenister* [at Ch 83; All ER 457], Mummery LJ referred to what had been said by Kitto J in *Community Development Pty Ltd v Engwirda Construction Co* [(1969) 120 CLR 455 at 459, [1970] ALR 173 at 174–175] and by Tadgell J in *Federal Commissioner of Taxation v Gosstray* [[1986] VR 876 at 878]. The first submission by the appellant should be rejected.

‘Incidental?’

[37] Upon like considerations, and again contrary to the appellant’s submissions, it cannot be said that exposure to an adverse costs order is “incidental” to liability for the underlying judgment debt. For reasons that will be explored later in these reasons, it is highly doubtful that the text of s 82 supports the notion of “incidental” liabilities that are not themselves provable debts. However, it is sufficient for present purposes to observe that, as a factual and legal matter, costs are no longer an “incident” of either verdict or judgment. As explained above, the making of an adverse costs order turns upon discretionary considerations that arise independently of the entry of judgment against the debtor.

[65] If the distraction of *British Gold Fields [Re British Gold Fields of West Africa]* [1899] 2 Ch 7] is resisted when construing the text of the Bankruptcy Act, and the nature of a costs order is appreciated, several difficulties lie in the path of the admission to proof of the costs order made against Mr Foots. First, the order made falls outside s 82(1) because it was made after bankruptcy, and was thus not a liability “to which a bankrupt was subject at the date of the bankruptcy, or to which he or she may become subject before his or her discharge by reason of an obligation incurred before the date of the bankruptcy” (emphasis added). Secondly, as explained earlier in these reasons, Mr Foots was under no antecedent obligation to pay costs until the order was made against him. Thirdly, there is no scope in the text or structure of the Bankruptcy Act for the notion of an obligation

or liability “incidental” to a provable debt. The necessary corollary of the appellant’s argument is the admission that such an obligation is not itself a provable debt, but is only “incidental” to one. If such an obligation is not a provable debt, when then should it be admitted to proof? Dressing the notion in the language of “incidence” does not alter matters: rather, it is apt to disguise the text of the Bankruptcy Act.

[67] Had the costs order made by Chesterman J on 3 February 2006 been made and taxed before the appellant’s bankruptcy ensued, it would have been a provable debt. Even if the order had not been taxed before bankruptcy, it would nonetheless have been provable as a debt incurred “by reason of an obligation incurred before the date of the bankruptcy”; namely the antecedent making of the costs order. However, the order was made only after bankruptcy had already intervened, and the appellant’s liability to meet that order did not arise from an obligation incurred before bankruptcy. Thus, it was not a provable debt, and the stay contained in s 58(3) of the Bankruptcy Act was not engaged. His Honour was therefore entitled to make the costs order against Mr Foots.’ *Foots v Southern Cross Mine Management Pty Ltd* [2007] HCA 56, (2007) 241 ALR 32, BC200710620 at [7], [10]–[11], [24], [35]–[37], [65], [67], per Gleeson CJ, Gummow, Hayne and Crennan JJ

Australia [11] The issue is whether a cross-claim by a director against a co-director for equitable contribution to the former’s exposure to liability under ss 588G and 588M of the Corporations Act, is a debt or liability which falls within the ambit of s 82(1) of the Bankruptcy Act, and therefore a provable debt under s 58(3)(b).

[12] In order to be such a debt or liability the bankrupt must have been subject to it at the date of the bankruptcy or it must be one to which he may become subject before his discharge by reason of an obligation incurred before the date of bankruptcy.

[13] It is not necessary to set out in full ss 588G and 588M of the Corporations Act.

[14] Those sections provide that if a person is a director of a company which incurs a debt when it is insolvent, or becomes insolvent by incurring that debt, and at the time there are reasonable grounds for suspecting the company is, or would become, insolvent, and that director is aware that there are grounds for suspecting insolvency, or if a reasonable person in a like position would be so aware, the liquidator of the

company may recover from that director "as a debt due to the company" the amount of the loss or damage suffered by the creditor in relation to the debt.

'[15] Ordinarily, the damage suffered by the creditor represents the amount of the debt owed by the company to him or her which remains unsatisfied because of the company's inability to pay it.

'[30] The distinguishing feature between an insolvent trading claim directly against a director and this claim is the interposition of what is required for an obligation to make equitable contribution.

'[31] The real question, it seems to me, is whether the engrafting onto the insolvent trading claim of the requirements for an equitable contribution liability of a coordinate obligor takes the claim outside the ambit of s 82(1) of the Bankruptcy Act.

'[32] This involves a consideration of the nature and requirements for equitable contribution liability, in particular whether it truly is a discretionary remedy and, if so, what the nature is of that discretion.

'[33] The doctrine of equitable contribution was considered by the High Court in *Burke v LFOT Pty Ltd* (2002) 209 CLR 282, 187 ALR 612, [2002] HCA 17. Gaudron A-CJ and Hayne J, at [14], held that in general terms the principle of equitable contribution requires that those who are jointly or severally liable in respect of the same loss or damage should contribute to the compensation payable in respect of that loss or damage either equally where they are liable in the same amount or proportionately where the amount of their liability differs. The doctrine of equitable contribution applies both at common law and at equity and is usually expressed in terms requiring contribution between parties who share coordinate liabilities or a common obligation to make good the one loss. Their Honours referred to *Dering v Earl of Winchelsea* (1787) 1 Cox 318 at 322 29 ER 1184 at 1186 as support for the notion that coordinate liability is one that depends on common interest and common burden.

'[34] The circumstances in which a court will order contribution are not closed: *Burke v LFOT* at [48]–[51] per McHugh J.

'[35] The doctrine stems from the equitable precept that equality is equity. However, this maxim is not to be interpreted literally and it is not necessary to demonstrate that each of the co-obligors owes exactly the same duty founded on exactly the same legal source in precisely the

same amount to the identical obligee: *Burke v LFOT* at [92]–[95] per Kirby J.

'[36] It seems to me that directors of the same company who are liable to the liquidator in respect of the insolvent trading of that entity where the liquidator could recover from each of them as a debt due to the company the amount of the loss or damage suffered by a creditor, have coordinate liability attracting the doctrine of equitable contribution.

'[37] Indeed, the cross-claim depends for its existence on such a coordinate liability. If such a liability did not exist, on the facts pleaded, the cross-claim would be liable to be struck out on that basis alone.

'[38] It may be accepted that a claim for equitable contribution could be met by defences generally available to meet equitable claims, such as unclean hands, laches and acquiescence. Culpability on the part of the claimant is a factor bearing on the right to equitable contribution. Also, contribution cannot be obtained from a person who is entitled to indemnity from the claimant: *Burke v LFOT* at [15]–[18] per Gaudron A-CJ and Heydon J.

'[39] It does not seem to me that it can properly be said, however, that the right to contribution in equity depends on the exercise by the court of a discretion at large. A right to such contribution exists in equity if there is coordinate liability. The nature and extent of contribution may depend on relative culpability and the availability of any equitable defence. However, that is the same in the case of almost any equitable claim. Liability for contribution arises from objective circumstances not from the exercise of discretion.

'[40] Neither the fact that there must be initial direct liability on the claimant, nor the fact that the circumstances which pertained at the relevant time may affect the extent of the liability of the respondent to the claim (which circumstances must be examined by the court if they are raised), makes the liability to contribute any less a liability which has arisen by reason of obligations incurred before the bankruptcy.

'[41] There is nothing in the language of s 82(1) of the Bankruptcy Act that restricts the term "debts and liabilities" to debts due only in law and not in equity: *Wilson v Official Trustee in Bankruptcy* (2000) 97 FCR 196, 170 ALR 430, [2000] FCA 282 at [34]–[38] per Emmett J.

'[42] The coordinate liability asserted existed as much as the director's several liability as at the date of the bankruptcy. As pleaded, there was an existing obligation upon each of the directors as at the date of the bankruptcy to pay as a debt due to the company

the loss suffered by the relevant creditors as a consequence of the insolvent trading and an obligation on each of those directors inter se to bear their equitable contribution to it which obligation would arise in a future event namely, that one of them became liable to pay more than his just share: compare *Lofthouse v Cmr of Taxation* (2001) 164 FLR 106, [2001] VSC 326 at [42]–[48] per Warren J; *Lyford v Carey* (1985) 3 ACLC 515.

[43] There does not seem to be any good reason in principle or logic why a claim by the liquidator of Buzzle against the bankrupt would be met by s 82(1) of the Bankruptcy Act because the necessary circumstances arose before the sequestration, but a claim for contribution by another director arising from the same circumstances against the bankrupt would not.

[44] The entirety of the acts and omissions of both Apple and the bankrupt which gives rise to their respective liability occurred before the bankruptcy.

[45] The broad policy of the bankruptcy law was referred to by James LJ in *In re Hide; ex parte Llynvi Coal & Iron Co* (1871) LR 7 Ch App 28 at 31–2 as follows:

Every possible demand, every possible claim, every possible liability, except for personal torts, is to be the subject of proof in bankruptcy ... The broad purview of this Act is, that the bankrupt is to be a freed man.

[46] It seems to me that an outcome that a direct claim against the bankrupt would be provable, but a claim for contribution against him by a co-director in respect of a coordinate liability arising out of the same circumstances would not be provable would be contrary to that broad policy.

[47] In my view, the claims sought to be promoted in the cross-claim fall within the ambit of s 82(1) of the Bankruptcy Act and require leave of the court to be proceeded with and, in the absence of that leave, must be stayed. *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* [2007] NSWSC 930, (2007) 214 FLR 48, (2007) 64 ACSR 300, BC200707396 at [11]–[15], [30]–[47], per Hammerschlag J

DECISION

Australia [Administrative Appeals Tribunal Act 1975 (Cth), s 44.] [8] The first question to consider in the statutory appeal to this court is,

therefore, whether what the tribunal did amounted to a decision within the meaning of s 44 of the AAT Act. Section 44(1) provides:

A party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding.

In *Director-General of Social Services v Chaney* (1980) 31 ALR 571; 3 ALD 161 (*Chaney*) it was held that “decision” in the context of s 44(1) was used in a restricted sense referring to a final decision or determination. ... An appeal under s 44(1) requires that the disposition by the tribunal be “the effective decision or determination of the application for review”. In the usual case an effective decision by the tribunal will be reflected in the orders made under s 43, but, as was explained by Deane J in *Chaney*, a decision may come within s 44 where it is (a) that the interests of a person are not affected by a particular decision (see s 44(2) of the AAT Act) and (b) where it is of a part of a proceeding which can properly be divided into separate parts. In such cases the disposition by the tribunal can be seen as deciding finally some aspect of a party’s entitlements and, therefore, as having the effect of finally deciding or determining an aspect of a proceeding. Its quality as a decision within the meaning of s 44 is that it ends the whole or a properly separable part of the matter before the tribunal.’ *Commissioner of Taxation (Cth) v Cancer And Bowel Research Association Inc* [2013] FCAFC 140, (2013) 305 ALR 534 at [8], per Edmonds, Pagone and Davies JJ

Australia [Administrative Decisions (Judicial Review) Act 1977 (Cth), ss 3, 5. Preliminary decision on exemption for overseas doctors under Health Insurance Act 1973 (Cth), s 19AB.] [44] Even though a principal issue in the appeal was whether there was a decision “under an enactment”, and thus whether the two criteria mentioned in *Griffith University [Griffith University v Tang]* (2005) 221 CLR 99; 213 ALR 724; 82 ALD 289; [2005] HCA 7] were satisfied, to widen the focus is to raise a separate issue as to whether what we have described as the decision of 22 October 2012 was a “decision” at all for the purposes of the ADJR Act. At a general level of abstraction, the furnishing of what was termed a “preliminary advice” undoubtedly did entail the making of a decision in the course of public administration. But as is confirmed by *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337;

94 ALR 11 at 23; 21 ALD 1 at 11, not every decision made in the course of public administration is amenable to review under the ADJR Act. Only those administrative decisions which, at least in a practical sense, are final or operative are decisions which may be judicially reviewed under the ADJR Act. That this decision was termed a “preliminary advice” is not itself decisive, as it is substance, not form, which is critical. In this case, terming the decision a “preliminary advice” truly does reflect its substance. Preliminary though it is, it is possible, as already discussed, to discern a prospective, practical effect in the decision of 22 October 2012 but the final or operative decision contemplated by the HIA is a s 19AB(3) exemption decision. And no such decision was made or even the subject of an application for it to be made. The lawfulness of administrative decisions which lack this final or operative quality may still be questioned but not under the ADJR Act. The other remedies, discussed above, may be open but not in the Federal Circuit Court.

‘[45] Thus, for the purposes of the ADJR Act, not only was the preliminary advice of 22 October 2012 not a decision under an enactment, it was not a “decision” at all.’ *Minister for Health v Nicholl Holdings Pty Ltd (ACN 063 703 748)* [2015] FCAFC 73, (2015) 321 ALR 340 at [44]–[45], per Greenwood and Logan JJ

Australia [Local Government Act 1995 (WA), s 9.1: review of ‘decision’ under the Act.] ‘[8] For the reasons which follow, both the Tribunal and the trial judge were wrong to conclude that the fact that councillors were unaware of PEA’s application at the time a decision was made on behalf of the Shire, which had the effect of refusing PEA’s application, meant that no decision of that nature had been made. ...

...
‘[76] Each of the Shire and CBP submitted that the word “decision” in Div 1 of Pt 9 of the Act should be construed as applying only to the outcome of a process of mental engagement by the decision-maker with the subject matter of the decision. So, in their submission, a decision which had the effect of refusing an authorisation was not a “decision” within the meaning of that term in Div 1 of Pt 9 of the Act unless the decision-maker had turned his, her or its mind to the question of whether the authorisation should be refused. In their submission, this construction should be adopted even in cases in which the decision-maker was aware that an

application for a directly conflicting authorisation had been lodged and the inevitable consequence of the grant of one application would be the refusal of the other. ...

‘[84] ... The Shire received two applications for permits to conduct beach polo tournaments at the same time and the same place in 2014. The grant of either application necessarily meant the rejection of the other. The Shire could have considered the applications simultaneously, as it had previously. It did not do so. By granting CBP’s application, the Shire implicitly refused PEA’s application. It was not necessary for the decision-making organ within the Shire (the council) to have mentally engaged with PEA’s application for its decision to grant CBP’s application to have had that effect. Of course, this process of reasoning depends upon the Shire having received two applications in circumstances in which the grant of one necessarily led to the refusal of the other.

...
‘[88] ... The Shire had received the applications for permits from each of CBP and PEA. Because of the inexorable conflict between those applications in respect of the event to be held in May 2014, the decision to approve CBP’s application in respect of that year necessarily involved an implicit and final rejection of PEA’s application, irrespective of whether or not the particular decision-maker on behalf of the Shire (the council) had overlooked (or in this case had not been made aware of) PEA’s application.

...
‘[92] For these reasons, in the particular circumstances of this case, when the Shire decided to grant CBP’s application for a permit to conduct a beach polo tournament on Cable Beach in May 2014, it also decided to refuse PEA’s application to conduct a similar event at the same time and place. Each of the tribunal and the judge at first instance were wrong to conclude that the Shire had not refused PEA’s application because its officers had not made the council aware of the fact that the application had been lodged.’ *Polo Enterprises Australia Pty Ltd v Shire of Broome* [2015] WASCA 201, (2016) 329 ALR 332 at [8], [76], [84], [88], [92], per Martin CJ

Australia [Administrative Decisions (Judicial Review) Act 1977 (Cth).] ‘[80] ... A “decision” under the AD(JR) Act is only reviewable if it has a substantive, final or operative quality about it: see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337–341; 94 ALR

11 at 23–27; 21 ALD 1 at 11–15 (Mason CJ), CLR 377; ALR 54; ALD 38 (Toohey and Gaudron JJ). Relevantly, at CLR 337; ALR 23; ALD 11 Mason CJ said:

To interpret “decision” in a way that would involve a departure from the quality of finality would lead to a fragmentation of the processes of administrative decision-making and set at risk the efficiency of the administrative process.

‘[81] Mason CJ’s observation about fragmentation is relevant to the exercise of discretion in the judicial review applications, whether under s 16 of the AD(JR) Act or under s 39B of the Judiciary Act [1903 (Cth)].

‘[82] The lack of a final or operative quality to the Tribunal’s evidentiary ruling is highlighted by the Tribunal’s statement in its reasons that the evidence ABMT Angre sought to adduce could be admitted “subject to all just objections”. The process of hearing and determining objections will, of course, take place during the appeal. Some or all of the evidence may be subject to a “just objection”: the evidence itself is not before the Court so this observation is no more than the statement of possibility. However, it illustrates an additional way in which the Tribunal’s decision is not final and operative.

‘[83] In some circumstances, there may be utility, or necessity, in the Court’s supervisory jurisdiction on judicial review being exercised notwithstanding the “decision” under review is but a step in the process towards the making of a final decision by a statutory tribunal. A decision of that character may not be reviewable under s 5 of the AD(JR) Act on well-established principles, although s 6 of the AD(JR) Act may be applicable. Relief under s 39B of the Judiciary Act may be available if the interim decision affects rights and interests. However, it will not ordinarily be appropriate to fragment ongoing proceedings in a statutory tribunal and to exercise the Court’s supervisory jurisdiction unless there is a real prospect of a person’s rights and interests being affected in a way that would not be capable of correction on a statutory appeal from a final decision under a provision such as s 52. I emphasise that such circumstances will be out of the ordinary.’ *Chief of Navy v Angre* [2016] FCAFC 171, (2016) 341 ALR 363 at [80]–[83], per Mortimer J

Canada [Proceeds of Crime (Money Laundering) and Terrorist Financing Act, SC 2000, c 17, s 30.] ‘[10] Section 30 of the Act, however, provides as follows:

30.

- (1) A person who requests a decision of the Minister under section 25 may, within 90 days after being notified of the decision, appeal the decision by way of an action in the Federal Court in which the person is the plaintiff and the Minister is the defendant.
- (2) The *Federal Courts Act* and the rules made under that Act that apply to ordinary actions apply to actions instituted under subsection (1) except as varied by special rules made in respect of such actions.
- (3) The Minister of Public Works and Government Services shall give effect to the decision of the Court on being informed of it. [Emphasis added.]

‘[11] That section allows anyone who has made a request under section 25 to appeal by way of an action before the Federal Court in which the person is the plaintiff, within 90 days “after being notified of the decision”. The Act does not specify which decision. Subsection 30(1), however, refers to a request under section 25, which provides as follows:

25.

A person from whom currency or monetary instruments were seized under section 18, or the lawful owner of the currency or monetary instruments, may within 90 days after the date of the seizure request a decision of the Minister as to whether subsection 12(1) was contravened, by giving notice in writing to the officer who seized the currency or monetary instruments or to an officer at the customs office closest to the place where the seizure took place. [Emphasis added.]

‘[12] Section 25 refers to the decision of the Minister as to whether subsection 12(1) of the Act was contravened. It is therefore that decision that is at issue in subsection 30(1). The Minister makes that decision under section 27 of the Act, which provides:

27.

- (1) Within 90 days after the expiry of the period referred to in subsection 26(2), the Minister shall decide whether subsection 12(1) was contravened.
- (2) If charges are laid with respect to a money laundering offence or a terrorist activity financing offence in respect of the currency or monetary instruments seized, the Minister may defer making a decision but shall make it in any case no later than 30 days after the conclusion of all court proceedings in respect of those charges.

(3) The Minister shall, without delay after making a decision, serve on the person who requested it a written notice of the decision together with the reasons for it. [Emphasis added.]

‘[13] There is no doubt that the action that may be brought relates to the decision made by the Minister under section 27.’ *Tourki v Canada (Minister of Public Safety and Emergency Preparedness)* [2008] 1 FCR 331, 2007 FC 186, 284 DLR (4th) 356, [2007] FCJ No 685 at [10]–[13], per Desjardins JA

New Zealand [Social Security Act 1964, ss 10A, 12I, 12J; appeal to Appeal Authority against ‘decision’ or ‘determination’ of the Chief Executive of the Department of Work and Income.] ‘[22] It was the argument of Mr McKenzie QC that because Mr Arbuthnot was seeking to appeal to the Authority against only the BRC’s ruling concerning the change of address, it was not open to the Chief Executive to raise any issue about conjugal status. That, counsel said, was the “same matter” in terms of s 12I(2) in respect of which the Authority was given all the powers, duties, functions and discretions of the Chief Executive in order to hear and determine the appeal. The limits of the appeal had been circumscribed in that way. He supported his argument by pointing out that the appeal provisions refer to both determinations and decisions which, he said, had different meanings. He said that his client’s appeal to the Authority had been limited to the determination by the BRC concerning the change of address. It was not against the whole of the decision of the BRC. Essentially this was the same argument that the Court of Appeal rejected, and we think it was right to do so.

‘[23] There is no pattern in the use of the two expressions in the relevant statutory provisions lending any support to this argument; nor, it is to be observed, could Baragwanath J find one in *Wharerimu v Chief Executive of Department of Work & Income* [[2000] NZAR 467]. The words seem to have been used interchangeably, probably as a product of numerous amendments over the years to a statute enacted over 40 years ago which is starting to show its age.’ *Arbuthnot v Chief Executive of the Department of Work and Income* [2007] NZSC 55, [2008] 1 NZLR 13 at [22]–[23], per Blanchard J

New Zealand [Whether determination of Lawyers and Conveyancers Tribunal that the appellant had a case to answer was a ‘decision’ within the meaning of the Lawyers and

Conveyancers Act 2006, s 253(1).] ‘[1] The respondent, Wellington Standards Committee (WSC), applies to strike out a notice of appeal filed by the appellant (Ms Hall). Ms Hall wishes to appeal a “determination” of the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (Tribunal). The word “determination” is used in this judgment because the issue this Court is asked to resolve is whether the Tribunal made a “decision” within the meaning of s 253(1) of the Lawyers and Conveyancers Act 2006 (the Act) which is amenable to appeal to this Court. The determination which Ms Hall wishes to appeal was that she had a case to answer in a disciplinary hearing brought against her by the WSC.

‘[15] I have undertaken a three pronged analysis of the issue I am required to resolve.

‘[16] First, I have focused upon the natural and ordinary meaning of the language Parliament has used when passing s 253(1) of the Act.

‘[17] Parliament has said that persons in Ms Hall’s position “may appeal to the High Court against any ... decision made ...” by the Tribunal under Part 7 of the Act.

‘[18] The natural and ordinary meaning of the word “decision” includes “a conclusion or resolution reached”, the “settlement of a question” and a “formal judgment”.

‘[19] The determination of the Tribunal which Ms Hall wishes to appeal fits all of the standard definitions of the term “decision”. The Tribunal:

- (1) reached a conclusion that Ms Hall had a case to answer;
- (2) settled the question raised by Ms Hall, namely whether she had a case to answer; and
- (3) delivered a formal judgment recording its reasons for reaching the conclusion that Ms Hall had a case to answer.

‘[20] Although not determinative of the issue, it is notable that the Tribunal itself described its determination as a “decision” when it announced the outcome of Ms Hall’s application and when delivering its written reasons for determining she had a case to answer. The Tribunal was chaired by a District Court Judge and includes a Queen’s Counsel. For its part it appears the Tribunal was in no doubt it was delivering a decision. The Tribunal’s view it was delivering a decision reflects the natural and ordinary meaning of the word “decision”.

‘[21] Second, I have found it helpful to focus on what the Tribunal did when it decided that Ms Hall had a case to answer. The Tribunal:

- (1) considered the evidence relied upon

by the WSC to support the charge brought against Ms Hall;

- (2) considered submissions it received from the parties;
- (3) applied its understanding of the law to the evidence before it; and
- (4) reached a conclusion in the form of a judgment.

‘[22] The process followed by the Tribunal was a judicial process. The Tribunal’s task involved the application of judicial reasoning to resolve an issue. The Tribunal was not engaged in an administrative or procedural exercise. The task which the Tribunal was engaged in was determinative of Ms Hall’s rights and interests.³ Indeed, the Tribunal would have determined the outcome of the charge brought against Ms Hall had it acceded to her submission that there was no case to answer.

‘[23] The submission from the WSC that the Tribunal did not deliver a decision that is amenable to appeal faces other difficulties. If the approach advocated by the WSC is correct and, if the Tribunal had ruled in Ms Hall’s favour, the WSC would have been forced to argue that such a determination was a decision for the purposes of s 253(1) if it wished to appeal that determination. This in turn would have raised the spectre of the Tribunal’s determination being considered by the WSC to be a decision for some purposes (if the Tribunal found for the practitioner and dismissed the charge) but not for other purposes such as (where the practitioner’s application failed). I doubt Parliament envisaged such subtle distinctions when it passed s 253(1) of the Act.

‘[24] Counsel for the WSC relied upon the Court of Appeal judgments of *Winstone Pulp International Ltd v Attorney-General* [(1999) 13 PRNZ 593, CA], *Association of Dispensing Opticians of New Zealand Inc v The Opticians Board* [[2000] 1 NZLR 158, CA] and *Attorney-General v W* [(2007) 18 PRNZ 673, CA] to support the proposition that the Tribunal’s determination in this case was not an appealable decision. Mr Turkington submitted that those cases, which advocated a restrictive interpretation of s 66 of the Judicature Act 1908 should be relied upon by this Court to read down the effect of s 253(1) of the Act in order to avoid practitioners frustrating the disciplinary process by challenging findings of the Tribunal that a practitioner has a case to answer. Mr Turkington acknowledged during the course of oral submissions, however, the force of the Supreme Court decision in *Siemer v Heron* [[2011] NZSC 133, [2012] 1 NZLR 309]. In that judgment the Supreme Court expressly

overturned a series of Court of Appeal cases concerning the scope of the ability of the Court of Appeal to entertain appeals under s 66 of the Judicature Act 1908 on interlocutory issues. ...

‘[25] In my assessment the Supreme Court judgment provides a complete answer to the issue I have to determine.

‘[26] The words “any order or decision” found in s 253(1) of the Act are at least equivalent to, or possibly even broader than the words “any judgment, decree or order” found in s 66 of the Judicature Act 1908.

‘[27] This Court is in no doubt that if the reasoning of the Supreme Court in *Siemer v Heron* is applied to the circumstances of this case it is apparent that Ms Hall has a right of appeal.’ *Hall v Wellington Standards Committee* [2012] NZHC 1723, [2012] NZAR 790 at [1], [15]–[27], per Collins J

New Zealand [Accident Compensation Act 2001, ss 107, 110 and 134: whether the Accident Compensation Corporation’s decision to assess a claimant’s vocational independence under s 110 was a reviewable decision under s 134.] ‘[6] The appellant suffered an injury, his claim was accepted by the Corporation and an individual rehabilitation plan was agreed upon. On 26 July 2011 the Corporation wrote to the appellant advising that, as his rehabilitation programme was complete, the Corporation proposed to assess his vocational independence. The letter notified him that he was required to submit to two assessments, an occupational assessment and a medical assessment.

‘[7] The appellant lodged an application for review pursuant to s 134. In a decision dated 7 February 2012 the reviewer declined jurisdiction on the ground that the Corporation’s letter was not a decision under the Act.

...

[17] The interpretation section, s 6, contains the following definition of “decision”:

decision or **Corporation’s decision** includes all or any of the following decisions by the Corporation:

- (a) a decision whether or not a claimant has cover;
- (b) a decision about the classification of the personal injury a claimant has suffered (for example, a work-related personal injury or a motor vehicle injury);
- (c) a decision whether or not the Corporation will provide any entitlements to a claimant;

- (d) a decision about which entitlements the Corporation will provide to a claimant;
- (e) a decision about the level of any entitlements to be provided;
- (f) a decision relating to the levy payable by a particular levy payer;
- (g) a decision made under the Code about a claimant's complaint.

...

[28] The meaning of "decision" in the context of the Act has been the subject of a number of judgments. Mr McGurk drew attention in particular to the observations of Gendall J in *Accident Compensation Corporation v Hawea* [[2004] NZAR 673 (HC)] at [18]:

To make a decision is to make up one's mind, to make a judgement, to come to a conclusion or resolution. Only when a decision has been made can there be a right of review and if no right of review exists then s 122(5) has no application. ... It cannot become a "decision" simply because the ACC may say so. The substance has to be analysed. ...

His Honour went on to observe that many different factual situations will arise and it all depends on the circumstances.

[29] Clearly a determination under s 107 determining that a claimant has vocational independence is a decision reviewable by the statutory process as are determinations under ss 103 and 105 (both of which have a connection with a s 107 determination: see s 111).

[30] Plainly decisions that in some way adjudicate upon a claimant's claim will constitute "decisions". Examples are items (a) to (e) in the definition of decision. ...

[31] On the other hand it was the Corporation's contention that certain actions by the Corporation, such as requiring claimants to take steps in connection with the processing of claims, will not amount to "decisions". Mr Hlavac drew attention to ss 55, 72 and 89, all of which concern requirements that claimants undertake assessments. In particular he contended that a referral under s 72 for a medical assessment is practically no different in terms of its requirements of a claimant or the potential end result (the loss of weekly compensation) than a vocational independence assessment referral under s 110.

[32] It was not the appellant's case that every action of the Corporation requiring a claimant to take some step in relation to the

claimant's claim amounted to a decision amenable to review under s 134(1). Indeed I understood Mr McGurk to accept that steps taken by the Corporation under ss 55, 72 and 89 were not decisions. That should allay the concern of the Corporation noted at [24(b)] above.

[33] It was his argument that s 107 is quite different from those three sections because the purpose of s 107 is to assess a claimant's vocational independence at the very end of the rehabilitation process. It therefore signals that existing entitlements are likely to be affected. Sections 55, 72 and 89 are not specifically designed for the purpose of putting a claimant's entitlements in question whereas a referral under s 107 indicates "a decision to make a decision" about whether compensation payments will continue and, by reason of the restriction contained in s 110(3)(a), that it is likely that compensation payments will not continue.

[34] Mr McGurk's depiction of the s 107 process as an end point is clearly correct. ...

...

[40] The pursuit of the Part 5 disputes process in relation to the instigation of the assessment process could result in delay in the commencement of the assessment procedures. While I recognise that s 112 provides a significant time buffer of three months before the impact of a s 107 determination takes effect (unlike ss 104(a)(i) and 106(a)(i) which are immediate), the pursuit of the disputes process in relation to an intermediate step in the vocational independence inquiry could have the consequence that claimants continue to receive entitlements for a significantly longer period than they should.

[41] Hence, important as the two conditions are in avoiding the imposition of unnecessary assessments, I do not consider that the Corporation's assessment that the conditions are fulfilled amounts to a resolution of a question which has the status of a "decision". Such a resolution will occur when the s 107 determination is made and in relation to which the statutory review process will be available.

[42] For the above reasons I conclude that in requiring a claimant to participate in an assessment of the claimant's vocational independence, the act of the Corporation in forming the view that the conditions in s 110(3) are satisfied is not a decision by the Corporation on the claimant's claim within the meaning of s 134(1) which is thereby amenable to the Part 5 dispute resolution process.' *Spilte v Accident Compensation Corporation* [2014] NZHC

2717, [2015] 2 NZLR 744 at [6]–[7], [17], [28]–[34], [40]–[42], per Brown J

DECISION OF THE JUDGE

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

DEDICATION

[For 21 Halsbury's Laws of England (4th Edn) (2004 Reissue) para 108 see now 55 Halsbury's Laws of England (5th Edn) (2012) para 111.]

DEED

[For 13 Halsbury's Laws of England (4th Edn) (2007 Reissue) paras 1, 8 see now 32 Halsbury's Laws of England (5th Edn) (2012) paras 201, 208.]

DEED POLL

[For 13 Halsbury's Laws of England (4th Edn) (2007 Reissue) para 3 see now 32 Halsbury's Laws of England (5th Edn) (2012) para 203.]

DEFAMATION

[For 28 Halsbury's Laws of England (4th Edn) (Reissue) paras 10, 42 see now 32 Halsbury's Laws of England (5th Edn) (2012) paras 510, 543.]

DEFEASANCE

[For 4(1) Halsbury's Laws of England (4th Edn) (2002 Reissue) para 730 see now 49 Halsbury's Laws of England (5th Edn) (2015) para 532.]

DEFECT OF TITLE

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 57 see now 23 Halsbury's Laws of England (5th Edn) (2016) para 61.]

DEFENCE

[CPR 26.11(1): time to apply for jury trial.]
 '[24] Pursuant to [the Senior Courts Act 1981] s 69(2), CPR 26.11(1) prescribes the period in which the claim must be made as within 28 days of service of the defence. "Defence" in not defined in CPR 2.3 (Interpretation) or the glossary to the rules.

...
 '[27] The claimant contends firstly that "defence" in CPR 26.11(1) includes "amended defence" so that the 28 day period in which to apply for jury trial prescribed under s 69(1) of the Senior Courts Act 1981 runs from when an amended defence is served. In this case the amended defence was lodged on 8 July 2013 and the claimant's application for a jury was raised before the Master on 24 July 2013. Thus the 28 day time limit was well and truly satisfied.

'[28] There is no authority on the point. Mr Benson QC invoked both high principle and practical reasoning for his interpretation of CPR 26.11(1). As to principle, he submitted that the right to trial by jury is of constitutional importance so that CPR 26.11(1) should be construed in favour of that right. Accordingly "defence" should be interpreted to include amended defence. Enough has been said already to put paid to that argument: trial by jury in civil cases cannot be said to be a constitutional right.

'[29] As to practical reasoning, Mr Benson gave the example of a defendant changing his defence to allege fraud after the 28 day period: is the claimant to be denied trial by jury, he asked rhetorically, subject only to the exercise of the court's discretion? If the courts were to limit the meaning of defence to the version first filed, and not the actual defence at trial, it would be an open invitation, he submitted, for defendants to file anodyne defences and hold back the real issues in the case until after the 28 days had elapsed. That would be contrary to the CPR's overriding objective. In this case, Mr Benson submitted, CPR 26.11 cannot have been intended to exclude from consideration the amended defence which for the first time made specific averments in relation to the second arrest. One concerned the basis on which the detective inspector made the decision to arrest. Further, the amended defence in effect raised fraud against the claimant not until then flagged.

'[30] In my judgment there are good practical reasons for the 28 day limit running from the date of the defence. Otherwise there would be uncertainty, since the defence might be amended at any time. Moreover, once a claimant advances particulars of any claim, the matters are in issue unless the defendant admits them. In this case it was plain from when the defence was first served that malicious prosecution and false imprisonment were in issue as to both the first and second arrest. Certainly in relation to the second arrest the Commissioner stated that he could not respond since there were ongoing criminal investigations, but in no way

did the Commissioner concede the truth of the claimant's case. Even if it be accepted that the amended defence raised fraud, that added nothing in the circumstances of this case. To my mind Mr Benson's fraud example is wide of the mark, since it overlooks that the court has a discretion under CPR 17.1(2)(b) to refuse an amendment to a defence. Manipulative action of the character in his example would be a very strong reason for the court to refuse to exercise its discretion to allow an amendment to the defence.

‘[31] In this case the claimant knew from the defence on 8 January 2013, indeed from the acknowledgment of service three weeks earlier, that the Commissioner did not admit any of what he was alleging in relation to unlawful arrest, malicious prosecution or false imprisonment. The claimant had 28 days to apply for jury trial; he did not take advantage of his right to do that. Thus the matter fell within the Master's discretion. There was no unfairness. That is especially so given that the claimant “is plainly well-versed in court proceedings” (see *R (on the application of Gregory) v City University London* [2014] EWHC 2937 (Admin) at [12] per Davis LJ). In this case the procedural history I outlined shows that the claimant's failure to apply for a jury trial within time was not an isolated failure to follow rules and time limits. He failed to complete standard disclosure on time; failed to exchange witness statements on time; failed to attend listing appointments; made applications without notifying the Commissioner; and had had two unless orders made against him. In summary the claimant has consistently failed to follow the rules and his failure to apply for a jury trial within the specified time is not an isolated example.’ *Gregory v Metropolitan Police Commissioner* [2014] EWHC 3922 (QB), [2015] 1 All ER 1029 at [24], [27]–[31], per Cranston J

DEL CREDERE AGENT

[For 2(1) Halsbury's Laws of England (4th Edn) (Reissue) para 13 see now 1 Halsbury's Laws of England (5th Edn) (2008) para 13.]

DELEGATION

[For 2(1) Halsbury's Laws of England (4th Edn) (Reissue) para 75 see now 1 Halsbury's Laws of England (5th Edn) (2008) para 48.]

DELIBERATE

No problem arises as to what is meant by ‘deliberate’ in art 12(1)(b) [of Council Directive (EEC) 92/43 on the conservation of natural habitats and of wild flora and fauna (the Habitats Directive) (1992 OJ L 206 p 7)]. As stated by the Commission in para 33 of their guidance:

“ ‘Deliberate’ actions are to be understood as actions by a person who knows, in light of the relevant legislation that applies to the species involved, and the general information delivered to the public, that his action will most likely lead to an offence against a species, but intends this offence or, if not, consciously accepts the foreseeable results of his action.”

Put more simply, a deliberate disturbance is an intentional act knowing that it will or may have a particular consequence, namely disturbance of the relevant protected species. ...’ *R (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, [2011] 1 All ER 744 at [14], per Lord Brown SCJ

DELIVERY

Of goods

[For 41 Halsbury's Laws of England (4th Edn) (Reissue) para 163 see now 91 Halsbury's Laws of England (5th Edn) (2011) para 161; and for 41 Halsbury's Laws of England (4th Edn) (Reissue) paras 163–195 see now 91 Halsbury's Laws of England (5th Edn) (2012) paras 161–193.]

Writ of delivery

[For 17(1) Halsbury's Laws of England (4th Edn) (Reissue) para 28 see now 12A Halsbury's Laws of England (5th Edn) (2015) para 1383.]

DEMISE

[For 27(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 130 see now 62 Halsbury's Laws of England (5th Edn) (2016) para 123.]

Of monarch

[For 8(2) Halsbury's Laws of England (4th Edn) (Reissue) para 40 see now 20 Halsbury's Laws of England (5th Edn) (2014) para 49.]

[For 12(1) Halsbury's Laws of England (4th Edn) (Reissue) para 15 see now 29 Halsbury's Laws of England (5th Edn) (2014) para 11.]

Halsbury's Laws of England (5th Edn) (2010) para 339.]

DEMURRAGE

[For 43(2) Halsbury's Laws of England (4th Edn) (Reissue) para 1506 see now 7 Halsbury's Laws of England (5th Edn) (2015) para 288.]

DENTAL SURGEON

[For 30(1) Halsbury's Laws of England (4th Edn) (Reissue) para 385 et seq see now 74 Halsbury's Laws of England (5th Edn) (2011) para 404 et seq.]

DEPENDENT RELATIVE REVOCATION

[For 50 Halsbury's Laws of England (4th Edn) (2005 Reissue) para 400 see now 102 Halsbury's Laws of England (5th Edn) (2010) para 108.]

DEPOSIT

Of chattel

[For 3(1) Halsbury's Laws of England (4th Edn) (2005 Reissue) para 6 see now 4 Halsbury's Laws of England (5th Edn) (2011) para 111.]

Of money

[Note that the Income and Corporation Taxes Act 1988, s 481(3) has been repealed.]

DERELICT

[For 43(1) Halsbury's Laws of England (4th Edn) (Reissue) para 1031 see now 94 Halsbury's Laws of England (5th Edn) (2008) para 987.]

DEROGATION

[For 13 Halsbury's Laws of England (4th Edn) (2007 Reissue) para 58 see now 32 Halsbury's Laws of England (5th Edn) (2012) para 258.]

DESCENDANT

[For 50 Halsbury's Laws of England (4th Edn) (2005 Reissue) para 627 see now 102

DESERTION

Matrimonial causes

[For 29(3) Halsbury's Laws of England (4th Edn) (Reissue) paras 418, 419 see now 72 Halsbury's Laws of England (5th Edn) (2015) paras 397, 411 respectively.]

DESIGN

[For 35 Halsbury's Laws of England (4th Edn) (Reissue) paras 776–777 see now 79 Halsbury's Laws of England (5th Edn) (2014) paras 711–712.]

DESIGNED OR ADAPTED FOR LIVING IN

[Leasehold Reform Act 1967, s 2(1). Claim for enfranchisement of a building built as a private residence in 18th century, subsequently used partly for business.] '[5] My Lords, the short issue in this appeal is whether a property at 21 Upper Grosvenor Street, London W1 is a "house" within the meaning of s 2(1) of the Leasehold Reform Act 1967 as amended.

...
 '[7] Section 2 of the 1967 Act defined "house" and "house and premises"; sub-s (1) is the only provision of relevance for present purposes, and it was in these terms:

"... 'house' includes any building designed or adapted for living in and reasonably so called, notwithstanding that the building is not structurally detached, or was or is not solely designed or adapted for living in, or is divided horizontally into flats or maisonettes; and—(a) where a building is divided horizontally, the flats or other units into which it is so divided are not separate 'houses' although the building as a whole may be; and (b) where a building is divided vertically the building as a whole is not a 'house' though any of the units into which it is divided may be."

'[8] Over the past 40 years, significant amendments were made from time to time to the 1967 Act, with a view to extending its reach. Thus, the low rent and rateable value limits in s 1(1) were substantially amended by the Housing Act 1974, then again by the Leasehold Reform, Housing and Urban Development

Act 1993, and most recently by the Commonhold and Leasehold Reform Act 2002. More importantly for present purposes, any requirement that the tenant should occupy or should have occupied the house as his residence in s 1(1) was removed by the 2002 Act, in all but a few cases. However, despite the significant amendments that have been made from time to time to s 2(1) of the 1967 Act, the primarily relevant provision for the purpose of this appeal, has remained unchanged.

...
 '[15] It is clear that to be a "house" for the purposes of s 2(1) of the 1967 Act, a property must satisfy two requirements, namely: (a) it must be "designed or adapted for living in", and (b) it must be "reasonably so called", i.e. it must reasonably be called a house. The judge concluded the property was not a house within the meaning of s 2(1), because it was not, as at October 2003, "designed or adapted for living in". Had he not reached that conclusion, he said that he would have accepted that it could "reasonably [be] called" a house. The Court of Appeal agreed. Before turning to the question of whether the property was designed or adapted for living in, it is right to record that, in the light of the reasoning of this House in *Tandon v Trustees of Spurgeons Homes* [1982] 1 All ER 1086, [1982] AC 755, the judge was plainly correct to conclude that the property could reasonably be called a house.

'[16] Grosvenor's case is that the property was not, as at October 2003, "designed or adapted for living in", because it was not physically fit for immediate residential occupation. That was accepted by both courts below. The judge said, in para 29 of his judgment, that the words "designed or adapted for living in" carried with them a notion of premises with "somewhere to sleep, to cook, to wash and simply to be when not out at work or out otherwise, and, depending on the size of the place, that is commonly provided by a bedroom, kitchen, a bathroom and WC and maybe a living room of some kind". In his judgment in the Court of Appeal ([2006] 1 WLR 2848), Laws LJ (with whom Tuckey and Carnwath LJ agreed) described (at [6]) the three upper floors as: "unoccupied and very dilapidated ... incapable of being occupied as residences", and in [19] he said that "because of the grave dilapidation apparent from the photographs the upper floors of the [property] were not at the [relevant time] designed or adapted for anything."

'[17] While I accept that for present purposes one is largely concerned with the physical state of the property, I disagree with

these conclusions. It seems to me that, as a matter of ordinary language, reinforced by considering other provisions of the subsection, and supported by the original terms of s 1(1), as well as by considerations of practicality and policy, the property was, as at October 2003, "designed or adapted for living in" within s 2(1). The fact that the property had become internally dilapidated and incapable of beneficial occupation (without the installation of floor boards, plastering, re-wiring, re-plumbing and the like) does not detract from the fact that the property was "designed ... for living in", when it was first built, and nothing that has happened subsequently has changed that. While internal structural works will no doubt have been carried out to the property from time to time over the past 275 years, it seems very likely from the floor plans that its layout, in terms of internal walls, partitions and staircases, has not changed much since the property was built. In any event, the upper three floors have always been laid out for residential use.

'[18] In my judgment, the words "designed or adapted for living in", as a matter of ordinary English, require one first to consider the property as it was initially built: for what purpose was it originally designed? That is the natural meaning of the word "designed", which is a past participle. One then goes on to consider whether work has subsequently been done to the property so that the original "design" has been changed: has it been adapted for another purpose, and if so what purpose? When asking either question, one is ultimately concerned to decide whether the purpose for which the property has been designed or adapted, was "for living in".

'[19] The notion that the word "designed" in s 2(1) is concerned with the past is reinforced by the later words in the same section "was or is solely designed or adapted ..." The use of the past tense is striking in a section which contains a number of verbs only in the present tense. In my judgment, the expression is to be construed distributively: thus, the word "was" governs "designed", and the word "is" governs "adapted". The present tense is appropriate for "adapted" because, as my noble and learned friend Lord Scott of Foscote pointed out in argument, there could have been several successive adaptations, and it is only the most recent which is relevant. The word "was" is in any event difficult to reconcile with Grosvenor's case (as accepted by the judge and the Court of Appeal), as it would be irrelevant whether the property could have been fit for residential occupation at any time in the past.

‘[20] Furthermore, the notion that s 2(1) is concerned with whether a property could be physically lived in sits rather ill with the fact that s 1(1), as originally enacted, required, in every case of enfranchisement, the tenant to have occupied the house as his only or main residence. The requirement that a property be in such a physical state that it can be lived in seems somewhat arid and valueless if there is a requirement that it is, and has been, actually lived in.

‘[21] I also find it hard to see what policy considerations would have driven a requirement that a property be fit to live in before a tenant could enfranchise, especially if, as mentioned, there was an actual residence requirement anyway. I can, however, discern a reason for having a requirement that a property must either have been originally designed for living in, or must subsequently have been physically adapted for that purpose. The legislature may well have thought it inappropriate to deprive a person of his freehold under the 1967 Act unless he (or his predecessor) (a) had built it, or permitted a tenant to build it, for living in, or (b) had subsequently permitted it to be adapted for living in.

‘[22] Furthermore, the issue of whether a property is fit for immediate residential occupation, the test adopted by the courts below, could easily lead to arguments and uncertainty. As the words I have quoted from the first instance judgment reveal, it may be a matter of debate whether a particular property is so fit if it has no bathroom or no kitchen, or if there is no sitting room. The resolution of such an issue would inevitably be a matter of subjective opinion in many cases. Also, it appears that a tenant’s notice would be invalidated if it happened to have been served on a day when he was having his only bathroom refitted: the property would not have been fit for immediate occupation on that day, as it had no usable washing and toilet facilities. Of course, the answer to this may well be that one does not treat the property as physically “frozen” on the relevant day. However, once one departs from the strict test of fitness for immediate residential occupation, the uncertainties multiply. No such difficulties, as I see it, are likely to arise if the words in question are given their natural meaning.

‘[25] There are two further points concerning the words “designed or adapted for living in” I should mention. The first relates to the facts of this case, and the second is more general. On the facts of this case, I have

concentrated on how the property was originally “designed”, but it is arguable that it was “adapted” in the 1940s. It is unnecessary to resolve the point, because, if it was so adapted, it was an adaptation for mixed business and residential purposes. In other words, the property would have been adapted for business use on the lower three floors and “adapted for living in” on the upper three floors. It is clear from s 2(1) that, in order to be a “house”, the property need not be “solely” adapted for living in, so it would make no difference to the outcome of this appeal if that were the correct analysis. The issue was, unsurprisingly, not much debated, but I incline to the view that the original design of the property is what matters in this case. Its original internal layout as a single residence appears to have survived substantially unchanged throughout, the three upper floors have always been envisaged as being for “living in”, and (perhaps less importantly) the internal fitting out of the lower three floors has a residential character, and the external appearance has not been altered since well before the property ceased being used as a residence in single occupation.

‘[26] The second further point concerning the words “designed or adapted for living in” is whether a property would be a “house” if it had been designed for living in, but had subsequently been adapted to another use. As a matter of literal language, such a property would be a house, because “designed” and “adapted” appear to be alternative qualifying requirements. At least at first sight, such a conclusion seems surprising, so there is obvious attraction in implying a qualification that, if a property has been, and remains adapted for a purpose other than living in, the tenant cannot rely upon the fact that it was originally designed for living in. However, a term is not easily implied into a statute, and further reflection suggests that the literal meaning of the words is not as surprising as it may first appear, particularly bearing in mind the existence of the residence requirement in s 1(1) of the original Act. It is unnecessary to decide this point, and, particularly as it was only touched on in argument, I do not think we ought to do so.’ *Boss Holdings Ltd v Grosvenor West End Properties* [2008] UKHL 5, [2008] 2 All ER 759 at [5], [7]–[8], [15]–[22], [25]–[26], per Lord Neuberger of Abbotsbury

[Leasehold Reform Act 1967, s 2(1).] ‘[30] The only other relevant authority at the highest level is the much more recent decision in *Boss Holdings Ltd v Grosvenor West End Properties* [2008] UKHL 5, [2008] 2 All ER 759, [2008] 1 WLR 289. The House of Lords held (at [24])

that a building previously designed or adapted for living in remained a house, even though at the material time it was not only disused but in parts “stripped out to the basic structural shell”. In contrast to *Tandon v Trustees of Spurgeon’s Homes* [1982] 1 All ER 1086, [1982] AC 755 this case was concerned solely with the first question. It was not in dispute that if that question was answered in the affirmative the building qualified as a house “reasonably so called”.

[31] As will be seen I do not regard the case as determinative in either of the present appeals. However, some comment is desirable, in view of the change of view of Lord Neuberger on one aspect of his leading speech. He had proposed the following grammatical analysis of the relevant words of the statutory definition [in [18]–[19], quoted *supra*]: ...

[32] Later in his speech, he considered the implications of this analysis for other cases, including how the definition should apply to a property which had been designed for living in, but had subsequently been adapted to another use. As a matter of “literal language”, he thought such a property would be within the definition. If, as appeared, “designed” and “adapted” were alternative qualifying requirements, a building which had been designed as a house would remain within the definition in spite of its adaptation to other uses. Such a conclusion, he accepted, might seem surprising, but it could have been more readily understandable when taken with the residence requirement in the original Act (see [26]).

[33] It was on this latter point that, as Lord Neuberger MR in the present case, he has had second thoughts. It had been put directly in issue by the tenants in *Day v Hosebay Ltd*, who argued (as they have in this court) that because the buildings were originally designed for “living in”, that was sufficient to bring them within the definition, regardless of any subsequent adaptation to other uses. On reconsideration, Lord Neuberger felt bound to reject the argument. Although the “literalist meaning” of “designed or adapted” was that either alternative would do, that was “not by any means what the words naturally convey”. His earlier thoughts had been based on “an over-literalist approach to the language used by the legislature” (see [2010] 4 All ER 36 at [31], [2010] 1 WLR 2317). In his revised view, a building originally designed for living in, but adapted for some other purpose, was not “designed or adapted for living in”, unless subsequently re-adapted for that purpose (see [40]).

[34] I have no doubt, with respect, that Lord Neuberger MR’s second thoughts on this point were correct. Context and common sense argue strongly against a definition turning principally on historic design, if that has long since been superseded by adaptation to some other use. However, that approach may also have implications for the earlier part of his grammatical analysis in the *Boss Holdings* case [2008] 2 All ER 759, [2008] 1 WLR 289 (see [31], above). The expression “was or is designed or adapted” is, as he says, to be read “distributively”: that is, as equivalent to “was designed or is adapted”. While that may support the view that the word “designed” is directed to the past, the same cannot be said of the expression “is adapted”. Nor (pace Lord Scott of Foscote) is that grammatically the same as “was most recently adapted”. Logically that expression can only be taken as directed to the present state of the building.

[35] Once it is accepted that a “literalist” approach to the definition is inappropriate, I find myself drawn back to a reading which accords more closely to what I have suggested was in Lord Denning MR’s mind in *Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 3 All ER 371, [1965] 1 WLR 1320, that is a simple way of defining the present identity or function of a building as a house, by reference to its current physical character, whether derived from its original design or from subsequent adaptation. Furthermore, I would not give any special weight in that context to the word “adapted”. In ordinary language it means no more than “made suitable”. It is true that the word is applied to the building, rather than its contents, so that a mere change of furniture is not enough. However, the word does not imply any particular degree of structural change. Where a building is in active and settled use for a particular purpose, the likelihood is that it has undergone at least some physical adaptation to make it suitable for that purpose. That in most cases can be taken as the use for which it is currently ‘adapted’, and in most cases it will be unnecessary to look further.

[36] That interpretation does not of course call into question the actual decision in the *Boss Holdings* case [2008] 2 All ER 759, [2008] 1 WLR 289. The basis of the decision, as I understand it, was that the upper floors, which had been designed or last adapted for residential purposes, and had not been put to any other use, had not lost their identity as such, merely because at the material time they were disused and dilapidated. It was enough that the building

was partially “adapted for living in”, and it was unnecessary to look beyond that (see [25]). That reasoning cannot be extended to a building in which the residential use has not merely ceased, but has been wholly replaced by a new, non-residential use.’ *Day v Hosebay Ltd; Lexgorgie Ltd v Howard de Walden Estates Ltd* [2012] UKSC 41, [2012] 4 All ER 1347 at [30]–[36], per Lord Carnwath SCJDesirable

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

DESPITE

New Zealand [Immigration Act 1987, s 105] ‘[151] Under s 105 of the Immigration Act, the Tribunal must determine an appeal against a deportation order by addressing two considerations. They are whether deportation would be unduly harsh to an appellant and whether allowing him to remain would not be contrary to the public interest. This statutory formula, expressed in similar although not always identical terms, has appeared elsewhere in immigration legislation in recent years. Parliament has adopted this mechanism for certain decisions made under immigration law to ensure that they comply with international humanitarian obligations. Its application, in the context of legislation providing for removal of those who remain in New Zealand after expiry of permits permitting them to be here, was addressed by this Court in *Ye v Minister of Immigration* [[2009] NZSC 76, [2010] 1 NZLR 104].

‘[152] The applicable provision for an appeal against a removal order in *Ye* was s 47(3) of the Immigration Act, which provided:

An appeal may be brought only on the grounds that there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person to be removed from New Zealand, and that it would not in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand.

‘[153] The judgment of the majority of the Court in *Ye* held:

[30] The subsection is drafted on the basis of two sequential considerations. The first step is to determine whether there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the person concerned to

be removed from New Zealand. If that is not shown, the inquiry ends there and removal takes place. If it is shown that it would, on the statutory basis, be unjust or unduly harsh to remove the person from New Zealand, the decision maker must move to the second inquiry. This concerns whether, despite the injustice or undue harshness, it would in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand. A person seeking to avoid removal must demonstrate not only qualifying injustice or undue harshness but also that it would not be contrary to the public interest for them to be allowed to remain in New Zealand.

‘[154] “Despite” is a preposition of concession which refers to something contrary to expectation. In the passage cited from *Ye* it carries its normal meaning of “notwithstanding” and indicates the overriding nature of the requirement to demonstrate that it would not be contrary to the public interest for a person to be allowed to stay in New Zealand.’ *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [151]–[154], per McGrath J

DESTRUCTION

Of will

[For 50 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 386 see now 102 Halsbury’s Laws of England (5th Edn) (2010) para 94.]

DETERMINE/DETERMINATION

See also DECISION

New Zealand [Summary Proceedings Act 1957, s 144A(1)(b). A party may appeal to the Supreme Court, with leave, against a ‘determination of the High Court ... made in a general appeal’.] ‘[4] It will be observed that an applicant for leave to appeal must be able to point to “a determination ... made in a general appeal”. The corresponding language in s 144 (in relation to appeals to the Court of Appeal) is: “any determination of the High Court on a question of law arising in any general appeal”. In issue on this application is whether the conclusion of Allan J that the charge had been

proved and his rejection of associated procedural challenges, all of which logically preceded his decision to discharge the applicant without conviction, amounted to a “determination” of the kind contemplated by s 144A(1)(b).

[5] The word “determination” is used in a number of the related sections of the Summary Proceedings Act, in particular ss 107 (as to appeals by way of case stated) and 115 (as to general appeals), and has been the subject of much judicial consideration, as the judgment of Allan J demonstrates.

[6] There are a number of High Court decisions as to whether a defendant who has been discharged without conviction has a right of appeal under s 115 of the Summary Proceedings Act. It is clear that such a defendant has no such right, unless also the subject of an adverse order (which now includes a refusal to order costs). This approach conforms to and has been largely driven by the text of s 115. It has, however, also been influenced by the reality that a defendant who has been discharged without conviction is deemed to have been acquitted.

[7] The case stated procedure provided for by s 107 of the Summary Proceedings Act can be invoked by either prosecutor or defendant and is thus expressed in more general terms than s 115. On a number of occasions, this process has been relied on by prosecutors where there have been discharges without conviction. We are, however, not aware of any instances where a defendant who was discharged without conviction and was not otherwise aggrieved by orders made in the District Court has successfully resorted to the case stated process.

[8] If the applicant had been discharged without conviction in the District Court and there had been no other relevant adverse decision, he would not have had a right of appeal to the High Court under s 115. Given that this is effectively what happened in the High Court, it would be rather odd if ss 144 and 144A provided him with the possibility of an appeal to either the Court of Appeal or this Court.

[9] More generally, if the courts are to be faithful to the language of s 106 of the Sentencing Act—providing that a discharge against conviction is deemed to be an acquittal—they cannot distinguish between an acquittal on the merits and a discharge without conviction. It follows that if there is a right of appeal in this case, there will likewise be a right of appeal to any person who was completely successful in the High Court (in terms of result) but claims that the High Court erroneously rejected an alternative argument as to why he or

she should have won in that Court. Such a broad and free-standing right of appeal would conform neither to the approach generally taken in relation to the word “determination” where it appears in the Summary Proceedings Act, nor to general appellate principles under which rights of appeal relate to the orders made by the courts and not to a judge’s intermediate reasoning steps.

[10] We are in no doubt that s 144A contemplates an appeal only in relation to determinations on questions of law which are material to a judgment which is, in its result, adverse to the proposed appellant. Accordingly, where that person was successful in the High Court in terms of result (as the applicant was), there is no right of further appeal.’ *Colman v Police* [2010] NZSC 147, [2011] 2 NZLR 59 at [4]–[10], per Elias CJ, McGrath and William Young JJ

New Zealand [Children, Young Persons, and Their Families Act 1989, s 18A.] [15] In order to invoke s 18A, a social worker must believe on reasonable grounds that the Court has “determined ... that there is no realistic prospect that the child or young person will be returned to the person’s care”.

... [20] The word “determine”, and its constituent parts appears extensively in legislation. Taking guidance from the High Court and District Court Rules, it appears that determination of a matter may refer to an individual point which, itself, feeds into the overall decision. Within the Family Courts Act the word “determine” generally appears in the phrase “hear and determine”. In the more inquisitorial processes in the Intellectually Disabled (Compulsory Care Recipient) Act, Criminal Procedure (Mentally Impaired Persons) Act, Mental Health (Compulsory Assessment and Treatment) Act and Protection of Person and Property Rights Act the term “determine” appears, in multiple sections, as synonymous with consider, decide and conclude.

[21] Elsewhere in the CYPFA the term appears, again on multiple occasions, and appears to be synonymous with consider and decide. Although in sections related to specific hearing process, the word “determine” appears in the phrase “hear and determine” in Parts 2 and 3 with which the Court is concerned here, the term “determine” appears without the conjunctive “hear”.

... [23] ... [O]n each occasion where the issue

of prospect of return home is considered, a plain reading of the legislation requires the conclusion that “determination” is an active decision-making process.

‘[24] In considering a plan filed under s 135 of the CYPFA the Court’s role, as defined in s 137, is to consider the report and plan. Although that consideration has at times been referred to as “approval” this consideration is not synonymous with the term “determine”.

‘[25] Thus, although a plan and review report (filed under s 135 of the CYPFA) may include the statement referred to at [4] above, under the Purpose of the Plan heading, I am satisfied, having considered the statutory use of the word “determination”, and contrasting it with the term “consideration”, that the Court does not determine the correctness or adequacy of that statement in undertaking its consideration of the plan and recording whether orders are to continue or not.

‘[26] In this matter, the Court considered a plan and report dated 12 August 2016 in relation to the older children and on 7 October recorded that the orders were to continue. This implies completion of the process of consideration of the plan, but did not occur in open court, was not a consideration in the light of the parents’ input, and cannot be seen as a “determination” of the proposition that there is no realistic prospect of return to the parents’ care.

‘[27] I am satisfied that the submissions of Ms Rennie and of Ms Lohrey are right that determination requires a specific, clear, and transparent process in which the Court can have some assurance that the parents understand the future implication of the determination sought.’ *Ministry of Social Development v BK* [2016] NZFC 10716, [2017] NZFLR 105 at [15], [20]–[21], [23]–[27], per Judge J F Moss

DEVASTAVIT

[For 17(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 792 see now 103 Halsbury’s Laws of England (5th Edn) (2010) para 1246.]

DEVIATION

Of ship

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 322 see now 60 Halsbury’s Laws of England (5th Edn) (2011) para 313.]

[For 43(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 1467 see now 7 Halsbury’s

Laws of England (5th Edn) (2015) para 249.]

DEVOLVE—DEVOLUTION

[For 17(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 337 see now 103 Halsbury’s Laws of England (5th Edn) (2010) para 916, and for 17(2) Halsbury’s Laws of England (4th Edn) (Reissue) paras 335–373 see now 103 Halsbury’s Laws of England (5th Edn) (2010) paras 916–954.]

DICTUM

[For 37 Halsbury’s Laws of England (4th Edn) (Reissue) para 1238 see now 11 Halsbury’s Laws of England (5th Edn) (2015) para 26.]

DIFFERENCES

Stock Exchange

[The definition is not included in 67 Halsbury’s Laws of England (5th Edn) (2016).]

DIOCESE

[For 14 Halsbury’s Laws of England (4th Edn) para 454 see now 34 Halsbury’s Laws of England (5th Edn) (2011) para 164.]

DIRECTION

[Wills Act 1837, s 9(a).] ‘[19] Section 9(a) provides for two alternative methods by which a testator may affix a signature to a will: either by personally signing, or by directing someone else to do so. Each part of s 9(a) must be assumed to contribute something to the requirement contained in that paragraph. Thus it is not enough for a third party to sign the will in the presence of the testator. He must have done so at the direction of the testator. This sheds some light on what amounts to a direction. The word “direction” is an ordinary English word. The relevant dictionary definition of “direction” in the *Oxford English Dictionary* (online edition) is the action or function: “of instructing how to proceed or act aright; authoritative guidance, instruction”.

‘[20] The *Concise Oxford Dictionary* (to which Mr Warwick referred us) defines the word as: “1. the act or process of directing; supervision. 2. (usu. in pl.) an order or instruction, esp each of a set guiding use of equipment etc.”

‘[21] The combination of the dictionary definitions and the fact that the section requires more than mere signing in the testator’s presence leads me to the provisional conclusion that something more than acquiescence or passivity on the part of the testator is required. What is required is something in the nature of an instruction.

‘[36] Signature at the direction of the testator is an alternative to signature by the testator personally. If, as Lord MacDermott [in *Fulton v Kee* [1961] NI 1] said, something active on the part of the testator is needed to satisfy the latter mode of signature, it seems to me that something active on the part of the testator must also be required to satisfy the former. Just as in the case of a personal signature satisfaction of the requirement by negative conduct would “run contrary to the spirit and purpose of the legislation as well as to the natural meaning of its language”, so in my judgment in the case of a signature by direction to hold that the requirement that a direction can be given by negative conduct would do the same. In my judgment the court should not find that a will has been signed by a third party at the direction of the testator unless there is positive and discernible communication (which may be verbal or non-verbal) by the testator that he wishes the will to be signed on his behalf by the third party. It is of course good practice that the attestation clause should show that the will was signed by another person signing his own or the testator’s name, by the direction and in the presence of the testator, and (as also in the case of a mark) that it had been read over to the testator and that he appeared thoroughly to understand it: Tristram and Coote *Probate Practice* (30th edn, 2006) para 3.79.’ *Barrett v Bem* [2012] EWCA Civ 52, [2012] 2 All ER 920 at [19]–[21], [36], per Lewison LJ

DIRECTION AND CONTROL

[Under the Police Reform Act 2002, s 10(8), nothing in Pt 2 of the Act confers any function on the Independent Police Complaints Commission in relation to so much of any complaint or conduct matter as relates to the ‘direction and control’ of a police force by the chief officer of police.] ‘[33] Consideration of the issue which I have to resolve seems to me to break down into two distinct questions. The first is whether Mr Jordan’s complaint related to the “conduct” of the chief constable. If it did not so relate, there was no basis on which the police authority

could be required to record it. The second question is whether, if the complaint did relate to conduct, it was excluded from the obligation to record because it related wholly to the “direction and control” of the North Yorkshire Police. This is, fortunately, not one of those cases in which a complaint may be of a hybrid kind, relating in part to pure direction and control matters and in part to other, recordable matters.

‘[34] On the first question, the thrust of the police authority’s case as expressed in the grounds for judicial review and in Mr Beggs’s written submissions is that the complaint cannot relate to “conduct” because it does not allege “personal misconduct” by the chief constable. For the purposes of s 12 of the 2002 Act, it is said, “conduct plainly refers to *misconduct*” (grounds, para 16). All that Mr Jordan’s complaint is about is that the chief constable did not “personally [institute] a criminal investigation upon demand, in circumstances where there is no realistic suggestion of impropriety going beyond Mr Jordan’s strident expression of unhappiness with a decision he disagreed with, and in circumstances in which the Chief Constable has had no personal involvement in the case” (written submissions, para 39). What the chief constable did could be regarded as personal misconduct only if “one characterises failure to accede to a request (or obey an instruction) made by a member of the public to investigate alleged crime as wrongdoing *per se*” (written submissions, para 46(ii)).

‘[35] In my judgment, this view of the legislation is not correct. The word “conduct” in its ordinary or natural meaning, which is that of behaviour, does not carry with it the notion that the behaviour must be of a particular quality, whether good or bad. The definition of “conduct” in s 29(1) of the 2002 Act does not assist. If the meaning of the word is to be extended or modified so as to be restricted to bad behaviour, or misconduct, or personal misconduct, one must find something in the context in which the word is used to justify the extension or modification. I cannot find anything of the kind. On the contrary, as Ms Lang pointed out, there is an indication in Sch 3 to the 2002 Act that conduct and misconduct are for the purposes of the legislation overlapping, and not mutually exclusive, concepts. The signpost is in para 19B(4) which deals with a “severity assessment”, which is directed to determining “whether the conduct, if proved, would amount to misconduct or gross misconduct”.

‘[36] I therefore conclude that the commission was right to treat Mr Jordan’s complaint as one which related to the conduct of the chief constable.’ *R (on the application of North Yorkshire Police Authority) v Independent Police Complaints Commission (Chief Constable of North Yorkshire Police and another, interested parties)* [2010] EWHC 1690 (Admin), [2011] 3 All ER 106 at [33]–[36], per Judge Langan QC

DIRECTLY CHOSEN BY THE PEOPLE

Australia [Commonwealth Constitution ss 7, 24.] ‘[112] ... [T]he words “directly chosen by the people” are to be understood as an expression of generality, not as an expression of universality. Because the power to delineate the franchise was given to the parliament, the ambit of exceptions to or disqualifications from the franchise was a matter for the parliament itself, so long always as the generality of “directly chosen by the people” was preserved.

‘[113] The scope, or content, of that “generality” cannot be charted by precise metes and bounds. The nature of its content, however, is indicated by the range of provisions made by the several state laws that were “picked up”, at federation, by [the Commonwealth Constitution] s 30. All of those laws disqualified some prisoners from voting. Excepting prisoners from the franchise did not and does not deny the generality required by “directly chosen by the people”.’ *Roach v Electoral Comr* [2007] HCA 43, (2007) 239 ALR 1, BC200708182 at [112]–[113], per Hayne J

DIRECTOR

[For the Companies Act 1985, s 741 see now the Companies Act 2006, ss 250, 251.]

[Note that the Income and Corporation Taxes Act 1988, s 417(5) is repealed by the Corporation Tax Act 2010, ss 1177, 1181(1), Sch 1 Pt 1 paras 1, 40, Sch 3 Pt 1.]

DISADVANTAGE

New Zealand [Official Information Act 1982, s 9(2): Minister can lawfully withhold some of the information requested if it is necessary to do so to enable a Minister of the Crown or any department or organisation holding the information to carry on negotiations without prejudice or disadvantage.] ‘[142] Section 9(2)(j) refers to a Minister or department of any organisation

carrying on “without prejudice or disadvantage, negotiations ...”. I have already explained the meaning of “prejudice” in the context of examining s 6 of the Act. The insertion of the transitive verb “disadvantage” into s 9(2)(j) of the Act suggests a potentially less adverse outcome than one that is prejudicial. Any “unfavourable” outcome could be considered a “disadvantage”. *Kelsey v Minister of Trade* [2015] NZHC 2497, [2016] 2 NZLR 218 at [142], per Collins J

DISBURSEMENTS

By solicitor

[For 44(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 191 see now 66 Halsbury’s Laws of England (5th Edn) (2015) para 729.]

DISCHARGE

Australia [Navigation Act 1912 (Cth), s 78.] ‘[49] Section 78 is in the following terms:

If a seaman’s wages are not paid in accordance with section 75 before or at the time the seaman is given his or her discharge from a ship, the seaman’s wages shall continue to run until the time of the final settlement of his or her wages (and shall be payable at double rates for any period after the time the seaman is given his or her discharge from the ship) unless the delay is due to the seaman’s act or default, to a reasonable dispute as to liability for the wages or to any other cause not attributable to the wrongful act or default of the owner or master of the ship.

‘[50] “Discharge” when used as a noun is defined in s 6 as the certificate of discharge given to a seaman upon his or her discharge from a ship. “Discharge” as a verb or verb auxiliary is not defined. But a person who, pursuant to the articles of agreement, ceases temporarily to be a member of a crew of a ship is not to be taken as having been discharged from the ship: s 6(4C).

‘[51] Thus, (and it is common ground in this case) the penal provisions of ss 75 and 78 are not enlivened when a seaman goes on leave. ...

‘[135] For s 75 (and therefore s 78) to apply, Mr Visscher must have been “discharged” at the conclusion of each voyage. As I mentioned in [50] “discharged” is not defined in the Navigation Act, but the noun “discharge” is

defined in s 6 as “the certificate of discharge given to a seaman upon his or her discharge from a ship”. The effect of the certificate, as Mr Visscher put it, is to sever the relationship between the seafarer and the master but not the relationship between the seafarer and his or her employer. The evidence shows that a certificate of discharge may be given to a seaman in a range of different circumstances, including when the seaman takes leave. It is common ground that a certificate of discharge is given when a seaman changes his articles. That is what happened when Mr Visscher left the *Broadwater* in Dampier on 3 May 2004. In each case the seaman remains an employee of the shipowner. Yet, Mr Visscher does not contend that the provisions of ss 75 and 78 apply in these cases.

‘[136] Unless the contrary intention appears, the verb should have the corresponding meaning: s 18A of the Acts Interpretation Act 1901 (Cth). The arguments in this case proceeded on the assumption that s 75 only applies where a seaman is discharged from employment. But I do not consider that it is limited in its application in this way, except where the termination of employment coincides with discharge from the ship. The Navigation Act regulates service on ships. A seaman enters into articles of agreement with the master for service on a ship. A certificate of discharge is provided when the seaman leaves the ship, that is, when he leaves the service of the master, not when he leaves the service of the employer. The rights conferred by s 78 are rights conferred on discharge from a ship, not discharge from employment.

‘[137] But the rights accruing on discharge do not apply if the seaman leaves the ship temporarily. Section 6(4C) of the Navigation Act provides that:

A person who, in pursuance of articles of agreement, ceases temporarily to be a member of the crew of a ship shall not be taken to have been discharged from the ship.

‘[138] Clause 7A of the articles of agreement provided that:

A seafarer who is temporarily absent from the ship in accordance with the terms of an award or agreement relating to his/her service as a seafarer shall cease temporarily to be a member of the crew of the ship.

‘[139] Plainly, then, if Mr Visscher, in accordance with the terms of his contract,

ceased temporarily to be a member of the crew of the *Broadwater* on 3 March 2004 and/or on 26 May 2004, he was not “discharged” from the ship for the purpose of s 75 (so as to trigger the operation of s 78), regardless of whether his employment came to an end at that time. ...

‘[185] This evidence supports the conclusion that Mr Visscher ceased temporarily to be a member of the crew of the *Broadwater* when he left the ship on 26 May 2004. The certificate of discharge that was issued to him duly recorded the reason for discharge as “leave”. The contract came to an end at a later time and as a result of a repudiation by Mr Visscher, which Teekay did not accept until 1 June 2004.’ *Visscher v Teekay Shipping (Australia) Pty Ltd* (ACN 079 641 580) (No 4) [2012] FCA 124,7 (2012) 297 ALR 674 at [49]–[51], [135]–[139], [185], per Katzmann J

DISCIPLINE, EFFICIENCY AND MORALE

Canada [National Defence Act, RSC 1985, c N-5, ss 130(1)(a), 117(f). Section 130(1)(a) creates a service offence of committing a federal offence punishable under Part VII of the NDA, the Criminal Code or any other Act of Parliament. Section 117(f) of the NDA creates a service offence of committing any act of a fraudulent nature.] ‘50. The appellants take a narrow view of the meaning of “discipline, efficiency and morale”. In their view, it is strictly limited to the [TRANSLATION] “operational effectiveness of the [Canadian Armed Forces]”: A F (Arsenault), at para 37. Thus, conduct or circumstances that do not relate directly to the operation of the armed forces would not fall within that purpose. This would be the case with most offences committed off duty and outside of military precincts.

‘51. The flaw in this position is that it is based on too narrow an understanding of how the effects of the provisions are connected to that purpose. The objective of maintaining “discipline, efficiency and morale” is rationally connected to dealing with criminal actions committed by members of the military even when not occurring in military circumstances. In light of this, the appellants fail to show that ss 130(1)(a) and 117(f) cover conduct that falls outside of their purpose.

‘52. Criminal or fraudulent conduct, even when committed in circumstances that are not directly related to military duties, may have an impact on the standard of discipline, efficiency

and morale. For instance, the fact that a member of the military has committed an assault in a civil context — a hypothetical scenario raised by Sergeant Arsenault — may call into question that individual's capacity to show discipline in a military environment and to respect military authorities. The fact that the offence has occurred outside a military context does not make it irrational to conclude that the prosecution of the offence is related to the discipline, efficiency and morale of the military.

'53. Consider, as a further example, an officer who has been involved in drug trafficking. There is a rational connection between the discipline, efficiency and morale of the military and military prosecution for this conduct. There is, at the very least, a risk that loss of respect by subordinates and peers will flow from that criminal activity even if it did not occur in a military context. Similarly, a member of the military who has engaged in fraudulent conduct is less likely to be trusted by his or her peers. Again, this risk provides a rational connection between the military prosecution for that conduct and the discipline, efficiency and morale of the military.

'54. These examples support a broad understanding of the situations in which criminal conduct by members of the military is at least rationally connected to maintaining the discipline, efficiency and morale of the armed forces: the behaviour of members of the military relates to discipline, efficiency and morale even when they are not on duty, in uniform, or on a military base. ...

'56. I conclude that the appellants have failed to show that the prosecution under military law of members of the military engaging in the full range of conduct covered by ss 130(1)(a) and 117(f) is not rationally connected to the maintenance of discipline, efficiency and morale regardless of the circumstances of the commission of the offence. The challenged provisions are therefore not overbroad.' *R v Moriarity* [2015] SCJ No 55, [2015] 3 SCR 485, at paras 50–54, 56, per Crommwell J

DISCLAIMER

By trustee in bankruptcy

[For 3(2) Halsbury's Laws of England (4th Edn) (2002 Reissue) paras 472–489 see now 5 Halsbury's Laws of England (5th Edn) (2013) paras 490–506.]

DISCLOSURE

[For 37 Halsbury's Laws of England (4th Edn) (Reissue) para 551 see now 12 Halsbury's Laws of England (5th Edn) (2015) para 621.]

DISCOVER

[For 23(2) Halsbury's Laws of England (4th Edn) (Reissue) para 1732 see now 59 Halsbury's Laws of England (5th Edn) (2014) para 2219.]

DISEASE

Disease contracted

[Employers' liability insurance policies covering sustaining injury or contracting disease; timing in cases of mesothelioma.] '[236] "Disease contracted" is another important phrase in the policy wordings, although not as constant as the "sustain injury" phrase. Thus it is found in BAT's two wordings as "any claim for injury sustained or disease contracted", and in MMI's third wording as "injury or disease ... sustained or contracted". It is more of a chameleon-like phrase. The relevant entry in the *Oxford English Dictionary* is: "To enter into, bring upon oneself (involuntarily), incur, catch, acquire, become infected with (something noxious, as disease, mischief; bad habits or condition; danger, risk, blame, guilt)".

'[237] It is common ground that it is capable of referring to disease either in its origin or in its onset, and even in its progress.

... '[244] What does the phrase mean in the present context? There is a pull in two directions. The combination of the phrase with "injury sustained" would suggest that it is concerned with the onset of disease, not with its origins. That of course assumes a certain meaning for "injury", namely injury in the *Bolton Metropolitan BC* case [*Bolton Metropolitan BC v Municipal Mutual Insurance Ltd* [2006] EWCA Civ 50, [2006] 1 WLR 1492] sense, but that is my present assumption. On the other hand, the commercial purpose of the EL insurance contract pulls in another direction, towards the causal origins of disease in the employee's exposure to the noxious activities of his employment. This is a difficult choice, but in the end, after something of a struggle, I have concluded that the commercial purpose should prevail. Authority strongly suggests that where language permits the vindication of the

contract's commercial purpose, that is the better choice. We are at this point primarily concerned with disease, in a contract wording which distinguishes between disease and injury (of course other wordings make "injury" do service for disease as well, or else, while distinguishing between injury and disease, speak of both in terms of the verb "sustain"). In such a contract, the injury which is sustained, since it is not concerned with disease, will almost invariably be of the kind where cause and effect is practically instantaneous. In such circumstances, the pull of the phrase "injury sustained" is much weakened. If an insurer provides cover in potentially ambiguous terms, then he cannot complain that his cover is construed more widely against him, rather than more narrowly in his favour, particularly where such wider construction better achieves the commercial purpose of the contract.

'[245] I would therefore conclude that prima facie the phrase "disease contracted" as a time hook for the application of the policy's cover refers to the time of the disease's causal origins.' *Durham v BAI (Run Off) Ltd (in scheme of arrangement); Re Employers' Liability Policy 'Trigger' Litigation* [2010] EWCA Civ 1096, [2011] 1 All ER 605 at [236]–[237], [244]–[245], per Rix LJ

'[49] There is no difficulty about treating the word "contracted" as looking to the causation or initiation of a disease, rather than to its development or manifestation. In relation to the two BAI wordings and the third MMI wording, this interpretation obtains strong support from the general nature and purpose of the relevant policies, derived from their immediate context and terms and analysed in paras [18] to [28] and [41], above. To the limited extent that the WCA background may assist to inform the meaning of later policies, it can be seen overall as a legislative scheme which was concerned with either the risk of or actual causation (para [32], above). Even if, in the phrase "sustained or contracted" or "injury sustained or disease contracted", the word "sustained" is to be understood as meaning "experienced", that would reflect no more than the fact that the cause and effect of an injury commonly coincide; I would still unhesitatingly conclude, as did the Court of Appeal, that the word "contracted" used in conjunction with disease looks to the initiating or causative factor of the disease.' *Re Employers' Liability Policy 'Trigger' Litigation* [2012] UKSC 14, [2012] 3 All ER 1161 at [49], per Lord Mance SCJ

See also SUSTAIN

DISENFRANCHISEMENT

[For 9(2) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 1150 see now 24 Halsbury's Laws of England (5th Edn) (2010) para 351.]

DISHONEST PURPOSE

New Zealand [Evidence Act 2006, s 67(1): 'A Judge must disallow a claim of privilege conferred by any of sections 54 to 59 and 64 in respect of a communication or information if satisfied there is a prima facie case that the communication was made or received, or the information was compiled or prepared, for a dishonest purpose ...'] '[44] The meaning of dishonest purpose is coloured by its context. It is to be contrasted with, or at least its meaning assessed by reference to, the alternative in s 67(1) of enabling or aiding commission of an offence. This means, amongst other things, a communication or information to aid commission of an offence is likely in most cases also to be for a dishonest purpose. A dishonest purpose encompasses things less than, as well as different from, an offence. Also, as the legislature has chosen to use the expression "dishonest purpose", rather than "fraud", or the composite expression "fraud, sham or trickery", it is reasonable to conclude that the legislature was intending to cover any dishonest purpose, not just those particular types of dishonest purpose.'

'[45] What is meant by "dishonesty" has been carefully considered in relation to accessory liability or dishonest assistance. The discussion of the meaning of dishonesty by the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan* [[1995] 2 AC 378, PC] in this context has been adopted in New Zealand. This includes approval in New Zealand of the objective standard to be applied as discussed in *Tan* and subsequently by the Privy Council in *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [[2005] UKPC 37, [2006] 1 All ER 333]. The *Barlow Clowes* decision was discussed with general approval by the New Zealand Supreme Court in *Westpac New Zealand Ltd v MAP and Associates Ltd* [[2011] NZSC 89, [2011] 3 NZLR 751], in relation to dishonest assistance by a bank. A further recent application of *Tan*, in respect of a trustee's liability, is in *Spencer v Spencer* [[2012] 3 NZLR 229]. French J cited with approval the basic test stated by the Privy Council in *Tan*:

[A]cting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard.

[46] The Privy Council also observed, in the same discussion:

In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment.

Further examples were given. This particular example is of direct relevance to this case.

...
[56] In the judgment under review, the Judge referred to the absence of evidence that Mr and Mrs Pritchard have a beneficial interest in either of the trusts referred to in the email [to the fourth defendant from the solicitor to the third defendant]. That conclusion is, with respect, justified from a consideration of the positive assertions in the email. However, I am satisfied that a dishonest purpose in the present context is not necessarily dependent upon establishing that the Pritchards have what as a matter of law would amount to a true beneficial interest in the trusts. What is relevant is whether the email, weighed in the context of other relevant evidence, indicates dishonest concealment by the defendants. Having regard to all of the matters referred to I am satisfied that the plaintiffs have established a *prima facie* case of dishonest purpose in the email. It is advice to assist in continuing and better perfecting intentional deception of the plaintiffs through dishonest concealment. It may be, following a substantive hearing, that this will not be the final determination of the Court. But the defendants have not put up evidence which persuades me that the plaintiffs have not at this point established a *prima facie* case of dishonest purpose.’ *Cityside Asset Pty Ltd v 1 Solution Ltd* [2012] NZHC 3162, [2013] 1 NZLR 722 at [44]–[46], [56], per Woodhouse J

DISHONESTLY

New Zealand [33] The question under s 228 [of the Crimes Act 1961] is similarly confined. That section requires the Crown to prove that, with intent to obtain any of the things mentioned, the accused “dishonestly” and “without claim of right” took, obtained, used or attempted to use any document.

[34] “Dishonestly” is defined by s 217 in these terms:

dishonestly, in relation to an act or omission, means done or omitted without a belief that there was express or implied consent to, or authority for, the act or omission from a person entitled to give such consent or authority.

Two things have present significance about this statutory definition. The first is that the word “belief” is not accompanied by the word “honest”. The second is that there is no suggestion that the belief has to be reasonable or based on reasonable grounds. It is the existence of the belief which matters, not its reasonableness. Of course the word “honest”, in the phrase “honest belief”, was designed to signify that the belief must actually be held. Despite the tautology, its usage in that sense is unobjectionable. It is preferable, however, to follow the drafting of the definitions of dishonestly and claim of right by not qualifying the word “belief” at all. The potential difficulty with the word “honest” in the phrase “honest belief” is its capacity to be understood as signifying an ability for the accused person to frame their own moral code (the so-called “Robin Hood” defence). That, of course, is not its purpose, but juries can be confused as to the sense in which the word is used. It is best to avoid the issue when summing up by using language such as “did the accused believe?” rather than “did the accused have an honest belief?” The verb in this context is easier than the noun.

[35] The expression “claim of right” has replaced the older and more familiar expression “colour of right”. It is defined in s 2 of the Crimes Act as follows:

claim of right, in relation to any act, means a belief that the act is lawful, although that belief may be based on ignorance or mistake of fact or of any matter of law other than the enactment against which the offence is alleged to have been committed.

The same two points can be made about the word “belief” in this definition. A qualifying belief does not have to be reasonable or based on reasonable grounds nor have those responsible for the drafting thought it necessary to qualify the word “belief” by reference to honesty. A belief is a belief.

...
[43] The objective facts of a particular case may be such that the jury can properly infer that

the accused had a dishonest mind unless he or she can raise a reasonable doubt on the basis of a relevant but mistaken belief. In this respect the international jurisprudence is consistent with New Zealand's view that, provided the accused's belief is actually held, it does not have to be reasonable. This approach recognises the common law principle that *mens rea* is, in most cases, a subjective concept. Hence a mistaken belief in facts or circumstances that would, if correct, exculpate the accused does not have to be reasonable or based on reasonable grounds.

...

'[51] It is ... clear that New Zealand is not out of line and, in any event, we now have statutory definitions of "dishonestly" and "claim of right". They are both directed to the accused's belief. Section 228 does not require the use of a document to be "objectively" dishonest. It is the user's state of mind which will determine whether his use was dishonest. All elements of the crime are now covered by the statutory language and definitions. There is no call for any common law overlay.

'[52] The Solicitor-General submitted that the introduction of the definition of "dishonestly" in s 217 of the Crimes Act provided this Court with the opportunity to assess whether it was appropriate for New Zealand to continue to assess dishonesty solely on the basis of what he called subjective considerations. The definition in s 217 has already been set out. It does not, in itself, suggest or encourage a movement away from the traditional approach, which is to consider whether the accused actually held the asserted belief. From the evidentiary point of view, the more reasonable the belief, the more likely it was held, and vice versa; but it is not necessary that the belief itself be reasonable.

'[53] It is clear that ordinarily when Parliament wishes a question of belief to have some objective control it makes express provision to that effect. A good example is sexual violation. A belief in consent must be based on reasonable grounds. The absence of any reference in s 217 to the relevant belief having to be reasonable or based on reasonable grounds is significant.

'[54] The legislative history of s 217 also supports the view that the definition it enacts was designed to allow a defence of belief in lawfulness even if that belief is unreasonable. The section began life as cl 178 of the Crimes Bill 1989. In that form it was longer and much more complicated than s 217. There was no defence of "colour of right" or "claim of right". Rather, cl 178 stated that an act or omission requiring the authority of another person would

be dishonest if the accused did not believe that any such authority had been given and had "no reasonable grounds for believing" that the other person would have given that authority had he or she been asked. The intention of the drafters, as demonstrated by the following statement in the Explanatory Note, was to remove the capacity of an accused to argue a "Robin Hood" type defence:

"[Clause 178] restricts the present law to the extent that it will no longer allow by way of defence a subjective view of what is morally right or wrong." [Explanatory Note, p xxii]

'[55] The Bill was revised by the Crimes Consultative Committee under the chairmanship of Sir Maurice Casey. The revised Bill, which accompanied the Committee's report in 1991, contained a new and simpler definition of "dishonestly" in cl 176. This definition was ultimately enacted in 2003 as s 217. It is not necessary to trace the intervening parliamentary history, as it has no relevance to the point under consideration. The revised Bill adopted, for offences of dishonesty generally, the formula "dishonestly and without claim of right", adapted from the then existing legislative definition of theft, which used the formula "fraudulently and without colour of right".

'[56] There are two aspects of the Committee's revision that are significant for the purposes of this case. The first is the deliberate removal of the reference to the accused having "no reasonable grounds for believing" that authority would have been given if sought. The Committee's report contains the following passage under the heading "Matters of Interpretation":

"The revised definition of 'dishonestly' ... deletes the objective test of 'reasonable grounds' for belief that an act or omission is authorised." [Report of the Crimes Consultative Committee on the Crimes Bill 1989 (1991), p 64]

'[57] The new formula also introduced to the Bill a defence of "claim of right"; distinguishable from the earlier legislative term "colour of right". Colour of right, subject to certain qualifications, had meant "an honest belief that an act is justifiable". As we have seen, claim of right refers to a "belief that an act is lawful". The change from "justifiable" to "lawful" and the dropping of the word "honest" as a qualifier of the word "belief" confirmed the intention behind the 1989 Bill that a "Robin Hood"

defence should not be available. The Committee explained [at p 65]:

“The term ‘dishonestly’ remains but is confined by our proposed definition to conduct which is known or believed to be without proper authority. While the Committee does not support the use of an objective standard to assess the defendant’s belief that the act in question was authorised, at the same time the bill should remove any doubt that an idiosyncratic moral view about what actually constitutes dishonest behaviour will excuse the defendant from liability.”

‘[58] The significance for present purposes of this history is that it is clear those who framed the new definitions did not seek to introduce any reasonableness qualification of the relevant beliefs. The beliefs contained in the definitions of “dishonestly” and “claim of right” were not meant to be subject to a reasonableness control, albeit their reasonableness will obviously have evidential relevance to the question whether they were actually held. It would in these circumstances be wrong for this Court to read in a requirement that the beliefs referred to in the statutory definitions must be reasonable.’ R v Hayes [2008] NZSC 3, [2008] 2 NZLR 321 at [33]–[35], [43], [51]–[58], per Tipping J

DISHONESTY

New Zealand [Crime insurance policy: insurance against direct financial loss consequent on dishonest acts of employees committed with the clear intent of causing loss to employer.] ‘[47] Mr Walker relied on US decisions as to the meaning of dishonesty. However, there are authoritative statements from the Court of Appeal and the Privy Council which I find to be more useful. In *McMillan v Joseph* [(1987) 4 ANZ Ins Cas 60–822, CA] the question of dishonesty arose in the context of the dishonesty exclusion in a professional indemnity policy. Cooke P adopted the approach taken by Quilliam J at first instance, namely that the conduct in question was:

... Deliberate and such as to be called “not straightforward” and “underhand”.

‘[48] Cooke P went on to observe that:

The law has experienced unexpected difficulty in defining dishonesty. In England there have been vacillation and differences of opinion between Judges of

high authority about whether the test is objective or subjective or some compromise between the two ...

Here we are concerned with the use of “dishonest” in an exception clause where it is accompanied by “fraudulent criminal or malicious” and is evidently used in a wide general sense, rather than some special one. Perhaps the only workable answer in such a context is that the tribunal of fact has to make up its own mind whether, according to the ordinary understanding of this ordinary English word, it is satisfied that the actions in question were dishonest.

‘[49] Subsequently, in the context of accessory to knowing receipt the Privy Council considered that dishonesty meant [in [in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at 389, [1995] 3 All ER 97, PC]:

Simply not acting as an honest person would in the circumstances. This is an objective standard. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety.

However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual ...

In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment ...

‘[50] On the basis of these statements I take the approach that dishonesty in the present context means deliberately not acting in a straightforward way or in a way that an honest person would act.’ *Marac Finance Ltd v Vero Liability Insurance Ltd* [2013] NZHC 2525, [2014] 2

NZLR 93 at [47]–[50], per Courtney J

DISMISS—DISMISSAL

[For 16(1B) Halsbury's Laws of England (4th Edn) (Reissue) para 629 et seq see now 40 Halsbury's Laws of England (5th Edn) (2009) para 712 et seq.]

DISORDERLY HOUSE

[For 11(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 223 see now 25 Halsbury's Laws of England (5th Edn) (2016) para 272.]

DISPOSITION

[For the Income and Corporation Taxes Act 1988, s 670 see now the Income Tax (Trading and Other Income) Act 2005 s 620(1).]

[Insolvency Act 1986, s 127.] '[7] The present proceedings are brought by SICL and the Liquidators against Samba in reliance on s 127 of the Insolvency Act 1986, which provides:

"Avoidance of property dispositions, etc

- (1) In a winding up by the court, any disposition of the company's property, and any transfer of shares, or alteration in the status of the company's members, made after the commencement of the winding up is, unless the court otherwise orders, void."

By s 436 of the 1986 Act the concept of "property" is defined in wide terms:

" 'property' includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property ...".

...

'[9] Following the oral hearing before it, the Supreme Court invited and received two sets of supplementary written submissions focusing more precisely on the questions (a) whether there was any "disposition" within s 127, even if SICL had equitable proprietary interests in the shares, and (b) why, if there was, it could not also be said that there was such a disposition, even if SICL only enjoyed personal rights in respect of the shares.

...

'[53] In these circumstances, I conclude that s 127 is neither aimed at, nor apt to cover, the present situation. Section 127 addresses cases where assets legally owned by a company in winding up are disposed of. The section is necessary to enable the company to recover them, by treating the disposition as void. The court's power to validate the disposition is a necessary safety valve, to cater for situations in which validation would be appropriate, bearing in mind the position of creditors as well as that of the other party to the transaction. Any such disposition will involve issues which arise directly between the company (embracing in that concept its creditors in liquidation) whose property is disposed of and the other party to the transaction, although the section embraces situations where the company's property is held by, for example, a director or agent and is disposed of by him to a third party: *Re J Leslie Engineers Co Ltd* [1976] 2 All ER 85, [1976] 1 WLR 292.

'[54] The holder of interests such as SICL's does not need protection on the lines of s 127, in order to protect its property or to protect or enforce its interests. Mr Al-Sanea disposed of his legal interest in the shares. That involved him in a breach of trust. But it did not involve any disposition of SICL's property. SICL's property, whether it consisted of an equitable proprietary interest or personal rights to have the shares held for its benefit, continued, despite the disposal of the legal title, unless and until that disposal overrode it. If the disposal overrode SICL's interest as regards a third party transferee of the legal title such as Samba, that was not because of any disposal of SICL's interest. It was because SICL's interest was always limited in this respect.

'[55] In some circumstances, the term "disposition" may, as Lord Neuberger demonstrates, embrace destruction or extinction of an interest. In the present context, one might also pray in aid academic descriptions of the wrongful alienation of trust property (even if it did not override any beneficial interest in such property) as a "misapplication of trust assets" (Snell's *Equity* (33rd edn), paras 30–013, 30–050 and 30–067) and a "disposition ... in breach of trust" (Swadling in Burrows, *English Private Law* (3rd edn), para 4.151). But the natural meaning of "disposition" in the context of s 127 is in my view that it refers to a transfer by a disponent to a donee of the relevant property (here the beneficial interest), not least when the section goes on to render any disposition "void" unless the court otherwise

orders. I agree with Lord Neuberger's and Lord Sumption's further reasoning on this point.

'[56] I do not, in these circumstances, see any basis for extending, or any need to extend, s 127 to cover three-party situations where legal title is held and disposed of to a third party by a trustee, and the beneficiary's beneficial interest either survives or is overridden by virtue of the disposition of the legal title to the third party. The law regulates, protects and circumscribes beneficial interests under a trust in a manner which is separate from and outside the scope of s 127.

'[57] It follows that I would allow the appeal, set aside the order made by the Court of Appeal, and declare that for the purposes of s 127 of the Insolvency Act 1986 there was no disposition of any rights of SICL in relation to the shares by virtue of their transfer to Samba. ...'

'[65] There is undoubtedly a powerful argument for saying that a transfer by the legal owner of the legal estate for value in an asset to a bona fide purchaser who has no notice of the existence of an equitable interest in that asset cannot amount to a disposition of that equitable interest. As already mentioned, and as Lord Mance demonstrates, there is no question of Mr Al-Sanea having transferred SICL's equitable interest in the shares to Samba: he simply transferred his legal ownership of the shares to Samba, and, on the assumption that Samba was a bona fide purchaser for value without notice, the equitable interest effectively disappeared. In those circumstances, at least on the basis of the meaning which it naturally conveys, s 127 simply does not apply: a "disposition" normally involves a disponor and a disponent, and so there has simply been no disposition. Indeed, in an Australian first instance decision, *Re Mal Bower's Macquarie Electrical Centre Pty Ltd (in liq)* [1974] 1 NSWLR 254 at 258 Street CJ in Eq expressly so stated, albeit in a very different context from the present.

'[66] However, it is fair to say that the word "disposition" is linguistically capable of applying to a transaction which involves the destruction or termination of an interest. Etymological analyses can fairly be said to be suspect in this sort of context, but it seems to me to involve a perfectly natural use of language to describe SICL's interest in the shares as having been "disposed of" by the transfer of those shares to a bona fide purchaser.

'[71] It would appear that Mr Al-Sanea was

a bare trustee of the shares—i.e the whole of the beneficial interest in the shares was vested in SICL. A transfer of the bare legal estate by the trustee to a purchaser with notice of the trust would not be caught, because he would only acquire the bare legal interest, which would normally be worth nothing, and no disposition of the company's property would have occurred. And a transfer by the company of its equitable interest would undoubtedly be caught by s 127 as it would involve a disposition by the company of that interest. It can therefore be said to be surprising if a transfer by the trustee which involved the transferee effectively obtaining the whole of the equitable interest previously owned by the company was not caught by the section.

'[72] Nonetheless, I have reached the conclusion, in agreement with Lord Mance, that there is no "disposition" of an equitable interest within s 127, when there is a transfer by the legal owner of the legal estate, which is subject to that equitable interest, to a bona fide purchaser for value without notice of that equitable interest.

'[73] As already mentioned, the natural meaning of s 127 appears to me to carry with it the notion of a disponor transferring property to a disponent, and on that basis there was no disposition of SICL's equitable interest in the shares in this case. Although, as explained above, there are arguments for departing from the natural meaning of s 127, I consider that they are outweighed by the arguments the other way.

'[74] In my view, Sir Roy Goode is right when he says that the surrender of a lease or the giving up of contractual rights by a company would be a "disposition" within s 127, as would a surrender of a life interest (and a company can no doubt have such an interest, at least if it is contingent on an individual's life) as discussed in *Buchanan [Inland Revenue Comrs v Buchanan]* [1957] 2 All ER 400, [1958] Ch 289]. However, there are differences between a surrender (whether of a lease, contractual rights, or a life interest) and the loss of a beneficial interest on a transfer of the legal estate to a bona fide purchaser for value without notice of that interest. In the former case, the person who is the disponor is the same as the person who loses the property; whereas in the latter case the disponor is, ex hypothesi, not the person who loses the property. And, in the former case the disponent is well aware of the property which is ceasing to exist: as far as he is concerned, its extinction is the purpose of the transaction; in the latter case, the disponent is, by definition,

unaware of the property which is being disposed of.’ *Akers v Samba Financial Group* [2017] UKSC 6, [2017] 2 All ER 799 at [7], [9], [53]–[57], per Lord Mance and at [65]–[66], [71]–[74], per Lord Neuberger P

Specific disposition

[For the Income and Corporation Taxes Act 1988, s 701(5) see now the Income Tax (Trading and Other Income) Act 2005 s 664(6) and the Corporation Tax Act 2009 s 947(6).]

DISQUALIFIED

[Note that the Licensing Act 1964 was repealed by the Licensing Act 2003, s 199, Sch 7, as from 24 November 2005 and the new regime of premises licences under the 2003 Act does not include the concept of disqualified persons and premises. See 67 Halsbury’s Laws of England (5th Edn) (2016) paras 5, 58 et seq.]

[For 40(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 755 et seq see now 89 Halsbury’s Laws of England (5th Edn) paras 281–284.]

DISSEMINATION

New Zealand [Criminal Justice Act 1985, s 138(5); whether providing internet link to a judgment was ‘dissemination’ for the purposes of a suppression order.] ‘[56] In an agreed statement of facts, Mr Siemer acknowledges that he published the judgment on his websites. We hold that such publication breaches that aspect of the order that prohibits publication on “the internet or other publicly available database”. That being so, the Solicitor-General’s alternative allegation that the publications breached the “or otherwise disseminated” limb of the suppression order cannot logically be correct. If the publication is caught by one of the earlier descriptions, it cannot also be “otherwise” disseminated by the same act. However, had we had doubts about the meaning of “internet”, we would have held that Mr Siemer’s actions amounted to “otherwise disseminating”.

‘[57] The respondent sought to dispute this by arguing it was not dissemination to make available a link. We disagree. The ordinary meaning of the word “disseminate” is “to spread widely”. A person who makes a document available on the internet so that it will be found by a search engine, and can be accessed by

anyone following the link, is disseminating that document. Mr Siemer accepts he published the judgments; even if his websites are not the internet, publishing the judgment on his websites must be dissemination. That is the very essence of publishing; it is making something known to someone else.’ *Solicitor-General v Siemer* [2011] 3 NZLR 101 at [56]–[57], per MacKenzie and Simon France JJ

DISSUASIVE

‘[177] Article 3(2) of the Enforcement Directive [European Parliament and Council Directive 2004/48/EC (on the enforcement of intellectual property rights) (OJ 2004 L157 p 45)] requires that remedies for infringement of intellectual property rights be “dissuasive”. Although counsel for the ISPs submitted that dissuasiveness was a separate requirement to the other requirements listed in para [158] above, she did not address it separately in her submissions. As I understood it, this was on the footing that it added nothing to the other requirements, and in particular the requirement of effectiveness, in the circumstances of this case.

‘[178] I disagree with this approach. Article 3(2) of the Enforcement Directive requires that remedies for intellectual property infringement shall not merely be effective, but also dissuasive. As I see it, the distinction between the two is that effectiveness relates to the defendant, whereas dissuasiveness relates to third parties. That is to say, the remedies granted against the defendant should dissuade third parties from infringing in the future. This function is particularly reflected in recital (27) and art 15 of the Directive. It is also recognised by the reasoning of the CJEU in the passage from *UPC v Constantin* [*UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* (Case C-314/12) EU:C:2014:192, [2014] IP & T 438 at paras 55–63] quoted in para [171] above.

‘[179] In my judgment, it follows that, when deciding whether or not to grant a website blocking injunction, it is relevant for the court to consider whether it is likely to have such a dissuasive effect.’ *Cartier International AG v British Sky Broadcasting Ltd* [2014] EWHC 3354 (Ch), [2015] 1 All ER 949 at [177]–[179], per Arnold J

DISTINCTIVE

[For 48 Halsbury’s Laws of England (4th Edn) (2000 Reissue) para 58 see now 97A Halsbury’s Laws of England (5th Edn) (2014) para 44.]

DISTRESS

[For 13 Halsbury's Laws of England (4th Edn) (2007 Reissue) para 901 see now 62 Halsbury's Laws of England (5th Edn) (2016) para 282n.]

[The common law right to distrain for arrears of rent was abolished as from 6 April 2014: see the Tribunals, Courts and Enforcement Act 2007, s 71; Tribunals, Courts and Enforcement Act 2007 (Commencement No 11) Order 2014, SI 2017/768. See 62 Halsbury's Laws of England (5th Edn) (2016) para 282.]

DISTURBANCE

[2] Issue one concerns the proper interpretation of art 12(1)(b) of Council Directive (EEC) 92/43 on the conservation of natural habitats and of wild flora and fauna (the Habitats Directive) (1992 OJ L 206 p 7) which provides that:

"Member States shall take the requisite measures to establish a system of strict protection for the animal species listed [the protected species] in their natural range, prohibiting ... (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration ..."

[14] As a background to deciding the meaning of art 12(1)(b), Ward LJ necessarily had regard to the European Commission's views upon the scope of the Habitats Directive, as set out in a guidance document issued in February 2007 ...

[19] In my judgment certain broad considerations must clearly govern the approach to art 12(1)(b). First, that it is an article affording protection specifically to species and not to habitats, although obviously, as here, disturbance of habitats can also indirectly impact on species. Secondly, and perhaps more importantly, the prohibition encompassed in art 12(1)(b), in contrast to that in art 12(1)(a), relates to the protection of "species", not the protection of "specimens of these species". Thirdly, whilst it is true that the word "significant" is omitted from art 12(1)(b)—in contrast to art 6(2) and, indeed, art 12(4) which envisages accidental capture and killing having "a significant negative impact on the protected species"—that cannot preclude an assessment of the nature and extent of the negative impact of the activity in question upon the species and, ultimately, a judgment as to whether that is

sufficient to constitute a "disturbance" of the species. Fourthly, it is implicit in art 12(1)(b) that activity during the period of breeding, rearing, hibernation and migration is more likely to have a sufficient negative impact on the species to constitute prohibited "disturbance" than activity at other times.

[20] Beyond noting these broad considerations it seems to me difficult to take the question of the proper interpretation and application of art 12(1)(b) much further than it is taken in the Commission's own guidance document. (The Commission's suggestion in their September 2008 additional reasoned opinion that art 12(1)(b) "covers all disturbance of protected species" in truth begs rather than answers the question as to what activity in fact constitutes such "disturbance" and cannot sensibly be thought to involve a departure from their 2007 guidance.) Clearly the illustrations given in para 39 of the guidance—on the one hand "any disturbing activity that affects the survival chances, the breeding success or the reproductive ability of a protected species or leads to a reduction in the occupied area", on the other hand "scaring away a wolf from entering a sheep enclosure"—represent no more than the ends of the spectrum within which the question arises as to whether any given activity constitutes a disturbance. Equally clearly, to my mind, the suggestion in para 39 that "consideration must be given to its effect [the effect of the activity in question] on the conservation status of the species at population level and biogeographic level" does not carry with it the implication that only activity which does have an effect on the conservation status of the species (ie which imperils its favourable conservation status) is sufficient to constitute "disturbance".

[21] I find myself, therefore, in respectful disagreement with Ward LJ's conclusion (at [37]) "that for there to be disturbance within the meaning of art 12(1)(b) that disturbance must have a detrimental impact so as to affect the conservation status of the species at population level". Nor can I accept his view (at [36]) that "the guidance at para (39) makes the point that the disturbing activity must be such as 'affects the survival chances ... of a protected species' ". On the contrary, as I have already indicated, para 39 of the guidance uses disturbing activity of that sort merely to illustrate one end of the spectrum. Rather the guidance explains that, within the spectrum, every case has to be judged on its own merits. A "species-by-species approach is needed" and, indeed, even with regard to a single species, the

position “might be different depending on the season or on certain periods of its life cycle” (see para 37 of the guidance). As para 39 of the guidance concludes: “it has to be stressed that the case-by-case approach means that the competent authorities will have to reflect carefully on the level of disturbance to be considered harmful, taking into account the specific characteristics of the species concerned and the situation, as explained above”.

‘[22] Two further considerations can, I think, usefully be identified to be borne in mind by the competent authorities deciding these cases (considerations which seem to me in any event implicit in the Commission’s guidance). First (and this I take from a letter recently written to the respondent by Mr Huw Thomas, Head of the Protected and Non-Native Species Policy at the Department for the Environment, Food and Rural Affairs, the department responsible for policy with regard to the Habitats Directive):

“Consideration should ... be given to the rarity and conservation status of the species in question and the impact of the disturbance on the local population of a particular protected species. Individuals of a rare species are more important to a local population than individuals of more abundant species. Similarly, disturbance to species that are declining in numbers is likely to be more harmful than disturbance to species that are increasing in numbers.”

‘[23] Second (and this is now enshrined in reg 41(2) of the Conservation of Habitats and Species Regulations 2010, SI 2010/490):

“disturbance of animals includes in particular any disturbance which is likely—(a) to impair their ability—(i) to survive, to breed or reproduce, or to rear or nurture their young, or (ii) in the case of animals of a hibernating or migratory species, to hibernate or migrate; or (b) to affect significantly the local distribution or abundance of the species to which they belong.”

Note, however, that disturbing activity likely to have these identified consequences is included “in particular” in the prohibition; it does not follow that other activity having an adverse impact on the species may not also offend the prohibition.’ *R (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, [2011] 1 All ER 744 at [2], [14], [19]–[23], per Lord Brown SCJ

Australia [Defence Force Discipline Act 1982 (Cth), s 33(b): service offence of having created

a disturbance on service land.] ‘[7] Major Li’s appeal, by special leave, to this court raises two questions about the service offence of creating a disturbance on service land contrary to s 33(b) of the DFDA of which Major Li was convicted:

- (1) Is violence or a threat of violence necessary to the existence of a “disturbance”?
- (2) What physical and fault elements are involved in “creating” a disturbance?

...

‘[17] The legislative history suggests that the mischief to which s 33 of the DFDA is addressed is appropriately identified broadly as the maintenance of order and discipline rather than narrowly as the elimination of violence. What is “reprehensible” about the conduct prohibited by each of the paragraphs of s 33 is the likely disruptive effect of that conduct on others in or in the vicinity of the place where that conduct occurs. The confining of the service offences created by s 33 to conduct only on service land, in a service ship, aircraft or vehicle, or in a public place also tells against preferring a narrower construction of the conduct prohibited by each of those paragraphs merely because that narrower construction would least diminish the personal rights and freedoms of those defence members and defence civilians whose conduct is governed by the section.

‘[18] The better construction of s 33(b) of the DFDA is that preferred by the other four of the five judges who constituted the Full Court of the Federal Court. A disturbance is a non-trivial interruption of order. Violence or a threat of violence is not necessary to the existence of a disturbance. Quarrelling may, in a particular factual context, be enough.

... ‘[27] In the context of the overall reference in s 33(b) of the DFDA to a person who “creates a disturbance or takes part in creating or continuing a disturbance”, it is apparent that the disturbance, whether created or continuing, is something which extends beyond the mere bodily action of the person who commits the offence. The words “creates a disturbance” are naturally read as referring to the doing of an act which results in a disturbance. To create is to bring something new into existence. To create a disturbance—an interruption of order—is to do an act which results in an interruption of order.

‘[28] The service offence created by s 33(b) of the DFDA is therefore best construed as relevantly having two physical elements, to each of which the Criminal Code attaches a distinct fault element. The first physical element

is conduct, for which the fault element is intention: it must be proved that the defence member or defence civilian charged did the act, and meant to do the act. The second physical element is the result of that conduct, for which the fault element is recklessness: it must be proved that the act resulted in a disturbance (being a non-trivial interruption of order), and that the defence member or defence civilian charged either believed that the act would result in a disturbance or was aware of a substantial risk that the act would result in a disturbance and, having regard to the circumstances known to him or her, it was unjustifiable to take that risk.' *Li v Chief of Army* [2013] HCA 49, (2013) 303 ALR 397 at [7], [17]–[18], [27]–[28], per French CJ, Crennan, Kiefel, Bell and Gageler JJ

DISTURBED

Canada '1. This case requires us to explore a particularly dark corner of the criminal law, the law of infanticide. Section 233 of the *Criminal Code*, RSC 1985, c C-46, provides that "a female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed". The focus of the appeal is the legal meaning of the phrase "her mind is then disturbed", a phrase which is not defined in the *Code* and for which the case law has provided little explanation.

'2. In my opinion, Parliament intended the concept of a "disturbed" mind in this offence to have its ordinary meaning, so as to provide a broad and flexible legal standard which will serve the ends of justice in the particular circumstances of these difficult cases. While we can provide some limited guidance for trial judges and juries, the rest is left, by Parliament's design, to their good judgment.

'18. The question of the meaning of the phrase "her mind is then disturbed" is one of statutory interpretation. To answer it, we apply the often reiterated "modern" approach which requires that we read the words in their "entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": E A Driedger, *Construction of Statutes* (2nd edn, 1983), at p 87. I will look at the grammatical and ordinary sense of the

words, their place within the *Criminal Code*, the provision's legislative history and evolution, and, finally, at the jurisprudence interpreting this phrase.

'19. The adjective "disturbed" means "[d]isquieted; agitated; having the settled state, order, or position interfered with" and "emotionally or mentally unstable or abnormal": *The Oxford English Dictionary* (2nd edn 1989), at p 872.

'20. The French version of the legislation provides that a woman commits infanticide "*si au moment de l'acte ou de l'omission elle n'est pas complètement remise d'avoir donné naissance à l'enfant et si, de ce fait ou par suite de la lactation consécutive à la naissance de l'enfant, son esprit est alors déséquilibré*". *Le Grand Robert de la langue française* (2nd edn 2001) defines "déséquilibré" as "[q]ui n'a pas ou n'a plus son équilibre mental, psychique": p 1344.

'21. The grammatical and ordinary sense of the words used in s 233 supports the conclusion that the legislator did not intend to restrict the availability of infanticide to situations where the psychological health of the woman was substantially compromised or where a mental disorder was established.

'22. The statutory language also shows that there is no requirement for a causal connection between the disturbance of the accused's mind and the act or omission causing the child's death. There is, however, a required link between the disturbance and having not fully recovered from the effects of giving birth to the child or of the effect of lactation consequent on the child's birth; in either case the disturbance must be "by reason thereof".

'23. The concept of a "disturbed" mind is unique to infanticide and does not appear elsewhere in the *Criminal Code*. Conceptually, a "disturbed" mind must be different from a "mental disorder", a term used in s 16 of the *Criminal Code*, and, when proved on a balance of probabilities, can lead to a verdict of not criminally responsible. It must also be different from non-insane automatism, which makes the act committed by the accused involuntary: *R v Parks* [1992] 2 SCR 871, at p 896.

'24. From this we may infer that the disturbance addressed in the infanticide provisions need not reach the level required to provide a defence under s 16 of the *Criminal Code*, that is, to be the result of a mental disorder (which is defined as a "disease of the mind" under s 2 of the *Criminal Code*) that renders the accused incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong. We can also infer

that the disturbance aspect of infanticide need not render the accused's acts or omissions involuntary as is required for automatism.

...
'35. From this review, I cannot accept the conclusion of the dissenting judge in the Court of Appeal that Parliament intended to restrict the concept of a disturbed mind to those who have "a substantial psychological problem": para 140. Rather, I conclude that the phrase "mind is then disturbed" should be applied as follows:

- (a) The word "disturbed" is not a legal or medical term of art, but should be applied in its grammatical and ordinary sense.
- (b) In the context of whether a mind is disturbed, the term can mean "mentally agitated", "mentally unstable" or "mental discomposure".
- (c) The disturbance need not constitute a defined mental or psychological condition or a mental illness. It need not constitute a mental disorder under s 16 of the Criminal Code or amount to a significant impairment of the accused's reasoning faculties.
- (d) The disturbance must be present at the time of the act or omission causing the "newly-born" child's death and the act or omission must occur at a time when the accused is not fully recovered from the effects of giving birth or of lactation.
- (e) There is no requirement to prove that the act or omission was caused by the disturbance. The disturbance is part of the *actus reus* of infanticide, not the *mens rea*.
- (f) The disturbance must be "by reason of" the fact that the accused was not fully recovered from the effects of giving birth or from the effect of lactation consequent on the birth of the child.'

R v Borowiec [2016] SCJ No 11, 2016 SCC 11 at paras 1–2, 18–24, 35, per Cromwell J

DIVERT

[For 21 Halsbury's Laws of England (4th Edn) (2004 Reissue) paras 781–783 see now 55 Halsbury's Laws of England (5th Edn) (2012) paras 811–813.]

DIVIDEND

[For 7(1) Halsbury's Laws of England (4th Edn) (2004 Reissue) para 905 see now 15A

Halsbury's Laws of England (5th Edn) (2016) para 1581.]

Dividend stripping

In 1955, action was taken against a form of avoidance known as dividend stripping. This consisted in setting up a trade of share dealing; buying the shares of a company with large undistributed profits; arranging for the company to pay a large dividend; and selling the shares, realising a trading loss. The dividends were at that time deemed to have borne the tax paid by the company on its profits. The counteraction consisted in treating the dividend as a trading receipt [Finance Act 1956, s 20 (repealed); subsequently the Taxes Management Act 1970, s 16 (repealed)]. Further legislation was subsequently required to deal with new variations of the scheme [Finance Act 1958, ss 18,19 (repealed)]. (Simon's Taxes A1.548)

Preference dividend

[Note that the Income and Corporation Taxes Act 1988, s 832(1) has been repealed.]

DIVINE SERVICE

[For 14 Halsbury's Laws of England (4th Edn) para 933 et seq see now 34 Halsbury's Laws of England (5th Edn) (2011) para 730 et seq.]

DIVORCE

[For 29(3) Halsbury's Laws of England (4th Edn) (Reissue) para 401 et seq see now 72 Halsbury's Laws of England (5th Edn) (2015) para 396 et seq.]

DOCUMENT

Document that appears to be a will

New Zealand [Wills Act 2007, s 14: the High Court may declare a document valid as a will if, *inter alia*, it appears to be a will. Solicitor took instructions in the form of detailed notes for the purpose of preparing a new will. The deceased later sent further instructions to the solicitor by email but died before she could execute new will.] '[13] Plainly the draft will satisfies the requirements for a will in terms of s 8(1), save that it is not signed. The reason, however, it is not signed is that it was drafted after the deceased passed away. This raises the issue as to

whether a document drafted after the death of the testator qualifies as a document under s 14. I have come to the conclusion that it cannot. The linkage to s 11 strongly suggests that the purpose of s 14 is to cure a non-compliance with s 11, rather than a wholesale absence of a will. There must at least be a document purporting to be a will under the hand or direction of the deceased prior to death. The draft will post-dates the death and therefore does not satisfy this criterion.

[14] I therefore turn to whether the notes taken by the deceased solicitor, combined with the subsequent email, might constitute a will (and codicil) for the purposes of s 14.

[15] Section 14, as I have said, is curative of any technical non-compliance. But it must be a "document" that "appears" to be a will. A document is broadly defined as any material on which there is writing. I am satisfied that the notes and email are "documents" for the purpose of s 14.

[16] For a document then to "appear" to be a will it must:

- (a) dispose of property;
- (b) appoint testamentary guardians; or
- (c) dispose of property to a personal representative.

[17] The notes and email are attached to this judgment for ease of reference. The notes and email are documents that:

- (a) dispose of the deceased's property;
- (b) identify Ms Smyth as the sole executor;
- (c) deal with the residue (though the exact quantum of the share to go to Advance Ashburton has to be inferred by necessary implication); and
- (d) address funeral arrangements.

[18] Needless to say, notes being notes, the reader is required to fill numerous gaps to make sense of the words used. But the notes are self-explanatory and the intentions are tolerably clear. The email is more complete, and the intentions of the deceased are obvious. Taken together the notes and email at least provide the skeleton for a will. The notes are headed "New Will", the executor is clearly identified and the dispositions recorded in an orderly way.

[19] The issue remains however as to whether this is sufficient for the purposes of s 14. Approached literally, the documents appear, as I have said, like a skeleton for a will. When however I approach s 14 with its curative purpose in mind I am content to proceed to approach the concept of "appear" on a robust basis, provided that I am satisfied that the skeleton represents the intentions of the deceased. I would add that the weaker the

documentation, the stronger the evidence will need to be that the documents represent the intentions of the deceased.

[20] In this case the Court has the benefit of direct testimony from the deceased's solicitor, Ms Smyth, who transcribed the detailed notes. As I have said the notes plainly evince the deceased's intentions to dispose of her property. Ms Smyth also avers to the fact that the Christchurch earthquake prevented the timely drafting of a complete will and that the deceased died shortly after those earthquakes. There is nothing to suggest that the deceased had changed her mind in the relatively short period between the giving of instructions and the deceased's passing. The primary beneficiaries under the previous will consent to the declaration. If there was something amiss, I would have expected one of them to register concern.

[21] Accordingly I am satisfied that the notes and email "appear" to be a will for the purposes of s 14. While I have been unable to locate a New Zealand authority directly on point, I gain some assistance from *Re Estate of TLB* (2005) 94 SASR 450 where the Court admitted a "Will Instruction Sheet" to probate. *Re Feron* [2012] 2 NZLR 551 at [13]–[21], per Whata J

DOCUMENTARY

Australia [Income Tax Assessment Act 1997 (Cth) s 376–65(6).] [27] That the tribunal determined the meaning of "documentary" to be the "ordinary" meaning requires some deeper consideration. It is the product of this which is key to the disposition of this appeal.

[28] The ITA Act does not define "documentary". The immediate text in s 376–65(6) offers little assistance. The wider context of s 376–65 suggests a meaning that would not, we think, immediately recommend itself as the "ordinary" meaning. For example, it is apparent that a "film of a public event" and a "reality program" may each be a "documentary": s 376–65(2)(d)(iii) and (vii).

[29] It was the *Oxford Dictionary* which the tribunal considered most satisfactory in reaching for the ordinary meaning of the word. It appears, at least implicitly, from the tribunal's reasons at [39]–[40] that the particular definition in that dictionary to which the tribunal was referring was this:

Factual, realistic; applied esp to a film or literary work, etc, based on real events or

circumstances and intended primarily for instruction or record purposes.

[30] This definition makes no mention expressly or by implication of “a creative recording of facts”, or “contrivance” by the documentary maker as an example of creativity yet these, as the tribunal found and to which we have referred, were indicia of a documentary giving it its ordinary meaning.

[34] The meaning of the word “documentary” in its ordinary meaning, so described, was derived by the tribunal at the outset, from the *Oxford Dictionary* meaning as well as with the aid of extrinsic material, including the explanatory memorandum; the documentary guidelines issued by the Australian Broadcasting Authority in 2004 in turn adopted by its successor Australian Communications and Media Authority as well as guidelines issued by Screen Australia.

[43] The starting point in the process of statutory construction is to apply the ordinary and grammatical sense of the statutory word(s) to be interpreted having regard both to text and perhaps also context as well as legislative purpose: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27; 260 ALR 1; [2009] HCA 41 at [4] (*Alcan*) per French CJ. Likewise the plurality in that case stated at [47]:

[47] The Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of the legislation is the surest guide to legislative intention. The meaning of the text *may require consideration* of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy. [Citations omitted and emphasis in original.]

[44] We think that the joint submission put to the tribunal by the parties that the word “documentary” had an ordinary meaning was probably, in the end, unhelpful if it was intended to convey that the meaning of the word could be distilled from its ordinary meaning having regard to the text and if necessary its statutory context as well as its underpinning legislative purpose in the way described in *Alcan*. We say

this because we do not think that the word “documentary” has an “ordinary” meaning in that sense. This is so for at least three reasons.

[45] First the *Macquarie* and *Oxford Dictionary* definitions considered by the tribunal do not disclose a unitary expression. The *Macquarie Dictionary* definition contains, unlike the *Oxford Dictionary*, no element of instruction.

[46] Second, having regard to the absence of any statutory definition and the particular use of “documentary” in s 376–65(2)(d)(iii) and (vii) we rather think it has an extraordinary meaning which is, as the tribunal found at [30], both obscure and ambiguous.

[47] Third, in addition to this contextual reinforcement for an extended definition of “documentary” from its ordinary meaning, if there indeed be one, this is further reinforced upon a purposive construction where the object of the statutory provision is to support and develop the Australian screen industry. This approach to construction warrants a wider meaning being attributed to “documentary”: *Collector of Customs v Cliffs Robe River Iron Associates* (1985) 7 FCR 271 at 275 per Bowen CJ, Morling and Neaves JJ; *Abbott Point Bulk Coal Pty Ltd v Collector of Customs* (1992) 35 FCR 371.

[48] Accordingly it was open to the tribunal, in the circumstances, to resort to the explanatory memorandum as material “capable of assisting in the ascertainment of the meaning of the provision”: s 15AB(1)(b) of the AI Act. It was not obliged to import the entire description of what constituted a documentary from the explanatory memorandum. The tribunal, for reasons stated, regarded part of this description as problematic raising as it did further definitional issues such as the expressions “magazine, infotainment or light entertainment program”. Section 15AB(1)(b)(i) is facultative and permits, but does not require, a court (or tribunal) to resort to extrinsic materials to determine meaning: *Brennan v Comcare* (1994) 50 FCR 555; 122 ALR 615. All that the provision provides is that “consideration may be given to that (extrinsic) material”. That is precisely what the tribunal did.

[49] While the reasons of the tribunal state to the contrary we are persuaded for the reasons set out above that the tribunal, in arriving at the “ordinary” meaning of “documentary” did have regard, at that point, not merely to the *Oxford Dictionary* but also to the extrinsic material. Fairly read, the tribunal’s reasons are informed, at least in part, by the definition of “documentary” found in extrinsic material. The tribunal’s

use of the expressions “presents fact, usually in the form of events”; “actuality”; “creative”; and “contrivance” (reasons at [13]–[17]) are, plainly enough, sourced from that material. The meaning attributed by it derives from those various sources in combination. The meaning thus reached by the tribunal was not its ordinary meaning. The process of construction which it in fact employed was a process of law and was not directed to a question of fact.

[50] It is unnecessary for us to express our view of the meaning of the word “documentary”. It is sufficient for present purposes that we have concluded that no material error of law has been demonstrated by the applicant. Rather, and to the contrary, we find that read fairly, as a whole, the tribunal had regard when determining the meaning of “documentary” to the relevant extrinsic material. It did so because the text and context of the ITA Act threw up ambiguity as to its meaning. ...’ *Screen Australia v EME Productions No 1 Pty Ltd* [2012] FCAFC 19, (2012) 287 ALR 186 at [28]–[30], [34], [43]–[50], per Keane CJ, Finn and Gilmour JJ

DOMESTIC VIOLENCE

See also VIOLENCE

[Housing Act 1996, s 177(1), (1A).] [39] The term “domestic violence” rose to prominence in the 1970s in connection with “battered wives”—women who, whether married or not, suffered violence at the hands of their husband or partner. One reaction was to set up refuges. Another was public pressure for the law to be reformed to give such women greater protection.

[40] Of course, it was known that physical violence was not the only form of abuse which women suffered. For example, in 1974 Dr Elizabeth Wilson referred to a case where the husband’s constant abuse in the form of offensive and cruel denigratory remarks had already damaged his wife’s psyche “possibly in a more irreparable way than if he had broken her nose ...”: see “Battered wives: why they are the born victims of domestic violence” (1974) *The Times*, 4 September, p 13. But, understandably, the predicament of women who were the victims of physical violence was at the forefront of demands for the law to be reformed.

[41] It is therefore not surprising that the term “domestic violence” first entered English law in the short title of the Domestic Violence and Matrimonial Proceedings Act 1976 which

derived from the Private Member’s Bill promoted by Miss Josephine Richardson MP. There can be no doubt that the main aim of Parliament in passing the legislation was to give some additional protection, by way of injunctions in the county court—and the possibility of including a power of arrest in certain cases—to women, whether married or cohabiting, who were likely to suffer physical violence at the hands of their husband or partner. Section 2 did indeed refer to the other party to the relationship “using violence”. But the Act was not confined to such cases. As Lord Scarman noted in *Davis v Johnson* [1978] 1 All ER 1132 at 1156, [1979] AC 264 at 348, the mischief at which s 1 of the Act was aimed (“molesting”) went beyond physical violence and included “conduct which makes it impossible or intolerable ... for the other partner, or the children, to remain at home”.

[42] When, the following year, Parliament enacted the Housing (Homeless Persons) Act 1977, it included provisions that were designed to provide additional help to victims of violence in the home. On this occasion it did not refer to cases where the woman was “molested”. Parliament therefore seems to have been concentrating on the paradigm case of battered wives, women who feared physical violence—understandably enough, since the new Act was imposing novel obligations on local authorities.

[43] More than 30 years have passed. The legislation has become a familiar part of the legal landscape and has been re-enacted in the Housing Act 1996. The question before the court is whether the word “violence” in s 177(1) and (1A) of the 1996 Act is confined to physical violence.

[44] At first sight it is curious that Parliament has maintained the special term “domestic violence”. Section 177(1) now applies to cases where it is probable that continuing to occupy accommodation will lead to “domestic violence or other violence”—“other” violence being violence from people, such as neighbours, who are not associated with the victim. Subsection (1A) then says that violence is “domestic violence” if it is from a person who is associated with the victim. In my view, there is no doubt that violence means the same, whether it comes from a person associated with the victim or from a third party. The form of the provision may simply reflect the way that the provision has evolved. More likely, however, the retention of the term “domestic violence” is intended to serve a purpose. The aim, it seems to me, may well be to ensure that the same standard is applied to

violence within the home as to other violence and so to counter any suggestion that violence within the home is to be treated as being somehow of less significance than violence outside the home. Subsection (1A) makes it clear that any conduct that would count as violence outside the home counts as violence if it occurs within the home: the law does not give a discount to the perpetrator because of the domestic setting.

‘[45] In 1974 Dr Wilson saw that the husband’s constant denigration of his wife had damaged her psyche—possibly irreparably. The court has not been referred to any case where a court had to consider whether such conduct would have counted as “violence” for the purposes of s 1(2)(b) of the 1977 Act. I have already made the point that cases of that kind were not the focus of Parliament’s attention in enacting that provision. But it is common place for courts to have to consider whether circumstances, beyond those at the forefront of Parliament’s consideration, may properly be held to be within the scope of a provision, having regard to its purpose.

‘[46] Similarly, cases of physical violence surely remain the main focus of s 177(1) of the 1996 Act. And, similarly, the question remains: does deliberate non-physical abuse which harms the other party fall within the scope of “violence” in that subsection, having regard to its purpose? Parliament has provided that it is not reasonable for someone to continue to occupy accommodation if it is probable that this will lead to her being subjected to violence in the form of deliberate conduct, or threats of deliberate conduct, that may cause her physical harm. So the person at risk is automatically homeless for the purposes of the 1996 Act. I can see no reason why Parliament would have intended the position to be any different where someone will be subjected to deliberate conduct, or threats of such conduct, that may cause her psychological harm. I would therefore interpret “violence” as including such conduct and the subsection as applying in such cases. To conclude otherwise would be to play down the serious nature of psychological harm.’ *Yemshaw v Hounslow London Borough Council* [2011] UKSC 3, [2011] 1 All ER 912 at [39]–[46], per Lord Rodger SCJ

DOMICILE

[For 8(3) Halsbury’s Laws of England (4th Edn) (Reissue) para 35 see now 19 Halsbury’s Laws of England (5th Edn) (2011) para 336.]

Of origin and choice distinguished

[For 8(3) Halsbury’s Laws of England (4th Edn) (Reissue) para 39 see now 19 Halsbury’s Laws of England (5th Edn) (2011) para 340.]

DONATIO MORTIS CAUSA

[For 17(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 340 see now 103 Halsbury’s Laws of England (5th Edn) (2010) para 921 and for 20(1) Halsbury’s Laws of England (4th Edn) (Reissue) paras 71–72 see now 52 Halsbury’s Laws of England (5th Edn) (2014) paras 271–272.]

DOUBLE JEOPARDY

‘[25] The objective of the criminal justice process is that after a fair trial there should be a true verdict. So far as humanly possible, there should be no wrongful convictions, and where they occur, or if new evidence emerges which undermines the safety of a conviction, they will be quashed and re-trials may be ordered. However until recently what has sometimes been described as the rule against “double jeopardy”, a long-established principle of the common law in criminal cases, precluded the possibility of a re-trial following an acquittal, whatever the strength of evidence emerging after the trial. Following consultation and a report from the Law Commission, and notwithstanding principled objections to the proposal, Pt 10 of the 2003 Act [Criminal Justice Act 2003] was enacted. In specified circumstances, the double jeopardy rule was abolished. We need not rehearse the arguments which were developed in opposition to this controversial legislation before it was enacted, or to canvass the Law Commission’s recommendations, and how, to some extent at any rate, the provisions of the 2003 Act go beyond them.

‘[26] Since it arose in argument, however, we should note the background discussion of the circumstances in which the power of re-trial could be ordered. It is fair to say that the examples of new evidence discussed by the Law Commission focused on new evidence in relation to the offence itself. Prominent was the way scientific breakthroughs might generate new evidence, notably with DNA. Thus the Law Commission in its Consultation Paper (Law Com no 156), *Double Jeopardy*, gave two examples of what were seen as the strongest possible cases for reopening an acquittal: DNA advances; and a hit-woman who comes forward

after the acquittal of those who hired her (para 5.8). When the Law Commission reported in 2001, *Double Jeopardy and Prosecution Appeals* (Law Com no 267), it referred to cases “where new evidence of the defendant’s guilt has become available” (para 4.1). It gave as examples a full and uncontested confession, evidence of a scientific nature, the weapon with the defendant’s fingerprints being found in his home or garden, and CCTV footage (paras 4.63–4.64).

‘[27] Part 10 of the 2003 Act sets out the relevant statutory framework providing for the re-trial of a defendant who has been acquitted at trial. The process is available for serious offences, as specified in the legislation, which in the main carry a possible sentence of life imprisonment. These are “qualifying offences” and are listed in Sch 5 to the Act. Rape is one of them, but indecent assault is not.

...
‘[41] There was some discussion in argument whether, when making this judgment, the court could or might reflect any of the considerations advanced in opposition to the abolition of the double jeopardy rule, and in particular, the desirability of finality to litigation. Our conclusion is that the principle of finality in litigation does not, as a principle, provide a relevant consideration bearing on the interests of justice. Double jeopardy as a prohibition against a second trial following an acquittal was abolished by the Act. No doubt, from time to time, individual features of a specific case will give rise to matters of potential significance which could be said to reflect one or other of the general considerations advanced in argument against the abolition of the common law principle, but to the extent that these may be relevant at all, they would be fact-specific. It is perhaps noteworthy that the public interest consideration is expressly vested in the Director, not the court. No doubt the public interest and the interests of justice will normally coincide, but this part of the legislative framework lends emphasis to the proposition that the double jeopardy principle cannot be resuscitated under the guise of the interests of justice.’ *R v A* [2008] EWCA Crim 2908, [2009] 2 All ER 898 at [25]–[27], [41], per Lord Judge CJ

DRAWBACK

[For 12(3) Halsbury’s Laws of England (4th Edn) (2007 Reissue) para 1109 see now 31

Halsbury’s Laws of England (5th Edn) (2011) para 1105.]

DRAWING

Australia ‘[19] The appellant asserts that its label is an “artistic work” within the meaning of the definition in s 10(1) of the Copyright Act 1968 (Cth). The relevant part of that definition reads:

artistic work means:

- (a) a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not;

‘[20] “Drawing” is defined to include “a diagram, map, chart or plan”.

‘[21] The appellant’s case is that its label is a drawing. It is submitted that the words and the placement of the photograph were part of an overall design which constituted a “drawing”. As already mentioned, no copyright is asserted in the photograph itself. However, it is said that the “drawing” consists of a number of visual elements selected and arranged by the appellant. These elements are the digitised photograph of the box and a series of words in specific fonts, colours and sizes. These elements, so the argument goes, have been carefully arranged in a spatial sense, with each element assuming a specific position that gives the overall arrangement a particular visual effect.

‘[22] In dealing with this issue the learned magistrate discussed *Lott v JBW & Friends Pty Ltd* (2000) 76 SASR 105, [2000] SASC 3. The work there in question was a graphic bar with the words “Opera in the Outback”. The report does not contain a reproduction. Mulhigan J held that it was a “drawing”. His Honour said (at [14]):

[14] The graphic designer had to create a design and make choices about the layout, font, colour and dimensions of each part of the design. Having perused the graphic ... I do not regard it as so simple as to deny copyright ... The selection of the font from a computer program is no less creative than manual drawing ...

‘[23] In the present case her Honour, correctly in my view, pointed out at [29] that *Lott* is not authority for the proposition that anything a graphic designer prepares is a drawing.

‘[24] The same point was made by Mr Minahan, counsel for the respondents, in his written submissions. The submissions, he said, involved the use of a computer and selection of

typeface and decisions about layout and presentation including headings and indentation. The same could be said for a newspaper. However neither the submissions nor a newspaper would be regarded as a drawing.

[25] Her Honour adopted the statement in S Ricketson, *The Law of Intellectual Property, Copyright Designs and Confidential Information*, at para 7.365:

Essentially, a drawing is a two-dimensional work in which shapes and images are depicted by lines, often without colouring.

[26] I would agree that this is the ordinary meaning of the term "drawing". The *Macquarie Dictionary* gives us several definitions of the noun "drawing":

2. representation by lines; delineation of form without reference to colour.
3. a sketch, plan, or design, esp one made with pen, pencil, or crayon.

[27] In the context of the visual arts, the traditional distinction has been between paintings, which are coloured, and drawings, which are monotone, usually, but not always, black upon white. The statutory definition, particularly by its inclusion of maps, makes it clear that for the purposes of the Act something may be a drawing notwithstanding that it is coloured. However, the essence of a drawing remains the concept of a representation of some object by a pictorial line.

[28] In the present case the work in question consists substantially of a photograph, which is not in ordinary speech a drawing and which the statute specifically treats as something distinct from a drawing. The only other visual item is the text. Text is not a drawing. I do not think that by adding a non-drawing to a non-drawing one can end up with a drawing, however much skill goes into the placement and arrangement.

[29] Certainly for something to be a "drawing" for copyright purposes no great complexity or (as the statute tells us) artistic quality is required. In *Millar & Lang Ltd v Polak* [1908] 1 Ch 433 the works held to be drawings included words such as "Greetings", "Friends ever", "Good luck", "Lest we forget", and "For old times sake" in a distinctive form within an ornamental oval or circular scroll. In *Roland Corporation v Lorenzo & Sons Pty Ltd* (1991) 33 FCR 111, 105 ALR 623, 22 IPR 245 the devices held by Pincus J to be drawings were based on the letters "R" and "B" but, as is apparent from the report at CLR 112; ALR 624; IPR 246, were quite stylised. As his Honour said

at CLR 114; ALR 626; IPR 248, they were "by no means random and were plainly drawn with care, to obtain an effect". Clearly a letter or letters of the alphabet can provide the subject matter for a drawing. One thinks of the illuminated manuscripts of medieval works such as the Book of Kells. However, in the present case the text is fulfilling a semiotic function. It is communicating to the reader the message that within the cardboard box will be found a wooden photo box with six albums which hold 120 10 × 15 cm photos. The pictorial image of that box is conveyed by a photograph, which is not a drawing.' *Woodtree Pty Ltd v Zheng* [2007] FCA 1922, (2007) 164 FCR 369, (2007) 74 IPR 484, BC200710705 at [19]–[29], per Heerey J

DRAWN TO A SCALE OF NOT LESS THAN 1:25,000

Wildlife and Countryside Act 1981, s 53(5), Sch 14; application for modification of definitive map and statement of public rights of way must be in the prescribed form, and should be accompanied by 'a map drawn to the prescribed scale and showing the way or ways to which the application relates'. The Countryside (Definitive Maps and Statements) Regulations 1993, SI 1993/12, specified by regs 2 and 8 that the application map should 'be on a scale of not less than 1/25,000'. Claimants' application was accompanied by maps scaled up by computer to 1:25,000 from digital data provided by the Ordnance Survey for its 1:50,000 maps.] '[10] It is important to keep in mind what para 1(a) of Sch 14 does and does not require. It is beyond dispute that it requires (1) something that is identifiable as "a map", which (2) is drawn to a scale of not less than 1:25,000, and which (3) shows the way or ways to which the application relates. Although the first of these requirements necessitates a map, it does not necessitate an Ordnance Survey map. It could have done. Such a statutory requirement is not unknown. For example, s 1(3) of the Commons Act 1899 refers to a "plan", adding that "for this purpose an ordnance survey map shall, if possible, be used". More recently, reg 5 of the Petroleum (Production) (Landward Areas) Regulations 1995, which is concerned with licence applications, requires an application to be accompanied by two "copies of an Ordnance Survey map on a scale of 1:25,000 or such other map or chart as the Secretary of State may allow". The scheme with which we are concerned is not so specific. Nor is it

prescriptive as to features which must be shown on the map, apart from the requirement that it “shows the way or ways to which the application relates”. It is well-known that an original Ordnance Survey map with a scale of 1:25,000 depicts more physical features than an original Ordnance Survey map of the same site with a scale of 1:50,000. However, as para 1(a) permits the use of a map which is not produced by Ordnance Survey (or any other commercial or public authority), it cannot be said to embrace a requirement that a map accompanying an application must include the same features as are depicted on an original 1:25,000 Ordnance Survey map. It may include more or fewer such features.

[11] In my judgment, this tends to militate against the submissions made on behalf of the Council. To the extent that it is contended that “drawn to a scale of not less than 1:25,000” means “originally drawn to that scale, with the range of features normally depicted on an original Ordnance Survey map drawn to that scale”, the submission seeks to read more into the text than its language permits. I can find nothing to support such a prescriptive requirement as to content as opposed to scale. The only prescriptive requirement as to content is that the map “shows the way or ways to which the application relates”. This is a flexible requirement. Sometimes more detail will be necessary, sometimes less, depending on the way in question and its location.

[12] The next question is whether the words “drawn to” a scale of not less than 1:25,000 mean that the map in question must have been originally drawn to that scale rather than enlarged or reproduced to it. I can see no good reason for giving the requirement such a narrow construction. What is important is the scale on the document which accompanies the application. “Drawn” need not imply a reference to the original creation. It is more sensibly construed as being synonymous with “produced” or “reproduced”. The Council does not suggest that only an original document will suffice. It accepts that a photocopy or a tracing of a 1:25,000 Ordnance Survey map would meet the requirement. However, no doubt mindful of the logic of his position, Mr George Laurence QC submits that an original 1:25,000 map which had been digitally enlarged to produce a 1:12,500 map would not meet the requirement. Mr Graham Plumbe, whilst also seeking to uphold the construction of Supperstone J, dissociates himself from this aspect of Mr Laurence’s analysis. I consider that he is right to do

so. It points to the pedantry of the Council’s position.

[13] I reach this conclusion on the basis of conventional interpretation. However, it is fortified by an approach which takes account of technological change. At the time when the 1981 Act was enacted, Parliament would not have had in mind the kind of readily available technology which was used in this case. In *R (on the application of Quintavalle) v Secretary of State for Health* [2003] UKHL 13 at [9], [2003] 2 All ER 113 at [9], [2003] 2 AC 687, Lord Bingham said:

“There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking ... The courts have frequently had to grapple with the question whether a modern invention or activity falls within old statutory language ... a revealing example is found in *Grant v Southwestern and County Properties Ltd* [1974] 2 All ER 465, [1975] Ch 185 where Walton J had to decide whether a tape recording fell within the expression ‘document’ in the Rules of the Supreme Court. Pointing out ([1974] 2 All ER 465 at 469, [1975] Ch 185 at 190) that the furnishing of information had been treated as one of the main functions of a document, the judge concluded that a tape recording was a document.”

Lord Bingham also referred to the speech of Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] 1 All ER 545, [1981] AC 800 where he said ([1981] 1 All ER 545 at 565, [1981] AC 800 at 822):

“when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the parliamentary intention. They be held to do so if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made.”

Although the present case may be said to be more concerned with procedure than with policy, the same approach is appropriate, as it was in *Grant v Southwestern and County Properties* (above).

[14] All this leads me to the view that,

whilst I am confident that “drawn” was never intended to be construed as being confined to “originally drawn”, it should also now be given a meaning which embraces later techniques for the production of maps. For practical purposes, when a computer is used to translate stored data into a printed map, it can properly be said that the computer and the printer are, upon human command, “drawing” the map which emerges to the scale which has been selected. I find no difficulty in this approach in circumstances in which the requirements do not prescribe that the submitted map depicts the features which are depicted on an original 1:25,000 Ordnance Survey map.

...
 “[16] For all these reasons, I conclude that a map which is produced to a scale of 1:25,000, even if it is digitally derived from an original map with a scale of 1:50,000, satisfies the requirements of para 1(a) of Sch 14 provided that it is indeed “a map” and that it shows the way or ways to which the application relates. I would therefore allow this appeal. ...’ *R (on the application of Trail Riders Fellowship) v Dorset County Council* [2013] EWCA Civ 553, [2014] 3 All ER 429 at [10]–[14], [16], per Maurice Kay LJ

DRIVE—DRIVER

Dangerous driving causing death

Australia [Crimes Act 1958 (Vic), s 319.] “[38] The ordinary meaning of “dangerous” is “[f]raught with or causing danger; involving risk; perilous; hazardous; unsafe”.⁷⁶ It describes, when applied to driving, a manner or speed of driving which gives rise to a risk to others, including motorists, cyclists, pedestrians and the driver’s own passengers. Having regard to the ordinary meaning of the word, its context in s 319 and the purpose of s 319, as explained in the second reading speech, negligence is not a necessary element of dangerous driving causing death or serious injury. Negligence may and, in many if not most cases will, underlie dangerous driving. But a person may drive with care and skill and yet drive dangerously. It is not appropriate to treat dangerousness as covering an interval in the range of negligent driving which is of lesser degree than driving which is “grossly negligent” within the meaning of s 318(2)(b) of the Crimes Act. The offence created by s 319 nevertheless takes its place in a coherent hierarchy of offences relating to death or serious injury arising out of motor vehicle

accidents. It is not necessary to that coherence that the terms of the section be embellished by reading into them a requirement for proof of some species of criminal negligence.’ *King v R* [2012] HCA 24, (2012) 288 ALR 565 at [38], per French CJ, Crennan and Kiefel JJ

DUE

As they fall due

[Insolvency Act 1986, s 123.] “[36] In the 1985 Act [Insolvency Act 1985], repeated in s 123 of the 1986 Act, commercial and balance sheet insolvency are for the first time split apart. In place of the mandatory requirement to take account of contingent and prospective liabilities there has been added in s 123(1)(e) the phrase “as they fall due” after “debts”. The mandatory requirement to consider contingent and prospective liabilities now only appears in s 123(2). There is no English authority on the question whether, as Mr Trower submitted, those changes prevent reference to prospective, ie future, debts under s 123(1)(e).

“[37] To the limited extent that academic writers have addressed this point, they are divided. ...

...
 “[41] There is a wealth of Australian authority on the question of whether a cash flow or commercial insolvency test permits references to debts which will fall due in the future, ie in English terminology “prospective debts”, rather than “prospective or contingent liabilities”. The reason why this question has, unlike in England, been analysed in such detail in Australia is probably that neither the Australian courts nor legislature have developed a balance sheet test of the type found in s 123(2).

...
 “[51] It is clear from that brief review of the Australian decisions that in an environment shorn of any balance sheet test for insolvency, cash flow or commercial insolvency is not to be ascertained by a slavish focus only on debts due as at the relevant date. Such a blinkered review will, in some cases, fail to see that a momentary inability to pay is only the result of a temporary lack of liquidity soon to be remedied, and in other cases fail to see that due to an endemic shortage of working capital a company is on any commercial view insolvent, even though it may continue to pay its debts for the next few days, weeks or even months before an inevitable failure.

“[52] Furthermore, the common sense

requirement not to ignore the relevant future was found to be implicit in the Australian cases in the simple phrase “as they become due”.

‘[53] Returning to the English legislation, it is, in my view, critical to note that when separating out balance sheet insolvency from commercial insolvency in 1985 the legislature did not merely remove the requirement to include contingent and prospective liabilities in framing s 123(1)(e) out of its predecessor, but added what in Australia have always been regarded as the key words of futurity, namely the phrase “as they fall due”. In that context “fall due” is, in my judgment, synonymous with “become due”.

‘[56] In my judgment, the effect of the alterations to the insolvency test made in 1985 and now found in s 123 of the 1986 Act was to replace in the commercial solvency test now in s 123(1)(e), one futurity requirement, namely to include contingent and prospective liabilities, with another more flexible and fact sensitive requirement encapsulated in the new phrase “as they fall due”.

‘[57] In the case of a company which is still trading, and where there is therefore a high degree of uncertainty as to the profile of its future cash flow, an appreciation that s 123(1)(e) permits a review of the future will often make little difference. In many, if not most, cases the alternative balance sheet test will afford a petitioner for winding up a convenient alternative means of proof of a deemed insolvency.’ *Re Cheyne Finance plc* [2007] EWHC 2402 (Ch), [2008] 2 All ER 987 at [36]–[37], [41], [51]–[53], [56]–[57], per Briggs J

DUPLEX QUERELA

[For 14 Halsbury’s Laws of England (4th Edn) para 823 see now 34 Halsbury’s Laws of England (5th Edn) (2011) para 611.]

DURESS

[For 9(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 710 see now 22 Halsbury’s Laws of England (5th Edn) (2012) para 292.]

[For 31 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 841 see now 76 Halsbury’s Laws of England (5th Edn) (2013) para 837.]

New Zealand ‘[19] Contractual duress is the imposition of improper pressure by threats that

coerce a party to enter a contract. Contracts that have been procured by duress are voidable at the discretion of the coerced party (*Pao On v Lau Yiu Long* [1980] AC 614 (PC) at 634), unless that party has subsequently affirmed the contract (see, for example, *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705). While originally duress was restricted to threats of physical injury, it has subsequently expanded to encompass both threats in relation to property and the exertion of economic pressure. The duress alleged in this case falls into the final category, namely economic duress.

‘[20] Duress involves two fundamental elements, as identified by Lord Scarman in *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 at 400. First, there must be the exertion of illegitimate pressure on a victim. Secondly, the imposition of that pressure must have compelled the victim to enter the contract. These were the elements endorsed by the Privy Council in *Attorney-General for England and Wales v R* [2003] UKPC 22, [2004] 2 NZLR 577 at [15] and by this Court in *Haines v Carter* [2001] 2 NZLR 167 at [108] and [112].

‘[21] In *Pharmacy Care Systems Ltd v Attorney-General* (2004) 2 NZCLR 187, this Court identified seven features of economic duress:

“[98]... First, there must be a threat or pressure. Secondly, that threat or pressure must be improper. Thirdly, the victim’s will must have been overborne by the improper pressure so that his or her free will and judgment have been displaced. Fourthly, the threat or pressure must actually induce the victim’s manifestation of assent. Fifthly, the threat or pressure must be sufficiently grave to justify the assent from the victim, in the sense that it left the victim no reasonable alternative. Sixthly, duress renders the resulting agreement voidable at the instance of the victim. This may be addressed either by raising duress as a defence to an action, or affirmatively, by applying timeously to a court for avoidance of the agreement. Seventhly, the victim may be precluded from avoiding the agreement by affirmation.

‘[22] Although the Court referred to these as “elements”, they are not elements in the ordinary sense. The sixth, for example, merely identifies a legal consequence of a contract having been procured through duress; similarly,

the seventh presupposes that contractual duress has in fact already occurred. The enunciated elements are therefore best regarded as legal propositions of relevance to duress.

‘[23] This summary in *Pharmacy Care* (CA) at [98] has been criticised as adding undue complexity to the ingredients identified by Lord Scarman in *Universe Tankships* (see Bigwood, “When Exegesis Becomes Excess: The Newborn Problematics of Contractual Duress Law in New Zealand” (2005) 21 JCL 208).

‘[24] The Supreme Court, in refusing leave to appeal in *Pharmacy Care Systems Ltd v Attorney-General* (2004) 17 PRNZ 308 (*Pharmacy Care* (SCNZ)), took the view that the law relating to duress had been “sufficiently clear

and settled” by the Privy Council in *Attorney-General for England and Wales v R* (albeit that the case was decided under the law of England, not that of New Zealand).

...

‘[26] The fact that one party to a contract has exerted pressure on the other does not, on its own, amount to duress: pressure (and even threats) is commonly exerted in commercial dealings (see the comments of Kirby P in *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50 (NSW:CA) at 106). A claim of duress cannot succeed unless there has been the exertion of *illegitimate* pressure.’ *McIntyre v Nemesis DBK Ltd* [2009] NZCA 329, [2010] 1 NZLR 463 at [19]–[24], [26], per O’Regan J

E

EARTHQUAKE-PRONE BUILDING

New Zealand [Building Act 2004, s 122(1): 'A building is earthquake prone for the purposes of this Act if, having regard to its condition and to the ground on which it is built, and because of its construction, the building—(a) will have its ultimate capacity exceeded in a moderate earthquake (as defined in the regulations); and (b) would be likely to collapse causing—(i) injury or death to persons in the building or to persons on any other property; or damage to any other property'.] [42] The definition of the phrase "earthquake-prone building" in s 122(1) has two limbs. There was no dispute that a building will not be earthquake-prone in terms of the section unless both limbs apply to it.

[43] The first limb describes the capacity of the building and there was no dispute about its meaning. If a building is below the 34 per cent of NBS [new building standard] benchmark, this element of the definition is met. It is important to note that s 122(1)(a) refers specifically to capacity "in a moderate earthquake". That, in turn, leads the reader to the definition of that term in the Regulations.

[44] The difference between the parties relates to the second limb, referring to the likelihood of collapse. The interpretation favoured by the Courts below treats the second component as a consequence of the first: the building is likely to collapse because it does not meet the 34 per cent of NBS benchmark. The purpose of the provision is to limit the ambit of the definition, by excluding buildings that, despite failing to meet the 34 per cent of NBS threshold, are not likely to collapse. This recognises the possibility that not every building that fails to meet the 34 per cent of NBS benchmark will be likely to collapse. That interpretation necessarily treats the likelihood of collapse as arising in a moderate earthquake, because it builds on the first limb of the definition.

[45] Mr Goddard supported this interpretation. He submitted that s 122(1) should be interpreted as a single (long) sentence that the drafter has broken into parts to improve its

readability. If s 122(1) is read in that way, it is clear that s 122(1)(b) is referring to the likelihood of collapse in a moderate earthquake.

[46] Mr Weston argued that the likelihood of collapse referred to in s 122(1)(b) is not linked to a moderate earthquake and not stated to be a consequence of the failure of a building to meet the 34 per cent of NBS standard. He accepted that s 122(1)(b) must be interpreted as dealing with the likelihood of collapse in, or as a result of, an earthquake, but said there was nothing in s 122(1)(b) to indicate that the likelihood of collapse had to be in, or as a result of, a *moderate* earthquake. Mr Weston's argument drew support from the engineering evidence referred to above to the effect that a building that is or exceeds 34 per cent of NBS may still be at risk of collapse in an earthquake.

[47] In essence, Mr Weston's submission was that s 122(1)(a) deals with the capacity of a building in a moderate earthquake while s 122(1)(b) deals with the likelihood of collapse in any earthquake, whether minor, moderate or of greater intensity. This interpretation does not broaden the scope of the definition to any great extent, because the 34 per cent of NBS benchmark will be the decisive criterion in most cases. If a building is not below that benchmark, it will not be an earthquake-prone building as defined, no matter how s 122(1)(b) is interpreted.

[48] It seems to us to be unlikely that Parliament would have enacted s 122(1)(b) without any reference at all to an earthquake if that had been its intention. We agree with Mr Goddard that a much more obvious interpretation is that s 122(1) is to be read as if it were one sentence, with both of the components addressing the situation that would result if a moderate earthquake were to occur.' *University of Canterbury v Insurance Council of New Zealand Inc* [2014] NZSC 193, [2015] 1 NZLR 261 at [42]–[48], per O'Regan J

EASEMENT

[For 16(2) Halsbury's Laws of England (4th Edn) (Reissue) paras 1, 2, 5, 6, 8, 10 see now 87 Halsbury's Laws of England (5th Edn) (2017) paras 731, 732, 734, 735, 737, 739.]

ECCLESIASTICAL CORPORATION

[For 14 Halsbury's Laws of England (4th Edn) paras 1253–1254 see now 34 Halsbury's Laws of England (5th Edn) (2011) paras 1013–1014.]

ECCLESIASTICAL LAW

[For 14 Halsbury's Laws of England (4th Edn) para 301 see now 34 Halsbury's Laws of England (5th Edn) (2011) para 1.]

ECCLESIASTICAL PROPERTY

[For 14 Halsbury's Laws of England (4th Edn) para 1224 see now 34 Halsbury's Laws of England (5th Edn) (2011) para 989.]

EDITION

[For 36(2) Halsbury's Laws of England (4th Edn) (Reissue) para 402 see now 85 Halsbury's Laws of England (5th Edn) (2012) para 704, notes 2, 3.]

EDITOR

[For 36(2) Halsbury's Laws of England (4th Edn) (Reissue) para 452 see now 85 Halsbury's Laws of England (5th Edn) (2012) para 732.]

EFFECTIVE

'[163] Article 3(2) of the Enforcement Directive [European Parliament and Council Directive 2004/48/EC (on the enforcement of intellectual property rights) (OJ 2004 L157 p 45)] requires that remedies for the enforcement of intellectual property rights must be "effective". Similar language is to be found in art 19(1) of the Treaty on European Union and in art 41(1) of TRIPS. Counsel for the ISPs submitted that the corollary of this requirement was that a remedy should not be granted if it would not be effective. She further submitted that it was incumbent on Richemont to show that the orders would be likely to achieve a significant reduction in the overall levels of access to infringing content, although she accepted that Richemont did not have to show that the orders would be 100% effective to prevent access to the Target Websites.

'[164] Article 3(2) requires Member States to make available remedies for infringement of intellectual property rights which are effective, that is to say, effective (among other things) to prevent further infringements. I accept that it is pointless to grant a remedy which will be wholly ineffective. I do not accept that it follows that it is incumbent on the rightholder to demonstrate that the remedy sought will be effective in reducing the overall level of infringement of its intellectual property right(s).

...
'[173] In my judgment it is wrong in principle to interpret art 3(2) of the Enforcement Directive as requiring rightholders to establish that the relief they seek is likely to reduce the overall level of infringement of their rights. As counsel for Richemont pointed out, art 3(2) is equally applicable to offline and online infringements. If trade mark owners like Richemont apply for a final injunction to restrain further infringements against a market trader who has been caught selling counterfeit watches, they do not have to show that the injunction is likely to reduce the overall level of infringement of their trade marks. Nor would it be a defence to such an application for the market trader to say "If consumers can't buy counterfeit goods from me, they will simply buy them from other market traders". Nor would the market trader improve his position by pointing to five other traders selling counterfeits in the same market whom the trade mark owner had not yet sued (but intended to sue in due course). To allow such a defence would not only undermine intellectual property rights, it would also be inimical to the rule of law: consider the application of such reasoning to burglars, for example. There is no reason to treat online infringers differently in this respect. Nor is there any reason to treat intermediaries whose services are being used to infringe by third parties differently in this respect.

...
'[175] On the other hand, I entirely accept that, as discussed in *20C Fox v BT [Twentieth Century Fox Film Corp v British Telecommunications plc]* [2011] EWHC 1981 (Ch), [2012] 1 All ER 806 (at [192]) and *EMI v Sky [EMI Records Ltd v British Sky Broadcasting Ltd]* [2013] EWHC 379 (Ch), [2013] IP & T 774 (at [103]–[106]), the likely efficacy of the injunction in terms of preventing or impeding access to the target website is an important factor in considering the proportionality of a website blocking injunction. It is evident from the CJEU's judgment in *UPC v Constantin [UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH]* (Case C-314/12) EU:C:2014:192, [2014] IP & T 438 that the applicable criterion of efficacy is whether the measures required by the injunction will at least seriously discourage users from accessing the target website.

'[176] Furthermore, despite what I have said above, I also accept that what the ISPs' solicitor Michael Skrein described in his evidence as the "substitutability" of unblocked websites for the blocked one is also a factor to be taken into

account in considering proportionality. Although the rightholder does not have to show that blocking access to the target website is likely to reduce the overall level of infringement in order to obtain relief, blocking access to the target website is less likely to be proportionate if there is a large number of alternative websites which are likely to be equally accessible and appealing to the interested user than if that is not the case.' *Cartier International AG v British Sky Broadcasting Ltd* [2014] EWHC 3354 (Ch), [2015] 1 All ER 949 at [163]–[164], [173], [175]–[176], per Arnold J

Effective remedy

[Under Council Directive 2005/85/EC (OJ L326, 13.12.2005, p 13) ('the Procedures Directive'), member states are required to ensure that applicants for asylum have the 'right to an effective remedy before a court or tribunal' against a decision taken on their application. Compatibility of Nationality, Immigration and Asylum Act 2002 ss 82, 83.] '[27] TN and MA were both aged over 16 years six months at the time when their applications for asylum were rejected and they were given discretionary leave to remain until they reached 17 years six months. In the interim period they had no statutory right to appeal to the First-tier Tribunal and the only form of legal challenge open to them was to bring judicial review proceedings (a course taken by TN but not MA). It is their case that they were thereby deprived of an "effective remedy" in breach of art 39.

'[28] This argument was rejected by the Court of Appeal unanimously but in part for different reasons. Maurice Kay LJ accepted the respondent's submission that judicial review was an effective remedy within the meaning of the Procedures Directive. He was not persuaded by the respondent's alternative submission that the availability of an appeal to the First-tier Tribunal under s 82 at the end of the period of discretionary leave was itself an effective remedy. He did not consider that a delayed remedy would necessarily be as effective as an immediate remedy.

'[29] Beatson LJ agreed that judicial review was, in the circumstances, an effective remedy which satisfied the requirements of art 39. He also accepted the respondent's alternative submission, as to which he said:

"[31] I do not consider that the short delay before claimants such as these would be able to appeal against an adverse decision by the Secretary of State made after their

eighteenth birthday means that the totality of the remedy they have is not 'an effective remedy' within article 39. As was stated in [*Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration* Case C-69/10 [2011] ECR I-7151], the Procedures Directive lays down minimum standards. Article 39 requires member states to ensure that applicants have the right to 'an effective remedy', not that they should have the most effective remedy. The suggestion that a delayed remedy by way of appeal would not, in principle, suffice because ... it would not necessarily be as effective as an immediate one would have been appears to require a higher threshold than 'an effective remedy'.

"[32] I also consider that to regard the right of appeal after the short delay envisaged in cases such as these as inadequate and not an 'effective remedy' could undermine the legislative decision to restrict the right of appeal under section 83 of the Nationality, Immigration and Asylum Act 2002 to those who have been given leave to enter for more than 12 months. That policy was not criticised by this court in [*FA (Iraq) v Secretary of State for the Home Dept* [2010] EWCA Civ 696, [2011] 1 All ER 270, [2010] 1 WLR 2545]. It serves the useful purpose of helping to avoid duplication between decision-making at first instance and on appeal in cases in which the Secretary of State will be reconsidering a person's position in the near future.

'[33] It may be the case that delaying an appeal until after a person's eighteenth birthday would mean that it would not be necessary for the best interests of that person as a child to be a primary consideration in the decision-making process pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009. But such applicants will, in the light of [*KA (Afghanistan) v Secretary of State for the Home Dept* [2012] EWCA Civ 1014, [2013] 1 WLR 615], be treated as young people and their whole history will be considered. I am concerned that to regard the fact that an immediate appeal would be an appeal by a child whereas an appeal within what would otherwise be a reasonable period would be an appeal by a young adult as a reason for finding the remedy to be inadequate and not an effective remedy under article 39 would be undesirable from a policy point of view."

‘[30] Briggs LJ agreed that judicial review was an effective remedy, and, if necessary, he said that he would have been inclined like Beatson LJ to accept the respondent’s alternative submission, but he preferred not to express a final view.

‘[31] The Strasbourg court has consistently accepted that judicial review is capable of satisfying the requirement of providing an effective remedy within the meaning of art 13 of the European Convention in the context of asylum cases: *Vilvarajah v UK* (1991) 14 EHRR 248, [1991] ECHR 13163/87 (para 126), *D v UK* (1997) 2 BHRC 273 (para 71), and *Bensaid v UK* (2001) 11 BHRC 297 (para 56). Those cases undoubtedly establish an important general principle, but I regard it as a mistake to concentrate on the remedy of judicial review in the particular circumstances that Parliament has established a statutory procedure under NIAA for granting and withdrawing refugee status. In general, a right of appeal to an immigration judge, involving a full factual review, arises at the point when an applicant would otherwise be liable to removal. Additionally, s 83 enables an applicant to appeal at a time when he is not at risk of removal, despite the rejection of his claim, if he has been given discretionary leave to remain for over a year. Such an applicant is in the position that his case will not be reviewed for some time, but his longer term outlook is uncertain. Does the scheme satisfy the requirement of providing “an effective remedy” for an applicant who is refused asylum but given leave to remain for a matter of months?

‘[32] I agree with Beatson LJ that the answer is yes for essentially the reasons which he gave. The right of appeal of the person to the tribunal is not immediate but is still effective. The deferment is not for long and there are understandable reasons for it. In a situation where crisis conditions in a particular country lead to a surge of asylum applications resulting in a large number of applicants being granted short term leave to remain, it is not in the public interest or the interest of applicants for tribunals to become clogged with cases which are due to be reviewed by the respondent before long in any event.’ *TN (Afghanistan) v Secretary of State for the Home Department; AA (Afghanistan) v Secretary of State for the Home Department* [2015] UKSC 40, [2015] 4 All ER 34 at [27]–[32], per Lord Toulson

EFFECTS

In will: generally

[For 50 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 579 see now 102 Halsbury’s Laws of England (5th Edn) (2010) para 290.]

EJUSDEM GENERIS

[For 13 Halsbury’s Laws of England (4th Edn) (2007 Reissue) para 234 see now 32 Halsbury’s Laws of England (5th Edn) (2012) para 435.]

ELDEST

[For 50 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 623 see now 102 Halsbury’s Laws of England (5th Edn) (2010) para 335.]

ELECTION

Doctrine of election

[For 16(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 724 see now 47 Halsbury’s Laws of England (5th Edn) (2014) para 161.]

ELECTION PROGRAMME

New Zealand [Broadcasting Act 1989, ss 69, 70.] ‘[81] The Broadcasting Act recognises various kinds of programme and two of them, advertising and election programmes, receive further definition. Election programme means:

election programme means, subject to subsection (2), a programme that—

- (a) encourages or persuades or appears to encourage or persuade voters to vote for a political party or the election of any person at an election; or
- (b) encourages or persuades or appears to encourage or persuade voters not to vote for a political party or the election of any person at an election; or
- (c) advocates support for a candidate or for a political party; or
- (d) opposes a candidate or a political party; or
- (e) notifies meetings held or to be held in connection with an election

It will be seen that this definition is similar to

the Electoral Act's definition of election advertisement insofar as it requires that the programme have the effect or apparent effect of persuading voters to vote for, or not to vote for, a party or candidate. It is narrower in that the effect must relate to a specific party or candidate; as noted above, election advertisements include party and candidate advertisements, but also those that relate to a type of party or candidate. It is wider in that the encouragement or persuasion need not be by reference to views or positions adopted or not adopted by the party or candidate.

'[82] It is common ground that the legislation has a very substantial effect on free speech. That being so, a rights-consistent approach must be taken when establishing what is an election programme, when assessing such programme's effect on voters, and when interpreting the exceptions.

'[83] We begin with the concept of programme. As noted, this term receives a definition that is very broad in that it speaks of sound and/or visual images but also requires that there be an intended objective of informing, enlightening, entertaining or promoting.

'[84] Clifford J held that a programme is "anything broadcast", and before us Mr Powell argued that s 70 captures "any sound or image or combination thereof" that has the effect of promoting or opposing a party. We do not agree that the Act uses the term in this very expansive sense. In our view it is a term of art. We make three points about it.

'[85] First, the Act expressly recognises programmes of different types—notably, advertising, election, news, and current affairs. These are distinctions based on purpose, content, effect and style. For example, the further definitions of advertising and election programmes refer respectively to a primary intention to promote something, and an effect upon voters. The Act does not preclude other types of programme.

'[86] Second, as noted above, broadcasters must make reasonable efforts to achieve balance within a programme or within close proximity to it. This requirement has been modified for election programmes by a code of practice issued by the Broadcasting Standards Authority, but it applies to other politically controversial programmes that do not qualify as election programmes, such as current affairs or news programmes.

'[87] Third, the Act presumes that broadcasters control the type and content of programmes. This suggests that for purposes of definition it is likely to be the broadcaster's intention for the

programme that matters. Of course, this is not to assume that the broadcaster must endorse the content.

'[88] It follows that when characterising a programme as an election programme, or comment, or current affairs, or news, or none of these, one must first begin by establishing where the programme begins and ends. We recognise that an election advertisement broadcast for a party or candidate will always be an election programme; such advertisements are by nature discrete, in that they stand alone and promote the advertiser's interests, and because the Act regulates broadcasting time bought by parties and candidates, it contemplates that advertisements will be treated as discrete programmes. In any other case, judgment is required and the parameters of the programme are likely to correspond to a decision made by the broadcaster.

'[89] This leads to the important point that it is the effect of the programme as a whole that matters under s 69. It must encourage or persuade, or appear to encourage or persuade, voters to vote or not to vote for a party or candidate, or advocate support for or oppose a party or candidate. In a similar vein to our point at [53(a)] above, the effect of a programme must be assessed from the perspective of the reasonable observer who is sensitive to the importance of free speech and the exceptionally high value of political speech in a democracy. This calls for a robust approach. The programme's effect may be influenced by the context, and its style and apparent purpose, and any attempt by the broadcaster to achieve balance.

'[90] Section 70 controls broadcasts by reference to this s 69 definition, which addresses the content of such programmes rather than the identity of their promoters. This might indicate that the Act regulates anyone who might broadcast a programme having the prescribed effect. But the long title to the Act states that its purpose, relevantly, is to enable political parties to broadcast election programmes for Parliamentary elections free of charge. The central objective was that of allocating time and money to political parties for election advertising on a fair basis, and that is what Part 6 is addressed to. Section 70 supports that regime by prohibiting other advertising. The absence of any reference to promoters, third parties or parallel campaigners may indicate that the legislature did not have anyone other than political parties in mind.

...

'[94] As noted, the point that for the

purposes of Part 6 election programmes means programmes broadcast for parties or candidates was not taken before Clifford J. We raised it with counsel. On reflection, Mr Butler took the point. Ms Aldred submitted that while such interpretation is attractive from a policy perspective, the text and context suggest that the legislation applies more broadly. Mr Powell submitted that it would seem surprising if the broadcast of election programmes by third parties was left “unregulated”, but conceded that this interpretation would be a more justifiable limitation on rights.

‘[95] We have concluded that the prohibition in s 70 is indeed confined to programmes broadcast for political parties or candidates, being those entitled to benefit from an allocation of broadcasting time under Part 6.’ *Electoral Commission v Watson* [2016] NZCA 512, [2017] 2 NZLR 63 at [81]–[90], [94]–[95], per Miller J

ELECTIONS

[Right to free elections under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 Protocol No 1 art 3 (as set out in Sch 1 to the Human Rights Act 1998).] ‘[44] ... [T]he word “elections” is not a word that naturally covers a referendum which does not involve electing anyone to any post. Of course, it might be said (perhaps particularly by a lawyer) that the Referendum required the Scottish people to “elect” whether to leave the United Kingdom, but that is a pedantic or syntactical point, which avoids addressing the natural meaning of the word “election”. Save in technical contexts (such as English legal terminology), which plainly do not arise here, an “election” is a ballot where people choose between more than one candidate.’ *Moohan v Lord Advocate* [2014] UKSC 67, [2015] 2 All ER 361 at [44], per Lord Neuberger P

ELEMENTS RELEVANT TO THE SITUATION

[Convention on the Law Applicable to Contractual Obligations 1980 (‘the Rome Convention’), art 3(3), as set out in the Contracts (Applicable Law) Act 1990, Sch 1: ‘The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the

application of rules of the law of that country which cannot be derogated from by contract, hereinafter called “mandatory rules” ...’.] ‘[28] The heart of the TCs’ [Portuguese public sector transport companies] case on the proper interpretation of those words is that they are confined to objective elements which, in the absence of the express choice of law by the parties, would be relevant and determinative of the proper law applying conflict of laws principles, and so connections which are not specific to a particular legal system are irrelevant.

‘[43] There is no conflict between art 1(1) of the Rome Convention and an interpretation of art 3(3), consistent with the natural and ordinary meaning of its words, that “elements relevant to the situation” are not confined to factors connecting the contract to a particular country in a conflict of laws sense.

‘[52] It is noteworthy, as observed by Cooke J in *Caterpillar Financial Services Corp v SNC Passion* [2004] EWHC 569 (Comm), [2004] 2 Lloyd’s Rep 99 (at [18]) that art 3(3) refers to elements “relevant to the situation”, which is wider than “elements relevant to the contract”.

‘[53] If it had been intended that “elements relevant to the situation” in art 3(3) should be confined to factors of a kind which connect the contract to a particular country for the purpose of identifying the proper law in the absence of an express choice, the drafter could have used the familiar and simple conflict of laws language of “close connection”, which one finds in art 4. The marked difference between the language of art 3(3) and of art 4(1) is striking and supports an interpretation of art 3(3) in accordance with the natural and ordinary meaning of its words. That striking difference is also apparent from other language versions of the Convention, such as the French, Italian and Spanish versions.

‘[56] The judge’s approach is consistent with the comments of Professor Allan Philip, who was a member of the Danish delegation to the working group that produced the draft of the Rome Convention, that “Article 3(3) relates only to situations which do not contain any international elements” and that “Article 3(3) provides that the choice of foreign law in a purely domestic situation shall, under no circumstances, prejudice the application of mandatory rules of the country to which the situation so to speak belongs”: *Contract Conflicts—The EEC Convention on the Law*

Applicable to Contractual Obligations: A Comparative Study (ed, North, 1982) Ch 5 pp 94 and 95.

‘[57] For all those reasons, I would dismiss Ground (1) of the appeal. I agree with the judge’s conclusion (at para [404]) that the enquiry under art 3(3) includes elements that point directly from a purely domestic to an international situation. Expressing the same point in a different way, I accept Mr Rabinowitz’s submission, that the only question under art 3(3), so far as relevant to this part of the appeal, is whether the situation is purely domestic.’ *Banco Santander Totta SA v Companhia Carris de Ferro de Lisboa SA* [2016] EWCA Civ 1267, [2017] 3 All ER 838 at [28], [43], [52]–[53], [56]–[57], per Sir Terence Etherton MR

EMBLEMMENTS

[For 1(2) Halsbury’s Laws of England (4th Edn) (2007 Reissue) para 306 see now 1 Halsbury’s Laws of England (5th Edn) (2008) para 369.]

EMBRACERY

[Note. The offence was abolished as from 1 July 2011 by the Bribery Act 2010, s 17(1). See 26 Halsbury’s Laws of England (5th Edn) (2016) para 369.]

EMPLOY OR ENGAGE

New Zealand [Under the Employment Relations Act 2000, s 97(2), an employer may employ or engage another person to perform the work of a striking or locked out employee only in accordance with s 97(3) or (4). Workers of parent company and volunteers were instructed to work for subsidiary company during a strike.]

‘[27] In this respect, as Mr Harrison emphasises, Judge Travis essentially accepted the Union’s construction of s 97(2). The Judge agreed that the words “employ” and “engage” where used in that provision have meanings wider than their legal or technical senses. Each extends, respectively, beyond either employment under a contract of employment or engagement under a contract of services to include the concepts of use or deployment. Moreover, he agreed that it does not matter how the replacement labour arrived at the Cheese Company’s site and who organised it; the focus must be on the entity which used the labour.

‘[28] The Judge was, we think, correct to

that extent: the words “employ” and “engage”, when read in the light of the purpose of s 97(2), refer to the employer’s use of the other persons, irrespective of its legal relationship with them. In terms of s 97(2), the question then is: did the Cheese Company use other persons to perform the strikers’ work—that is, the work normally undertaken by them for its benefit? The section’s concern is with the employer’s acts or omissions—not those of another entity or that entity’s relationship with the replacement workers. What is required is an objective inquiry into the purpose, nature and effect of their work, assessed by reference to all the relevant circumstances.

‘[29] The material circumstances are not in dispute. The Cheese Company continued its processing and manufacturing operations throughout the strike period. The only difference was that the work of the strikers was performed by another company’s employees or by volunteers. However, in law the work they performed was the Cheese Company’s work. That was the work which the strikers normally undertook for and on the company’s behalf; and which enabled the company, as the Judge himself found, to satisfy its contractual obligations. The Cheese Company made use of the replacement workers for that specific purpose and with that specific effect. And it secured the consequential commercial benefits.

‘[30] Nevertheless, despite his apparent acceptance of the substance of the Union’s argument, Judge Travis found that the Cheese Company could not have employed or engaged the replacement workers in terms of s 97(2). That was because they were employed (in a contract of service sense) and directed by the Dairy Company. With respect, that gloss is contrary to the test mandated by s 97(2) and the Judge’s earlier acceptance of the Union’s argument. He was apparently diverted by the attribution argument. It does not matter that the Dairy Company directed or controlled the manner in which a replacement performed the Cheese Company’s work. The question is whether the Cheese Company employed or engaged them. As we have said, and as the Judge himself appeared to accept, the employment status of the replacement workers has no bearing on that question.

‘[31] Judge Travis’ error is exemplified in two ways. One is in his identification of the three permutations arising from the Union’s argument on the meaning of “employ” or “engage” where used in s 97(2). He fixed the categories according to whether the replacement

workers were requested or had arrived voluntarily and were then directed to work. But these distinctions are inconsistent with the broad meaning of the words. The inquiry is not into the means of a worker's employment or engagement but the nature of their use or deployment.

[32] The other example of the Judge's error is in his finding that the Cheese Company did not consent to the presence of the replacement workers and was not given the choice of using them as part of its operations. However, the issue of the Cheese Company's consent or acquiescence as employer is relevant only to the limited extent of establishing its acceptance of the replacements by using them to perform the strikers' work. Plainly, as a separate legal entity—and we agree with Mr Millard QC for the Cheese Company that it was inappropriate to lift the corporate veil here—the Cheese Company was entitled to refuse access to the replacement workers, either to the plant itself or its manufacturing equipment (as Mr Fankhauser admitted and the Judge found). It did neither but instead cooperated with the replacements by rostering their work and making its plant and supervisors available to them. It is immaterial that the Cheese Company's general manager, Mr Slade, inferred that he had no option except to comply with Mr Fankhauser's directions.

[33] Mr Millard sought to uphold the decision by a variant on Judge Travis' reasoning. He argued that the words "employ" and "engage" when coupled with the word "perform" are active verbs, requiring positive action by the employer of the striking workers to engage the substitute workers to perform that work and connoting a degree of direction or control. He said s 97(2) does not apply unless there is a request by the employer followed by the employees' consent, in the form of an express arrangement; and that there has to be a direct relationship between the employer and "another person", not an indirect arrangement that has the employer's acquiescence.

[34] We do not accept Mr Millard's argument. It postulates an additional gloss on s 97(2), contrary to its statutory purpose. The plain words do not require proof that the employer has taken active steps to engage "another person". It is sufficient that the Cheese Company allowed the other persons to perform the strikers' work, which was itself the Cheese Company's work. In any case, as noted ([32] above) on the evidence accepted by Judge Travis, the Cheese Company participated actively in the strike-breaking events occurring at its plant.

...

[38] Judge Travis focussed primarily on the strike-breaking role of the Dairy Company employees. He referred briefly to the volunteer farmers. He accepted that the Cheese Company arguably breached s 97(2) by using the volunteers. But he did not express a final view because the issue was not argued fully. On our approach, it must follow that any work actually undertaken by the volunteers constituted a breach by the Cheese Company of s 97(2).

[39] In the result we are satisfied that the Employment Court erred in law (see [30] above) in finding that the Cheese Company did not "employ or engage [other] person[s] to perform the work" of its striking employees within the meaning of s 97(2) because at the relevant times they were employed (in the contract of service sense) by the Dairy Company. That error involved a significant question of law and was decisive to the Court's dismissal of the Union's claim against the Cheese Company for breach of s 97(2). *New Zealand Dairy Workers' Union Inc v Open Country Cheese Co Ltd* [2011] NZCA 56, [2011] 2 NZLR 350 at [27]–[34], [38]–[39], per Harrison J

EMPLOYEE

See also WORKER

[Employment Rights Act 1996, s 230. Whether a minister of the Methodist Church was an employee for the purposes of unfair constructive dismissal.] [2] ... In *Methodist Conference (President) v Parfitt* [1983] 3 All ER 747, [1984] ICR 176 the Court of Appeal had held (and I quote the headnote ([1984] ICR 176)):

"... a correct appreciation of the spiritual nature of the relationship between a minister and the Methodist Church showed that the arrangements between the minister and the Church in relation to his stationing throughout his ministry, and the spiritual discipline which the Church was entitled to exercise over the minister in relation to his cases, were non-contractual ... therefore, the applicant was not employed by the Church under a contract of service and, accordingly, the industrial tribunal had no jurisdiction to consider the applicant's claim of unfair dismissal."

The current arrangements between a minister and the church are not precisely the same as pertained at the time of *Parfitt's* case but they

are substantially similar.

... [21] It seems to me that *Parfitt's* case and some of the other earlier cases were decided on the basis that, at the very least, ministers of religion were appointed on the basis of a rebuttable presumption that, viewed objectively, there was an absence of an intention to create legal relations. That was expressed most clearly by Dillon LJ in *Parfitt's* case itself ([1983] 3 All ER 747 at 752, [1984] ICR 176 at 183). I say "at the very least" because some judgments expressed the proposition virtually as a rule of law. The judgment of Waterhouse J in the EAT in *Parfitt's* case is an example. So, perhaps, is the speech of Lord Templeman in *Davies v Presbyterian Church of Wales* [1986] 1 All ER 705 at 709, [1986] ICR 280 at 289. Its language is not that of simple presumption. Although there may be difficulties of interpretation in the speeches in *Percy's* case [*Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, [2006] 4 All ER 1354, [2006] 2 AC 28], one thing is abundantly clear. Abandonment of the rebuttable presumption is part of the *ratio*. That has already been established by this court in *Stewart's* case [*New Testament Church of God v Stewart* [2007] EWCA Civ 1004, [2008] IRLR 134] and it is further explained in the judgment of Underhill J in the EAT in the present case, at para 50. As he went on to say (at para 51), the difficulty is where that leaves *Parfitt's* case, which was decided by reference to the presumption but which was not expressly overruled in *Percy's* case.

[22] In the EAT, Underhill J analysed the effect of *Percy's* case in this way (at para 52):

"The conclusion of Dillon and May LJ in *Parfitt's* case and of Waterhouse J whose reasoning they endorsed, was based essentially on the spiritual nature of a minister's role: such other specific points as they made (eg in relation to a minister's stipend) were merely supportive of that general point. But the spiritual nature of a minister's role is the basis also of the presumption against intention to create legal relations which was disapproved in *Percy's* case. If it is illegitimate to rely on the spiritual nature of the role as a basis of a general presumption, it must equally, it seems to us, be illegitimate to rely on it *without more* as the basis of a specific finding. It comes to the same thing: in other words, we can see no difference in substance between saying 'because of the

minister's spiritual role there is a presumption against any intention to create legal relations and that presumption has not been rebutted' and saying 'because of the minister's spiritual role (and nothing else) we find that there was no intention to create legal relations'. It seems to us that Lord Nicholls and Lady Hale meant to hold that the spiritual role of a minister could not by itself justify denying contractual effect to an arrangement which otherwise had the indicia of a contract: thus *Percy's* case has not simply disapproved the erection of any general principle on the basis of *Parfitt's* case but has undermined its actual reasoning, at least as regards whether stationing—as opposed simply to ordination—gives rise to a contract."

I agree with this analysis.

... [36] *Davies's* case [*Davies v Presbyterian Church of Wales* [1986] 1 All ER 705, [1986] ICR 280, [1986] 1 WLR 323, HL], like *Parfitt's* case, was the subject of discussion in *Percy's* case. It is true that the Appellate Committee in *Percy's* case did not say that it was departing from its own previous decision in *Davies's* case. However, it did not need to because in Lord Templeman's speech an earlier passage had accepted that "it is possible for a man to be employed as a servant or as an independent contractor to carry out duties which are exclusively spiritual".

[37] In other words, a minister of religion may be an employee. If he is, he is an eligible applicant in relation to unfair dismissal and it will be for the ET, upon consideration of the facts of a particular case, to decide whether the statutory criteria of unfairness are satisfied (assuming that dismissal is established). In my view, this free-standing ground of appeal adds nothing to the general consideration of *Percy's* case.' *Preston v President of the Methodist Conference* [2011] EWCA Civ 1581, [2012] 2 All ER 934 at [2], [21]–[22], [36]–[37], per Maurice Kay LJ

[Limited Liability Partnerships Act 2000, s 4(4).] [30] I return to s 4(4) of the 2000 Act. The question for the ET was whether Mr Tiffin was an employee of the LLP. As he was a *member* of the LLP, the answer to it required a navigation of s 4(4). That informs us that, as such a member, Mr Tiffin—

"shall not be regarded for any purpose as employed by the [LLP] unless, if he and the other members were partners in a

partnership, he would be regarded for that purpose as employed by the partnership.” (My emphasis.)

‘[31] The drafting of s 4(4) raises problems. Whilst I suspect that the average conscientious self-employed professional or business person commonly regards himself as his hardest master, such perception is inaccurate as a matter of legal principle. That is because in law an individual cannot be an employee of himself. Nor can a partner in a partnership be an employee of the partnership, because it is equally not possible for an individual to be an employee of himself and his co-partners (see *Cowell v Quilter Goodison Co Ltd* [1989] IRLR 392). Unfortunately, the authors of s 4(4) were apparently unaware of this. The subsection is directed to ascertaining whether a particular member (call him A) of an LLP is or is not for any purpose an employee of it. The statutory hypothesis which the subsection requires in order to answer that question is that A and the other members of the LLP “were partners in a partnership”. That hypothesis, if it is to be read and applied literally, must in every case produce the same answer, namely that A cannot be an employee of the LLP for any purpose. If that had been Parliament’s intention when enacting s 4(4), it might just as well have ended the subsection immediately before the word “unless”. That, however, was plainly not its intention. The subsequent words must be contemplating a practical inquiry that, in particular factual circumstances, will yield a Yes or No answer to the question whether a particular member of an LLP is an employee of it. The subsection must, therefore, be interpreted in a way that avoids the absurdity inherent in a literal application of its chosen language so that it can be applied in a practical manner that will achieve the result that I consider it obviously intended. The presumption is that Parliament does not intend to enact legislation whose application results in absurdities, and s 4(4) must therefore be interpreted with that in mind.

‘[32] In my judgment the way s 4(4) is intended to work is as follows. Subject to the qualification which I mention below, it requires an assumption that the business of the LLP has been carried on in partnership by two or more of its members as partners; and, upon that assumption, an inquiry as to whether or not the person whose status is in question would have been one of such partners. If the answer to that inquiry is that he *would* have been a partner, then he could not have been an employee and so he will not be, nor have been, an employee of

the LLP. If the answer is that he would *not* have been a partner, there must then be a further inquiry as to whether his relationship with the notional partnership would have been that of an employee. If it would have been, then he will be, or would have been, an employee of the LLP. I consider that it is implicit that the primary source material for the purpose of answering these questions will be the members’ agreement although this will not necessarily represent the totality of what may be looked at. The inquiry thus requires a consideration of the circumstances in which a person may become a partner in a partnership under the 1890 Act, which is why I have summarised such circumstances. The qualification that I have referred to is that, in what are probably likely to be more unusual cases, the relevant issue may perhaps arise in circumstances in which at the material times there were just two members in the LLP, with the issue being whether one of them was an employee of the LLP. The approach that I have suggested does not work in such a case and would need to be adapted for it. For present purposes, however, there is no need to consider such cases further.

‘[33] The only reported authority on s 4(4) to which we were referred was *Kovats v TFO Management LLP* [2009] ICR 1140, a decision of the EAT. The EAT’s judgment was delivered by Judge Birtles QC. The issue was similar to that in this case: a member of an LLP was required by resolution to retire as a member and there arose in his consequential complaint of unfair dismissal the question of whether or not he was an employee. The ET dismissed his claim, holding that he was not and the EAT dismissed his appeal. In directing itself as to the application of s 4(4), the EAT said this:

“18. Parliament has thus expressly provided that the legal test which determines whether a person is a partner or an employee of a partnership also determines whether a member of a limited liability partnership is employed by the limited liability partnership. We agree with the following submissions by Mr Catherwood [who was representing the LLP]:

- (1) The partnership test applies for determining whether the person is an employee for any purpose including whether or not for the purposes of the Employment Rights Act 1996.
- (2) The question of whether a person can be both a member of a limited liability partnership and its employee is not relevant to the facts of this case. The

question for the employment tribunal was whether, having regard to section 4(4) the claimant was an employee. The fact (if it is a fact) that, if he was an employee, he might remain a member of the limited liability partnership does not affect that determination.

- (3) The application of this test does not ask the standard common law tests applicable to determine whether the person is an employee or self-employed. In our judgment the test of determining employment status in a limited liability partnership is additional to the standard common law tests. Thus in the context of partnership the tribunal is required to decide into which of two legal categories a person falls: partnership or employment. If the tribunal decides that the person is not a partner, it does not follow that he is necessarily an employee: the usual common law tests will still need to be applied, as the person may in fact be self-employed: *Lindley & Banks on Partnership*, 18th ed (2002), para 5–70.

- (4) The tribunal were correct to first consider whether the claimant was a partner in the partnership. Having found that he was a partner in the partnership (in accordance with section 4(4) of the 2000 Act) the tribunal correctly considered the common law tests and decided that they would not have conferred employment status on him.”

‘[34] I would not give my unqualified agreement to the whole of that summary of the operation of s 4(4) although I respectfully agree with most of it. I interpret the opening paragraph, and also para 18(1), as being in line with the position as I have sought to explain it. As to para 18(2), it is clear that a member of an LLP can be an employee of it: that is what s 4(4) recognises. As to para 18(3), I interpret this as saying that there are two tasks. The first requires an assumption that the LLP is in fact being carried on as partnership and then requires an answer to the question whether, on that assumption, the claimant would or would not be a partner. The second requires an answer to the question whether, if the claimant would not be a partner, he would be an employee of the partnership (as opposed, for example, to being retained by it on a self-employed basis). If

that is the full sense of para 18(3), I agree with it. As for para 18(4), I respectfully disagree with the approach which the EAT thereby approved. If the finding was that the claimant would have been a partner in the partnership, there was no basis upon which he might also be found to be an employee of it and so no scope for the further inquiry that the ET apparently made in *Kovats’s case*.’ *Tiffin v Lester Aldridge LLP* [2012] EWCA Civ 35, [2012] 2 All ER 1113 at [30]–[34], per Rimer LJ

Australia [Fair Work Act 2009 (Cth), s 335.] ‘[13] Section 335 provides that, in Pt 3–1 (in which ss 342 and 351 appear) “employee and employer have their ordinary meanings (original emphasis)”.

...
‘[21] Both parties accept that, historically, enlisted servicemen and women were not employees. They joined issue on whether the historical position had been modified by statute and, in particular, by the provisions of the FW Act and the regulations.

...
‘[30] We do not accept that the decision in *Konrad* [*Konrad v Victoria* (1999) 91 FCR 95, 165 ALR 23, [1999] FCA 988] has led to a change in the “ordinary” meaning of “employee” such that it comprehends persons who would not be treated as employees at common law.

...
‘[34] First, unlike Div 3 of Pt VIA of the IR Act [Industrial Relations Act 1988 (Cth)], which was considered in *Konrad*, the FW Act contains definitions of both “employer” and “employee”. The “ordinary meanings” of “employee” and “employer” are rooted in the common law. The ordinary meaning referred to must be the ordinary legal meaning as distinct from one of more colloquial context. The terms refer to parties to a contract of service or employment: see, for example, *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; 181 ALR 263; 33 MVR 399; [2001] HCA 44. Parliament could have, but did not, incorporate into Pt 6–4 a provision such as s 170CB of the IR Act. Instead, s 770 was included. Given that the draftsman would have been aware of the Court’s decision in *Konrad*, the adoption of a narrower definition is significant. That narrow definition may not extend to some or all police officers. So much is implicit in s 30E(1) of the FW Act which provides for an expanded definition of “employee”:

...
‘[41] It is, therefore, necessary to examine

the FW Act and the regulations with a view to determining whether the text of the relevant provisions, read in the context in which they appear, displaces the previously established norm that enlisted members of the Defence Force are not employees of the Commonwealth. Having undertaken such an examination we are not persuaded that any such change has been effected by the relevant provisions of the FW Act or the regulations. On the contrary, they combine to maintain the long established position.

[42] Any examination of the current legislation with a view to determining whether any modification of the common law position has been effected must take account of the historical context. As Dixon J said in *Welsh* [*Commonwealth v Welsh* (1947) 74 CLR 245 at 268, [1947] ALR 215] (at CLR 268; ALR 221):

The relation to the Crown of members of the armed forces is no new subject; the rules of the common law define it. The regulations are not to be read in disregard of those rules and of the long tradition to which they have contributed.

See also: *Marks v Commonwealth* (1964) 111 CLR 549 at 573 ; [1965] ALR 25 at 38–9 (Windeyer J).

...

[50] Despite these developments, one essential element of the former common law arrangements has been preserved by statutory prescription. As Logan J reaffirmed in *Millar* [*Millar v Bornholt* (2009) 177 FCR 67, 257 ALR 263, [2009] FCA 637] (at [72]) the relationship between the Crown and a member of the Defence Force has not been and is not founded on contract and is not that of employer and employee.

...

[54] Under present arrangements members of the Defence Force are not, by reason of their enlistment, party to any contract of service. They are not employees of the Commonwealth.

[55] It follows that C was not, at relevant times, an “employee” to whom ss 342 and 351 of the FW Act applied.’ *C v Commonwealth* [2015] FCAFC 113, (2015) 327 ALR 195 at [13], [21], [30], [34], [41]–[42], [50]. [54]–[55], per Tracey, Buchanan and Katzmann JJ

EMPLOYERS’ ASSOCIATION

[For 47 Halsbury’s Laws of England (4th Edn) (2001 Reissue) para 1201 see now 40

Halsbury’s Laws of England (5th Edn) (2009) para 1028.]

EMPLOYMENT

[Whether the appointment of an arbitrator was ‘employment’ for the purposes of the Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660, regs 2, 6.] [22] The critical question under this head is whether the Court of Appeal was correct to form a different view from the judge on this point. In my opinion it was not. As the Court of Appeal correctly observed at [15], the meaning of art 3 of the Directive [Council Directive (EC) 2000/78 (OJ 2000 L303, p 16)] has not been considered by the Court of Justice, and is to be interpreted in the light of the recitals and given its natural meaning consistent with the EC Treaty and the existing case law of the court.

[23] It is common ground, at any rate in this class of case, that there is a contract between the parties and the arbitrator or arbitrators appointed under a contract and that his or their services are rendered pursuant to that contract. It is not suggested that such a contract provides for “employment under a contract of service or of apprenticeship”. The question is whether it provides for “employment under ... a contract personally to do any work”. There is in my opinion some significance in the fact that the definition does not simply refer to a contract to do work but to “employment under” such a contract. I would answer the question in the negative on the ground that the role of an arbitrator is not naturally described as employment under a contract personally to do work. That is because his role is not naturally described as one of employment at all. I appreciate that there is an element of circularity in that approach but the definition is of “employment” and this approach is consistent with the decided cases.

...

[27] On the basis of those materials I would accept Mr Rhodri Davies QC’s submission that the Court of Justice draws a clear distinction between those who are, in substance, employed and those who are “independent providers of services who are not in a relationship of subordination with the person who receives the services”. I see no reason why the same distinction should not be drawn for the purposes of the 2003 Regulations between those who are employed and those who are not notionally but genuinely self-employed. In the light of *Allonby*’s case [*Allonby v Accrington and*

Rossendale College Case C-256/01 [2005] All ER (EC) 289], there can be no doubt that that would be the correct approach to the near identical definition in s 1(6) of the Equal Pay Act 1970 and must remain the correct approach to the definition of employment in s 83(2) of the 2010 Act, which provides, so far as relevant: “‘Employment’ means—(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work”. That definition is almost identical to the definition in reg 2(3) of the 2003 Regulations and, since it applies to equal pay issues by virtue of ss 83(4), 80(2) and 64 of the 2010 Act, it must equally apply to the 2003 Regulations.

‘[28] In my opinion there is nothing in the domestic authorities which requires the court to come to any different conclusion. The problem with some of them is that they do not refer to the jurisprudence of the Court of Justice. However, the most recent decision of the House of Lords does. In *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, [2006] 4 All ER 1354, [2006] 2 AC 28 the House of Lords considered a sex discrimination claim brought by a woman who was a minister of the Church of Scotland. The issue was whether she was employed within the meaning of s 82(1) of the 1975 Act. The House held that she was. Lord Hoffmann dissented on the basis that she was the holder of an office but had no doubt (see [66]) that, if the arrangement had been contractual, it would plainly have been a contract of service.

...
‘[40] If the approach in *Allonby’s* case is applied to a contract between the parties to an arbitration and the arbitrator (or arbitrators), it is in my opinion plain that the arbitrator’s role is not one of employment under a contract personally to do work. Although an arbitrator may be providing services for the purposes of VAT and he of course receives fees for his work, and although he renders personal services which he cannot delegate, he does not perform those services or earn his fees for and under the direction of the parties as contemplated in para 67 of *Allonby’s* case. He is rather in the category of an independent provider of services who is not in a relationship of subordination with the parties who receive his services, as described in para 68.

‘[41] The arbitrator is in critical respects independent of the parties. His functions and duties require him to rise above the partisan interests of the parties and not to act in, or so as to further, the particular interests of either party. As the International Chamber of Commerce (the

ICC) puts it, he must determine how to resolve their competing interests. He is in no sense in a position of subordination to the parties; rather the contrary. He is in effect a “quasi-judicial adjudicator”: *K/S Norjarl A/S v Hyundai Heavy Industries Co Ltd* [1991] 3 All ER 211 at 228, [1992] QB 863 at 885.

...
‘[43] The 2003 Regulations themselves include provisions which would be wholly inappropriate as between the parties and the arbitrator or arbitrators. For example, reg 22(1) provides: “Anything done by a person in the course of his employment shall be treated for the purposes of these Regulations as done by his employer as well as by him, whether or not it was done with the employer’s knowledge or approval”. It is evident that such a provision could not apply to an arbitrator.

‘[44] In this regard an arbitrator is in a very different position from a judge. The precise status of a judge was left open by this court in *O’Brien v Ministry of Justice (Note)* [2010] 4 All ER 62, in which the court referred particular questions to the Court of Justice: see para [41]. However, as Sir Robert Carswell said in *Perceval-Price v Department of Economic Development* [2000] IRLR 380, [2000] NI 141 and Lord Walker said in *O’Brien v Ministry of Justice* at [27], judges, including both recorders and all judges at every level are subject to terms of service of various kinds. As Sir Robert put it, although judges must enjoy independence of decision without direction from any source, they are in other respects not free agents to work as and when they choose, as are self-employed persons.

‘[45] In both those cases the court was considering the relationship between the relevant department of state and the judges concerned. It was not considering the relationship between the judges and the litigants who appear before them. Here, by contrast, the court is considering the relationship between the parties to the arbitration on the one hand and the arbitrator or arbitrators on the other. As I see it, there is no basis upon which it could properly be held that the arbitrators agreed to work under the direction of the parties as contemplated in para 67 of *Allonby’s* case [2005] All ER (EC) 289, [2004] ECR I-873. Further, in so far as dominant purpose is relevant, I would hold that the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision

of personal services, they were not personal services under the direction of the parties.

...
 '[49] Some reliance was placed upon the reference to the "conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions" in art 3(1)(a) of the Directive. In para [20] the Court of Appeal gave a wide construction to that provision, rejecting the submission made by Mr Davies that it related to barriers to entry to trades, professions and occupations. It did so on the same footing as before, namely that a wide meaning should be given to the terms of the Directive and, in any event, to the 2003 Regulations. However, I would accept Mr Davies's submission that the expression "access ... to self-employment or to occupation" means what it says and is concerned with preventing discrimination from qualifying or setting up as a solicitor, plumber, greengrocer or arbitrator. It is not concerned with discrimination by a customer who prefers to contract with one of their competitors once they have set up in business. That would not be denying them "access ... to self-employment or to occupation". I see no reason to give a different meaning to the 2003 Regulations from that given to the Directive.

'[50] For these reasons I prefer the conclusion of the judge to that of the Court of Appeal. I agree with the judge that the 2003 Regulations are not applicable to the selection, engagement or appointment of arbitrators. It follows that I would hold that no part of cl 8 of the JVA is invalid by reason of the 2003 Regulations and would allow the appeal on this ground.' *Hashwani v Jivraj* [2011] UKSC 40, [2012] 1 All ER 629 at [22]–[23], [27]–[28], [40]–[41], [43]–[45], [49]–[50], per Lord Clarke SCJ

ENACTMENT

[For 44(1) Halsbury's Laws of England (4th Edn) (Reissue) para 1232 see now 96 Halsbury's Laws of England (5th Edn) (2012) para 609.]

[Inheritance (Provision for Family and Dependents) Act 1975, s 8. Nomination of beneficiary pursuant to National Health Service Pension Scheme Regulations 1995, SI 1995/300.] '[45] Section 8 deals with property which is to be treated as part of the net estate. By sub-s (1), where a deceased person has, in accordance with the provisions of any enactment, nominated any person to receive any

sum of money or other property on his death and that nomination is in force at the time of his death, that sum of money is to be treated, for the purposes of the Act, as part of the net estate of the deceased. By s 25(1), a beneficiary, in relation to the estate of a deceased person, means (amongst others) a person who has received any sum of money or other property which by virtue of s 8(1) of the Act is treated as part of the net estate of the deceased. By s 25(1), "net estate", in relation to a deceased person, is defined as including any sum of money or other property which is treated for the purposes of the Act as part of the deceased's net estate by virtue of s 8(1) of the Act.

...
 '[47] It is appropriate for me, at this point, to consider the death in service payment and whether, by virtue of s 8(1) of the Act, that forms part of the deceased's net estate. ... The submission advanced on behalf of the estate is that since the relevant NHS Pension Scheme Regulations are not primary legislation, the nomination is not within the scope of s 8(1). As Mr Jackson put it in his skeleton argument: "Statutory instruments are not, strictly speaking, enacted".

'[48] Mr Clark submits that the assertion that "enactment" is ordinarily construed to mean primary legislation is not supported by the authorities. He cites two passages from *Bennion on Statutory Interpretation*. At p 379 the writer recognises that the term "enactment" may be used with reference to the whole or a part of an item of delegated legislation. This variation of meaning is said to call for care in construing a passage of an Act or other instrument in which the term "enactment" is used. Later, at p 380, it is said that when used in legislation, the term "enactment" includes a provision of delegated legislation, although in some Acts the context may indicate that references to an "enactment" do not include subordinate legislation.

...
 '[59] In the present case it is possible to give meaning and content to s 8(1) of the 1975 Act by construing the reference to any "enactment" as limited to primary legislation by way of Act of Parliament, but I can see no good reason for so limiting the meaning of that phrase. There is nothing within the 1975 Act which would justify such a limitation upon the scope of that section. In those circumstances, and consistently with what would appear to have been the clear view of Anthony Lincoln J in the case of *Re Cairnes* [*Re Cairnes, Howard v Cairnes* (1983) 4 FLR 225], I conclude that since the nomination was made pursuant to rules made by

way of statutory instrument made under a power conferred by a statute the nomination should, within the meaning of s 8(1) of the 1975 Act, be regarded as one made “in accordance with the provisions of any enactment”. I therefore hold that the lump sum death in service payment falls to be treated as part of the deceased’s “net estate”.’ *Goenka v Goenka* [2014] EWHC 2966 (Ch), [2015] 4 All ER 123 at [45], [47]–[48], [59], per Judge Hodge QC

By virtue of an enactment

[Equality Act 2010 s 120(7).] ‘[50] Section 120(7) provides as follows:

“Subsection 1(a) does not apply to a contravention of section 53 in so far as the act complained of may, by virtue of an enactment, be subject to an appeal or proceedings in the nature of an appeal.”

‘[51] In *Jooste v General Medical Council* (2012) UKEAT/0093/12, [2012] EqLR 1048 the Employment Appeal Tribunal held that following the enactment of the Senior Courts Act 1981 the right to apply for judicial review is statutory in nature and that, since decisions of the General Medical Council infected by unlawful discrimination can be challenged by way of judicial review, those decisions are “by virtue of an enactment” subject to “proceedings in the nature of an appeal” and therefore fall outside the jurisdiction of the Employment Tribunal. In my view, however, that is wrong and proceeds on a misunderstanding of the purpose of s 120(7).

‘[52] I agree with Ryder LJ that, whereas qualifications bodies may be presumed to have special expertise in judging the skills and qualities required by a member of the profession in question, they cannot be presumed to have special expertise in recognising unlawful discrimination, victimisation, harassment or unlawful detriment. In the Equality Act 2010 Parliament has not only rendered acts of the kind described unlawful, but has provided a process by which a remedy can be obtained by means of a complaint to an Employment Tribunal. The remedies available include an award of damages, which in many cases will be what the claimant primarily seeks. Section 120(7) contains a provision of general application designed to regulate competing jurisdictions. One would therefore expect that it was intended to exclude from the jurisdiction of the Employment Tribunal only those cases in which some alternative provision has been

made for obtaining a remedy for unlawful acts of the kind in question. Such a remedy is likely to be found, if anywhere, in legislation which deals with the procedures governing the way in which a particular qualifications body reaches its decisions and provides an appeal process which extends to decisions infected by unlawful acts of the kind under consideration.

‘[53] In my view considerations of that kind point clearly towards the conclusion that the words “by virtue of an enactment” in s 120(7) are directed to cases in which specific provision is made in legislation for an appeal, or proceedings in the nature of an appeal, in relation to decisions of a particular body, as, for example, in *Khan v General Medical Council* [1994] IRLR 646, [1996] ICR 1032. They are not, in my view, intended to refer to the general right to seek judicial review merely because, since 1981, that happens to have been put on a statutory footing.

‘[54] In the present case the President of the Employment Appeal Tribunal considered it appropriate in the interests of the orderly development of the law to follow and apply the decision in *Jooste v GMC* and cannot be criticised for having done so. Nonetheless, he clearly had some misgivings about the decision. For the reasons I have given I think *Jooste* was wrongly decided. On its true interpretation s 120(7) of the Equality Act 2010 does not apply to a claim of the kind which Dr Michalak seeks to pursue in this case.’ *Michalak v General Medical Council* [2016] EWCA Civ 172, [2017] 2 All ER 534 at [50]–[54], per Moore-Bick VP

ENCOMPASSING

Australia [Endorsement on insurance policy.]

‘[17] One aspect of the dispute concerns the extent to which, if at all, the breadth of the phrase “financial planning” is narrowed by the present participle “encompassing” and the following words. Does “encompassing” merely connote a non-limiting illustration of financial planning? Or does it limit the financial planning, in respect of which cover is granted, to that which is advice on (relevantly) approved investment products? Or is there some midway position? ...”

‘[65] Set in a definition clause such as Endorsement No 11, the words from “encompassing” appear to us to define and limit the scope of the activities of the insured of financial planning that are the subject of the liability

insurance: cf *Horsell International Pty Ltd v Divetwo Pty Ltd* [2013] NSWCA 368 at [262] per Meagher JA.

‘[66] The word “encompassing” in this context naturally connotes the meaning of “containing”. Thus, the cover is for financial planning containing advice on approved investment products. This would mean that the coverage clause covered all aspects of that financial planning as long as the financial planning contained advice on approved investment products. Given the practical likelihood, in any given circumstances, of advice being given on financial products, we doubt whether this limitation would be likely to limit in any practical way the insureds’ coverage for claims for financial planning advice. Any such advice is likely to have been given in the context of advice on products. This construction, which was debated on appeal, would leave to the exclusion the task of removing from cover the effects of advice on non-approved products. This more happily gives a congruent operation to the coverage clause (cl 1.1 and Endorsement No 11) and the exclusion clause (Endorsement No 002).’ *Todd v Alterra at Lloyds Ltd (on behalf of underwriting members of Syndicate 1400)* [2016] FCAFC 15, (2016) 330 ALR 454 at [17], [65]–[66], per Allsop CJ and Gleeson J

END

Of engagement/Of voyage

[For 43(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 1701 et seq see now 93 Halsbury’s Laws of England (5th Edn) (2008) para 426 et seq.]

ENDOWMENT

New Zealand [The Local Government (Rating) Act 2002, Sch 1 Pt 1 cl 5(e) exempted from rates land ‘owned or used by, and for the purposes of The Royal New Zealand Foundation of the Blind, except as an endowment’. A question arose whether the exemption from rates applied to the land of the foundation which it did not occupy itself but held for the purpose of deriving investment income.] ‘[10] There is dictionary and case authority as to the meaning and connotations of the term “endowment”. They are of limited assistance in the present case. *Black’s Law Dictionary* defines endowment as:

“A gift of money or property to an institution (such as a university) for a

specific purpose, esp. one in which the principal is kept intact indefinitely and only the interest income is used.”

A similar concept is indicated by the Oxford English Dictionary for “endow”:

“... to provide (by bequest or gift) a permanent income for (a person society, or institution).”

“Endowment” is defined as:

“The property or fund with which a society, institution etc. is endowed.”

‘[11] But the term has not always been used to connote a particular provenance or the specific purpose of the provision of income. So, in the Charitable Trusts Act 1863 (UK), endowment meant, in effect, all property of every description belonging to or held in trust for a charity, for any purpose. The origin of the property was irrelevant.

‘[12] The Auckland City Empowering Act 1913 required the Auckland City Council to hold land “as and for an endowment for the benefit of the inhabitants of the City of Auckland, and not for any special purpose”. In dealing with that provision in *Auckland City Corporation v R* [[1941] NZLR 659 at 667], Fair J determined that the land was “held for the specific purpose of ensuring that income be derived from it”. He cited Lord Cranworth LC in *Edwards v Hall* [(1856) 25 LJ Ch (NS) 82 at 83]:

“By the endowment of a school, an hospital or a chapel, is commonly understood, not the building, or providing a site for a school, or hospital, or chapel, but the providing of a fixed revenue for the support of those by whom the institutions are conducted.”

‘[13] The term under consideration does not, of course, stand alone in the Act but in a context. That context is concerned with purpose, not origin. The meaning and effect of Part 1 of Schedule 1, cl 5(e), is that land will be exempt if it is owned or used by the Foundation for its purposes, unless it is owned or used as an endowment. And, as the authorities we have mentioned indicate, in common usage the term “endowment” connotes, essentially, land held in order to produce income, even though it may also connote a gifted provenance. That this type of land holding or use is envisaged by the exception is indicated by the statutory history of the term in a rating context.

...

‘[23] Thus, the catalogue of exempted land which has been accumulated over a period of about 130 years indicates a policy of not excluding from rates land which, although held for or by an organisation with a generally charitable or public service objective, is nevertheless used to produce revenue.

‘[24] It would be difficult to understand why the various Acts which, over many years, have excluded land owned or used or held as an endowment would be concerned with the provenance of the land. Indeed, s 40(1) of the Finance Act (No 4) 1931 and s 35(1) of the New Zealand Foundation of the Blind Act 1955, referring as they do to “land ... otherwise in any manner acquired”, suggest that the legislature specifically regarded provenance as irrelevant. On the other hand, it is not at all difficult to understand why the legislature would be unwilling to exempt from rates land being used to produce revenue. Rates are a normal expense of the use of land for commercial purposes.

‘[25] Having regard to the commonly accepted view that the essential quality of an endowment is to provide a source of income, and to the case law, and to the legislative history and context of the expression “endowment”, we are satisfied that the Court of Appeal correctly determined that the land in question was not exempted from rates because it is land owned or used as an endowment. ...’ *Royal New Zealand Foundation of the Blind v Auckland City Council* [2007] NZSC 61, [2008] 1 NZLR 141 at [10]–[13], [23]–[25], per Anderson J

ENEMY

[For 49(1) Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 573 et seq see now 3 Halsbury’s Laws of England (5th Edn) (2011) para 194 et seq.]

ENFORCEMENT

[Consumer Credit Act 1974, ss 65, 127. Default notice relating to a fixed-sum regulated loan agreement was accompanied by a letter which stated that if payment or arrangements for payment had not been made within 28 days, information about the claimant’s debt would be given to three credit reference agencies (CRAs).] ‘[79] In contrast, the bank invited the court (as set out in the list of issues) to conclude not only that reporting to the CRAs did not amount to enforcement, but that a number of other activities did not constitute enforcement: (i) reporting to CRAs without also telling them

that the agreement is currently unenforceable; (ii) disseminating or threatening to disseminate the claimant’s personal data in respect of the agreement to any third party; (iii) demanding payment from the claimant; (iv) issuing a default notice to the claimant; (v) threatening legal action; and (vi) instructing a third party to demand payment or otherwise to seek to procure payment.

‘[80] So far as activities (iii) to (vi) are concerned, it was accepted on behalf of the claimant that these did not amount to enforcement or actions to enforce the agreement. That concession seems to me to be correct: at most these activities are steps preparatory to subsequent enforcement. Furthermore, in a recent decision, *Rankine v American Express Services Europe Ltd* [2009] CCLR 3, Judge Simon Brown QC (sitting as a deputy judge of the High Court) concluded that the bringing of proceedings is only a step taken with a view to enforcement and not actually enforcement. It seems to me that that conclusion must be correct. Were it otherwise, as Mr Handyside pointed out, one would be left with the conundrum that the creditor could not apply to the court for an enforcement order under s 127(1), because to do so would amount to enforcement, not permitted by s 65(1).

‘[81] Once it is recognised that the bringing of proceedings is not enforcement, it necessarily follows that activities (iii) to (vi) do not constitute enforcement, since they are all steps taken prior to the commencement of proceedings and therefore by definition, at most, steps taken with a view to enforcement.

‘[82] I do not consider that either reporting to the CRAs or the related activities referred to in (i) and (ii) come anywhere near amounting to enforcement if activities (iii) to (vi) are not enforcement. These activities are concerned with reporting to CRAs or other third parties and are not even steps taken prior to enforcement such as threatening proceedings would be. Even if one accepted (which for reasons given earlier in this judgment I do not) the claimant’s somewhat pejorative categorisation of reporting to CRAs as being motivated by the desire to pressurise the claimant into paying the outstanding balance, at its highest that is an attempt by indirect means to persuade the claimant to pay. If demanding payment directly or through a third party does not amount to enforcement, it is difficult to see how such indirect means could do so, even if the claimant were right as to the relevant motive of the bank.

...
‘[85] It follows that, in my judgment the

reporting to CRAs and related activities do not constitute enforcement for the purposes of the 1974 Act.’ *McGuffick v Royal Bank of Scotland plc* [2009] EWHC 2386 (Comm), [2010] 1 All ER 634 at [79]–[82], [85], per Flaux J

ENGINE

‘[Other engine calculated to destroy human life or inflict grievous bodily harm’ in Offences against the Person Act, 1861, s 31.] ‘[2] The statement of offence in count three alleged setting a mantrap with intent, contrary to s 31 of the Offences Against the Person Act 1861. The particulars were that between 1 January 2006 and 11 July 2006, the appellant set or placed, or caused to be set or placed, a mantrap or other engine calculated to destroy human life or inflict grievous bodily harm, with intent that the same or whereby the same may destroy or inflict grievous bodily harm on a trespasser or other person coming into contact therewith.

‘[3] This offence is rarely charged. The question in this appeal was whether, having heard evidence from a defence expert, the recorder was right to reject the submission that, as a matter of statutory construction, an undoubtedly dangerous contraption positioned by the appellant on top of some farm equipment in a shed on his land was capable or not of falling within the ambit of s 31. The recorder decided that it was so capable. He directed the jury accordingly. The jury concluded that the contraption was indeed an engine for the purposes of s 31 and that the necessary intent had been proved: hence this appeal.

‘[6] The contraption set by the appellant was neither a spring gun nor a mantrap. The conviction could only have been sustained if it was an “other engine calculated to destroy human life or inflict grievous bodily harm”. It was exhibit 5 at the trial. We have examined it. Briefly, it is a spiked metal object made from two pieces of heavy steel plate into which some 20 four-inch long nails, protruding at different angles, are welded. It was connected by a metal rod or wire to the roof frame of a shed on the appellant’s land. Another wire connected it to the shed door. When the shed door was opened it was activated and the force of gravity caused it to swing downwards and catch the person entering through the door.

‘[7] On 11 July 2006, in the course of a lawful investigation of the appellant’s property, an army officer pushed open the shed door. As he did so, with good sense, he took the

precaution of holding his arm across his face. The spiked object struck his forearm rather than his face. Two nails entered into his clothing, and a third punctured his forearm. His injuries could well have been very much more serious than they were.

‘[8] It was submitted on behalf of the appellant that this object was not and could not be treated as an engine. The power needed to work it was applied exclusively by nature, gravity. No other form of stored energy or force was involved. This therefore was not a mechanical contrivance at all, and the decision of this court in *R v Munks* [1963] 3 All ER 757, [1964] 1 QB 304 provides clear authority for the proposition that if the object was not such a contrivance it could not be an “other engine” for the purposes of s 31.

‘[10] The 1861 Act brought the statutory offences against the person then in force into a single statute. The precursor to s 31 of the 1861 Act was the Spring Gun Act 1827. It was enacted in the period after the Napoleonic Wars which were followed by poverty and hunger throughout the country and when resort to trespass to find food became commonplace. Landowners responded by setting traps and spring guns and other devices, to catch and discourage trespassers and poachers. These were not purely defensive measures (for example, broken glass on walls or spiked fences) but aggressive, dangerous objects intended to cause really serious harm or death. The preamble to the 1827 Act reads: “Whereas it is expedient to prohibit the setting of spring guns and man traps, and other engines calculated to destroy human life, or inflict grievous bodily harm”. This provides an ample indication of the legislative purpose of this statute, which was re-enacted in s 31 of the 1861 Act and therefore, since 1827, spring guns and other engines calculated to kill or inflict grievous bodily harm have been illegal in England unless kept in a dwelling house at night as a protection against burglars.

‘[11] A spring gun can be described as a gun, often a shotgun, rigged up so as to fire when a string or other triggering device is tripped by contact of sufficient force to “spring” the trigger. Someone stumbling over or treading on the string or triggering device causes it to be discharged and in consequence is wounded. Mantraps take many forms, although the most common is something like a large bear trap, with steel springs armed with teeth which meet on the victim’s leg and trap him. Both spring guns and mantraps appear to involve the

deployment of stored energy, and this consideration led Mr Magarian to reject the suggestion in argument that a disguised deep hole dug in the ground with a vicious spike or spikes fixed at the bottom would constitute a mantrap. While we are inclined to agree that a shallow hole, on its own, might not do so, probably because it would not be calculated to inflict grievous bodily harm, as a matter of statutory construction, notwithstanding the concession by the Crown in *R v Munks* [1963] 3 All ER 757, [1964] 1 QB 304, we entertain no doubt that a deep hole containing potentially lethal spikes would fall within the description “mantrap”. The legislation is not confined to objects which operate through “stored energy”.

‘[12] On the face of it any engine calculated to kill or inflict grievous bodily harm falls within the ambit of s 31. The Oxford English Dictionary, among other descriptions, describes an engine as a “mechanical contrivance, machine, implement, tool”. Something of the breadth of its meaning at the time when the 1827 Act came into force is identified in the dictionary itself where, among other references, we find a pair of scissors described as a “little engine” in the *Rape of the Lock* (1712–1714) and a description of “engines of restraint and pain” at the victim’s feet in *Death Slavery* (1866). Indeed at much the same time, in *Barnard v Ford* (1869) 4 Ch App 247, the court rejected a proposition which would turn it “into an engine of fraud”. None of these references dilutes or could dilute the authority of *R v Munks*, although they suggest that the Crown’s argument in that case was more constrained than it perhaps should have been.

‘[13] In these circumstances, there is no reason for giving (and every reason, given the evident purpose behind the legislation, for not giving) the words “spring gun” or “mantrap” or “other engine” an unduly narrow meaning. In *R v Munks*, it is true that a very wide definition of the word “engine” was rejected, and in the context of the electrical device with which it was concerned the word “engine” was said to connote a mechanical contrivance. However we reject the argument implicit in Mr Magarian’s submissions that *R v Munks* was intended to or could redefine the statutory language of s 31 by replacing the words “other engine” with “other mechanical contrivance”. The court cannot re-write statutory language which has been unamended for nearly 200 years. In any event the words “mechanical contrivance”, as used in *R v Munks*, are not to be applied restrictively so as to lead to the exclusion of a contraption which falls within the ambit of the statute. On

the rare occasions when this question arises for decision, the object itself as well as the manner, if any, in which it may be activated should be examined pragmatically to see whether, looked at overall, it falls within the statutory language. In *R v Munks*, the placing of cables on or by a door through which an electric current could pass was held not to be sufficient of a mechanical contrivance to be an “engine”. In the present case, using ordinary language, the contraption was certainly a contrivance. It was mechanical, since as a mechanism, it was triggered into dangerous movement by inadvertent pressure on a wire or string. In short therefore it is properly described as a mechanical contrivance or machine, and it unquestionably is an “other engine” for the purposes of s 31 of the 1861 Act. For these reasons the main ground of appeal failed.’ *R v Cockburn* [2008] EWCA Crim 316, [2008] 2 All ER 1153 at [2]–[3], [6]–[8], [10]–[13], per Sir Igor Judge P

ENTIRE CONTRACT

[For 4(3) Halsbury’s Laws of England (4th Edn) (Reissue) para 8 see now 6 Halsbury’s Laws of England (5th Edn) (2011) para 209.]

ENTAILED INTEREST

[For 39(2) Halsbury’s Laws of England (4th Edn) (Reissue) paras 117–118 see now 87 Halsbury’s Laws of England (5th Edn) (2017) paras 111–112.]

ENTITLED

[For 35 Halsbury’s Laws of England (4th Edn) (Reissue) para 1211 et seq see now 80 Halsbury’s Laws of England (5th Edn) (2013) para 834 et seq.]

ENTITLED BY REASON OF THE INVALIDITY OF THE DISPOSITION IN QUESTION

[The Charitable Trusts (Validation) Act 1954, s 2 provides that the 1954 Act applies to any disposition of property to be held or applied for ‘objects declared by an imperfect trust provision’ which would be valid if the objects were exclusively charitable but s 2(2) states that the 1954 Act does not apply to a disposition if, before 16 December 1952, ‘property comprised in ... the disposition or income arising from any

such property, has been paid or conveyed to or applied for the benefit of, the persons entitled by reason of the invalidity of the disposition in question’.] ‘[53] Counsel for the club submitted that, since the land was applied by the trustees for the benefit of the club at all times prior to 16 December 1952, the effect of s 2(2) was that the 1954 Act did not apply. Counsel for the church submitted that, since the trust deed had been treated by all concerned as valid and operated in accordance with its terms, s 2(2) did not apply. The issue is one of construction of s 2(2): does “entitled by reason of the invalidity of the disposition in question” describe the class of persons (ie it means the class of persons whose entitlement arises from the invalidity of the disposition) or does it describe what has happened (ie it means the persons who have received benefits because the disposition is invalid)? I was told that there was no authority on this question, and I was not referred to any commentary either. I prefer the latter interpretation. It seems to me that the purpose of s 2(2) is to prevent the 1954 Act being applied where the imperfect trust provision has already been recognised to be invalid, and the invalidity acted upon.

...
 ‘[55] In the present case, as I have already said, it is clear that the primary purpose of the trust deed was to benefit the club. If the trust deed were to be restricted to exclusively charitable trusts for the benefit of the church, the club would be deprived of the benefit which it was intended to have and has in fact enjoyed for the past 70-odd years. In those circumstances, it seems to me that, whether or not Mr Tweddle might have objected, the club would certainly have legitimate grounds to object to an exclusively charitable application. Accordingly, I conclude that the trust deed is not validated by the 1954 Act.’ *Re St Andrew’s (Cheam) Lawn Tennis Club Trust; Philippe v Cameron* [2012] EWHC 1040 (Ch), [2012] 3 All ER 746 at [53], [55], per Arnold J

EQUAL PAY

New Zealand [Equal Pay Act 1972, s 3(1)(b): ‘... in determining whether there exists an element of differentiation, based on the sex of the employees, in the rates of remuneration of male employees and female employees for any work or class of work payable under any instrument, and for the purpose of making the determinations specified in subsection (1) of section 4, the following criteria shall apply: ...

(b) for work which is exclusively or predominantly performed by female employees, the rate of remuneration that would be paid to male employees with the same, or substantially similar, skills, responsibility, and service performing the work under the same, or substantially similar, conditions and with the same, or substantially similar, degrees of effort’.] ‘[5] Equal pay is defined under the Act [in s 2] as:

a rate of remuneration for work in which rate there is no element of differentiation between male employees and female employees based on the sex of the employees.

‘[6] It is accepted that Terranova pays Ms Bartlett the same wages as it pays its male employees doing the same work. However, what is claimed in effect is that both male and female caregivers are being paid a lower rate of pay than would be the case if care giving of the aged were not work predominantly performed by women.

...
 ‘[11] Terranova now challenges two of the answers given by the Employment Court. The two answers concern the interpretation of s 3(1)(b) of the Act. Section 3(1)(b) sets out the criteria to be applied in determining whether an element of sex-based differentiation exists in wage rates being paid for work that is exclusively or predominantly performed by female employees.

...
 ‘[25] The Act came into force on 20 October 1972. It has remained in force ever since, subject to some amendments. Its key features are as follows:

- (a) it defines equal pay as “a rate of remuneration for work in which rate there is no element of differentiation between male employees and female employees based on the sex of the employees” [s 2].
- (b) It sets out equal pay criteria to be used for two purposes [s 3]. ...

...
 ‘[147] Based in particular on the existence of the two categories in s 3(1), the purpose of the Act and its definition of equal pay, we have reached the preliminary conclusion that the Act is not limited to providing for equal pay for the same or similar work. Our interpretation of the Act’s text leads us to the view that in determining what would be paid to the hypothetical man posited by s 3(1)(b), it may be relevant to consider evidence of wages paid by other employers and in other sectors. Further,

any evidence of systemic undervaluation of the work in question must be taken into account.’ *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437, (2014) 11 NZLR 878 at [5]–[6], [11], [25], [147], per French J; application for leave to appeal dismissed [2014] NZSC 196, [2015] 2 NZLR 437

EQUAL SHARED RESPONSIBILITY

Australia [Family Law Act 1975 (Cth), s 65DAC]. ‘[11] Section 4 of the FLA defines parental responsibility (as used in Pt VII of the FLA) as having the meaning given by s 61B of the FLA. Section 61B of the FLA provides that parental responsibility, in relation to a child, means all the duties, powers, responsibilities and authority, which by law, parents have in relation to children.

‘[12] Section 65DAC of the FLA deals with the effect of a parenting order that provides for shared parental responsibility about major long-term issues and is as follows:

- (1) This section applies if, under a parenting order:
 - (a) 2 or more persons are to share parental responsibility for a child; and
 - (b) the exercise of that parental responsibility involves making a decision about a major long-term issue in relation to the child.
- (2) *The order is taken to require the decision to be made jointly by those persons.*

Note: Subject to any court orders, decisions about issues that are not major long-term issues are made by the person with whom the child is spending time without a need to consult the other person (see section 65DAE).

- (3) The order is taken to require each of those persons:
 - (a) to consult the other person in relation to the decision to be made about that issue; and
 - (b) to make a genuine effort to come to a joint decision about that issue.
- (4) To avoid doubt, this section does not require any other person to establish, before acting on a decision about the child communicated by one of those persons, that the decision has been made jointly. [Emphasis added.]

...

‘[17] Although the FLA defines the terms “parental responsibility” and describes what “shared parental responsibility” requires, the phrase “equal shared parental responsibility” is not defined. That is because the word “equal” does not really require further definition. Equal is a word like “unique” or “pregnant”. Something is either equal or it is not equal. As I have said earlier, parental responsibility is defined as all the duties, powers, responsibilities and authority by which, by law, parents have in relation to children. Equal shared parental responsibility means that each parent equally has all of those things.

‘[18] Section 61C of the FLA provides if there is no contrary court order, each parent has parental responsibility. When that type of equal parental responsibility is exercised, it need not be described as “shared”, as decisions about major long-term issues can be made either jointly or independently.

‘[19] “Equal shared parental responsibility” can only be created by court order. The expression “equal shared parental responsibility” is prone to being used loosely when orders are framed. It is important to understand the work that the phrase “equal shared parental responsibility” does in the FLA when considering using those words in an order. The expression only appears in Pt VII of the FLA in ss 61DA, 61DB, 65D and 65DAA. Of those provisions, ss 61DA and 65DAA are of most relevance in this discussion.

...

‘[29] I conclude that an order for equal shared parental responsibility should not be made unless all decisions about all major long-term issues are to be made jointly by parents. If only some are to be made jointly, then the preferable expression to use is “shared parental responsibility” for those decisions.’ *Pavli v Beffa* [2013] FamCA 144, (2013) 48 Fam LR 677 at [11]–[12], [17]–[19], [29], per Watts J

EQUITY—EQUITABLE

[For 16(2) Halsbury’s Laws of England (4th Edn) (Reissue) paras 404–405 see now 47 Halsbury’s Laws of England (5th Edn) (2014) paras 4–5.]

Equitable charge

[For 32 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 306 see now 77 Halsbury’s

Laws of England (5th Edn) (2016) para 106.]

Equitable execution

[For 17(1) Halsbury's Laws of England (4th Edn) (Reissue) para 332 et seq see now 12A Halsbury's Laws of England (5th Edn) (2015) para 1492 et seq.]

Equitable interest

[For 39(2) Halsbury's Laws of England (4th Edn) (Reissue) para 46 see now 87 Halsbury's Laws of England (5th Edn) (2017) para 100.]

Equity of redemption

[For 32 Halsbury's Laws of England (4th Edn) (2005 Reissue) para 307 see now 77 Halsbury's Laws of England (5th Edn) (2016) para 107.]

Equity security

[The Companies Act 1985, s 94 has been repealed. See now the definition in the Companies Act 2006, s 560(1), as follows: 'equity securities' means: (a) ordinary shares in the company, or (b) rights to subscribe for, or to convert securities into, ordinary shares in the company.]

Equity share capital

[The Companies Act 1985, s 744 has been repealed. See now the similar definition in the Companies Act 2006, s 548.]

ERROR, IRREGULARITY OR OMISSION

Canada '3. The sole issue on appeal concerns the interpretation of a verification of account clause (the "Verification Clause") in a banking agreement between the parties that was in force when various cheques were improperly drawn on SNS' account with the Bank by an SNS employee who forged the signature of SNS' authorized signing officer on the cheques.

...
'5. SNS sued the Bank for recovery of the amount of the forged cheques that were debited to its account by the Bank, relying on s 48(1) of the *Bills of Exchange Act*, RSC 1985, c B.4. Under that provision, "where a signature on a bill of exchange is forged, or placed thereon without the authority of the person whose signature it purports to be, the forged or

unauthorized signature is wholly inoperative ...".

'6. The Bank defended the action, arguing that the Verification Clause provided a complete defence to SNS' claim. The trial judge disagreed. He held, in effect, that the Verification Clause did not apply to forged cheques because the honouring of a forged cheque did not constitute an "error, irregularity or omission" within the meaning of those terms as used in the Verification Clause.

'7. We agree that the Verification Clause does not afford a valid defence to the Bank in this case, although for reasons that differ somewhat from those of the trial judge.

...
'9. The Verification Clause does not refer expressly to forged cheques or otherwise to cheques debited to a customer's account for improper purposes or by illegal means. Further, the terms "error", "irregularity" and "omission" are not defined in the Verification Clause. Nor is their meaning clear on a plain reading of the Verification Clause as a whole. Thus, the meaning of these terms is not apparent on the face of the Verification Clause. Certainly, the scope of these terms would not be self-evident to many, if any, customers of the Bank without clarification or explanation. It is difficult to conceive, therefore, absent evidence to the contrary that does not exist in this case, that both parties intended, when the banking agreement was entered into, that the Verification Clause would extend to forged cheques honoured by the Bank.

'10. Obviously, the Bank was free to include a specific definition or other clarification of these terms in the Verification Clause if it wished to do so. Indeed, the evidence at trial, and the Bank's own pleading, established that the Bank included specific reference to forgery—albeit in the context of cheque endorsements—in a subsequent version of a verification of account clause in a later banking agreement with this same customer—SNS.

...
'14. Verification of account clauses of the type at issue here form part of the Bank's standard form account documents prepared by the Bank to govern its relations with its customers. We agree with SNS that clauses of this kind are to be construed strictly and, in the event of any ambiguity, against the Bank, as the author of the clause, in accordance with the doctrine of *contra preferentem*: see [Dunn v. Chubb Insurance Company of Canada (2009), 97 OR (3d) 701 (CA)], at para 36.

'15. A forged cheque is not simply a bill of

exchange that does not conform with requisite formalities. As properly acknowledged by the Bank before this court, it is an invalid cheque for want of proper authorization. By operation of s 48(1) of the *Bills of Exchange Act*, except for specific circumstances that are inapplicable here, a forged signature on a cheque is “wholly inoperative”. It might reasonably be expected, therefore, that any intention by the parties to include forged cheques in the ambit of the Verification Clause would have been stated in clear and unambiguous language. That did not occur in this case.

‘16. In all these circumstances, we are not persuaded that the Verification Clause operates in this case to afford the Bank a defence to SNS’ claim. The trial judge was therefore correct to hold that the Verification Clause did not exempt the Bank from liability under s 48(1) of the *Bills of Exchange Act*. We endorse the trial judge’s observation that, on this record, it appears that “[no one] on either side gave the verification agreement a thought”.’ *SNS Industrial Products Ltd v Bank of Montreal* [2010] OJ No 2934, 2010 ONCA 500, Ont CA, at paras 3, 5–7, 9–10, 14–16, per JC MacPherson, EA Cronk and A Karakatsanis JJA

ESCAPE

See also CUSTODY

From lawful custody

[Whether a prisoner on temporary release who failed to return to prison at the expiry of the period of release under the Prison Rules 1999, SI 1999/728, r 9 could be guilty of the common law offence of escape from lawful custody.] ‘[3]... Rule 9 of the Prison Rules 1999, SI 1999/728, headed “Temporary release”, by para (1) provides for the Secretary of State to “release temporarily a prisoner to whom this rule applies” in various circumstances specified in para (3) of the rule.

‘[4] The appellant was granted temporary release under r 9. We do not have very much information about the nature of the release arrangement, but apparently he was released each morning to go to some form of employment, being one of the circumstances identified under para (3). We are told in a letter from the governor of the prison that he was “not under any form of supervision”, but we were told by counsel that he was obliged to return to the prison at a specified time each evening.

‘[5] On the evening of 2 April 2006 the

appellant did not return to prison at the appointed time. He remained at large until 19 May, when he was observed by chance by a police officer and arrested. He was charged with escape from lawful custody. On the advice of counsel he pleaded guilty, and he was sentenced at Woolwich Crown Court to a term of eight months’ imprisonment, to run consecutively to the term which he was already serving. He has since received advice that the admitted facts did not disclose the offence charged. If that advice is correct, the original advice which he received at the time that he entered his plea was wrong and the Crown properly accepts that this would be one of those exceptional cases where the court should entertain an appeal notwithstanding the appellant’s plea of guilty.

‘[6] The issue for us is thus simply whether a prisoner on temporary release in the circumstance set out above who fails to return to prison at the expiry of the period of release is guilty of the offence of escape from lawful custody.

‘[7] The ingredients of the offence of escape from lawful custody were authoritatively established by this court in *R v Dhillon* [2005] EWCA Crim 2996, [2006] 1 WLR 1535.... David Steel J, delivering the judgment of this court, conducted a thorough review of the authorities and summarised their effect at para [21] of his judgment in the following terms:

“In our judgment, these authorities demonstrate that the prosecution must in a case concerning escape prove four things: i) that the defendant was in custody; ii) that the defendant knew that he was in custody (or at least was reckless as to whether he was or not); iii) that the custody was lawful; and iv) that the defendant intentionally escaped from that lawful custody.”

...

‘[8] It will be seen that although the summary of the ingredients of the offence provides an invaluable starting point the specific problem which arose in *R v Dhillon* was different from the issue in the instant case, which is essentially whether, on the undisputed facts, the appellant is to be regarded as having been “in custody” in the period immediately prior to, or at the moment of, his non-return; in other words, whether the first ingredient identified by David Steel J is present. As to that, there is very little guidance in the cases. With commendable diligence Mr Levy has unearthed and discussed in his advice in support of the appeal a number of authorities in which various

issues in relation to the applicability of the offence were dealt with, in particular *R v Allan* (1841) Car & M 295; *R v Hinds* (1957) 41 Cr App Rep 143; *R v Timmis* [1976] Crim LR 129, *R v Frascati* (1981) 73 Cr App Rep 28; *Nicoll v Catron* (1985) 81 Cr App Rep 339; *R v Moss and Harte* (1985) 82 Cr App Rep 116 and *R v Reader* (1986) 84 Cr App Rep 294. He has also referred us to the definition of “escape” set out in the 1795 edition of Hawkins’ *Pleas of the Crown* (7th edn) vol III, Ch 18, p 242, namely that the offence is committed—

“if the party were lawfully in prison for any cause whatsoever, whether criminal or civil, and whether he were actually in the walls of a prison ... or in the custody of any person who had lawfully arrested him.”

None of these authorities, however, concern the position of a prisoner on temporary release or in any close analogous situation. Nor do they contain any relevant discussion of principle. There are only three cases which it seems to us do offer some assistance, which we will consider in turn.

...
 ‘[14] In our view the conception underlying the decisions in the cases to which we have referred, and also s 13(2) of the [Prison Act 1952], is that a person may be in custody, notwithstanding that he is not physically confined, provided that he is nevertheless under the direct control of—that is in the charge of—a representative of authority. ...

‘[15] On that basis, we do not believe that a person who fails to return to prison at the end of a period of temporary release under r 9 can be said to have escaped from custody. He is not during his period of temporary release in custody, because not only is he not in prison but he is not under the direct or immediate control of any representative of authority. As we have already noted, the governor of the prison has confirmed in the present case that the appellant was under no form of supervision during his release. It is indeed of the essence of “temporary release” from custody that while it lasts the appellant is not in custody. That is what release involves. Of course it is true that the moment of the alleged escape does not occur during the currency of release but only at the point that it comes to an end and the appellant fails to return to custody. From that moment on he should no doubt have been in custody. But we do not think that it can be said that the reason he is not in custody is that he has

“escaped” from it. As a matter of common sense and ordinary language what has happened is not that he has escaped from custody but that he has failed to return to it.’ *R v Montgomery* [2007] EWCA Crim 2157, [2008] 2 All ER 924 at [3]–[8], [14]–[15], per Underhill J

From prison

[For 11(2) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 742 see now 26 Halsbury’s Laws of England (5th Edn) (2016) para 806.]

Rule in *Rylands v Fletcher*

[For 34 Halsbury’s Laws of England (4th Edn) (Reissue) paras 42–43 see now 78 Halsbury’s Laws of England (5th Edn) (2010) paras 150–151.]

ESCHEAT

[For 39(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 254 see now 87 Halsbury’s Laws of England (5th Edn) (2017) para 266.]

ESCROW

[For 13 Halsbury’s Laws of England (4th Edn) (2007 Reissue) para 37 see now 32 Halsbury’s Laws of England (5th Edn) (2012) para 237.]

ESSENTIAL (TERM OF CONTRACT)

Australia ‘[99] ... I am prepared to accept that it is useful to maintain the rule that some contractual terms, limited in number, are so critical to particular contracts that their breach will give rise to an automatic right to terminate. I accept that such terms can be identified and characterised a priori as “essential”. I would not disagree that whether or not a term is to be so characterised is a question to be determined with reference to the actual content of the contract, viewed in the context of the entire commercial relationship between the parties.’ *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61, (2007) 241 ALR 88, BC200710839 at [99], per Kirby J

ESTABLISHED FOR COMMUNITY SERVICE PURPOSES

Australia [Income Tax Assessment Act 1997 (Cth), s 50–10 item 2.1.] ‘[28] The only issue at

trial, and on appeal, was whether in the 2006 year and in the 2007 year, WDCL was “established for community service purposes”. There was no dispute that WDCL was an association, that it met the special conditions in s 50–70 and it was not established for political or lobbying purposes.

‘[29] What then does “established for community service purposes” mean?

‘[30] First, the word *established*. It is past tense. On its face, it would appear that the enquiry to be made about the purposes for which a body was set up is limited to the past or, more particularly, to the time when the body was first established. It was common ground, however, as the trial judge stated, that the issue of whether a body in question was “established” was to be addressed in *each* income year by looking at its activities in that year while at the same time it was relevant to look at the objects or purposes for which the body was incorporated, including the clauses in its memorandum of association or constitution: see *Cronulla Sutherland Leagues Club Ltd v Commissioner of Taxation* (1990) 23 FCR 82 at 89–90 and 116–17 (*Cronulla*) (which considered s 23(g)(iii) of the Income Tax Assessment Act 1936 (Cth), the predecessor to item 2.1 of s 50–10), s 4–1 of the 1997 Act and the explanatory memorandum to cl 6 of the Taxation Laws Amendment Act (No 2) 1990 (Cth). Thus, an entity might be established for the requisite purpose in 1 year, but not another: see *Cronulla* at 89–90 and 116–17. The word *established* therefore means *existing in the year of income*.

‘[31] The next issue is one of characterisation of the purpose for which the body was established. Again, it was common ground that the trial judge was correct to conclude that s 50–10 requires the body be established for a specified purpose. Where that body is established for multiple purposes, the body must have the relevant purpose as its main or dominant purpose and its main or dominant purpose is ascertained by examining the “true character and nature of” the body in question: *Cronulla* at 93–6.

‘[32] These observations about the construction of s 50–10 lead to a close definition of the particular issues on appeal—(1) ascertaining what was the main or dominant purpose for which WDCL was “established” and (2) determining whether that main or predominant purpose was a community service purpose? As noted earlier, the commissioner submitted that although the trial judge correctly accepted that the provision of face-to-face banking for reward

could not amount to a community service purpose within item 2.1 of s 50–10 of the 1997 Act, the trial judge erred when he held that the *facilitation* by WDCL of face-to-face banking for reward in a small country town did amount to a community service. We do not accept the commissioner’s contentions.

‘[33] The trial judge identified the following principles as presently relevant:

- (1) The kind of community service referred to in s 50–10 is a practical or tangible help, benefit or advantage conferred on the community or an identifiable section thereof: *Navy Health Ltd v Federal Commissioner of Taxation* (2007) 163 FCR 1; [2007] FCA 931 at [83] and [84] (*Navy Health*); *Victorian Women Lawyers’ Association Inc v Federal Commissioner of Taxation* (2008) 170 FCR 318 ; 250 ALR 516 ; [2008] FCA 983 at [163] and [164] (*Victorian Women Lawyers’ Association*).
- (2) A service provided for reward is not a community service, at least where there is no element of subsidisation: *Navy Health* at [83].
- (3) Community service purposes include the purpose of providing a community service, although the purposes contemplated are not limited solely to the act of provision. The expression is broad and may extend to encompass any activity whose purpose has a reasonable connection to the delivery of a community service. Facilitation and promotion, therefore, are purposes that are squarely within s 50–10: see the explanatory memorandum to cl 6 of the Taxation Laws Amendment Act (No 2) 1990 (Cth).
- (4) The entity claiming the exemption must be established for those purposes. That requires an analysis of what the entity is doing in the relevant year of income, both as a matter of its constitutive documents, and also by reference to its actual activities: see [30] above.
- (5) The purpose must be the entity’s main or dominant purpose. The existence of other purposes will not lead to a different conclusion so long as a matter of true characterisation, the main or dominant purpose is still reasonably connected to the delivery of a community service: see [31] above.

These propositions were not challenged and should be accepted.

‘[34] Against this background, the task is to ascertain the main or dominant purpose for which WDCL was “established” in each year of income and, then to determine whether that

main or dominant purpose was a community service purpose: see [30], [31] and [32] above.’ *Comr of Taxation v Wentworth District Capital Ltd* [2011] FCAFC 42, (2011) 276 ALR 280 at [28]–[34], per Gilmour and Gordon JJ

ESTABLISHMENT

Of business

New Zealand [Insolvency (Cross-border) Act 2006, Sch 1, arts 2(f), 16(3).] ‘[28] The term “centre of ... main interests” is not defined in the Act. Nor is it defined in the Model Law [UNCITRAL *Model Law on Cross-Border Insolvency*]. In contrast, the term “establishment” is defined [in Sch 1, art 2(f)]:

... *establishment* means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services ...

...

‘[50] A foreign proceeding may be recognised as a non-main proceeding if, at a relevant time, the debtor had an “establishment” in the country of origin of that insolvency proceeding. To bring Mr Simpson within the definition of “establishment” Mr Williams must demonstrate that:

- (a) Mr Simpson has a “place of operations” in England
- (b) where he carries out a non-transitory economic activity
- (c) with human means or goods or services.

...

‘[62] Responsibly, Mr Crossland accepted that the definition of “establishment” was difficult to apply in the context of a retired professional who stated he had been unemployed for 12 or 13 years and was drawing a private pension in the United Kingdom, as well as New Zealand superannuation. Nevertheless, he submitted that Mr Simpson did have an “establishment” in England.

...

‘[64] Like s 1502(2) of the US Bankruptcy Code, art 16(3) of sch 1 uses the present tense. Both provisions have their origin in art 2(f) of the Model Law. In New Zealand, having also adopted the latter part of the Model Law’s definition of “establishment” (with “human means and goods or services”) there is a more compelling case for taking the same approach to the interpretation of “establishment”.

‘[65] It is true that English law permits a creditor to present a petition against a debtor based on that person having “carried on business in England and Wales”. However, the use of the *present* tense in art 16(3) militates against a conclusion, based on a ground on which a bankruptcy petition might be presented in England, that is expressed in the *past* tense. In other words, while under English law, Mr Simpson is subject to the bankruptcy laws of that country, on the basis that he is still in the process of winding up his business activities, that is not a reason for holding that he, *in fact*, has a place of operations in England or Wales from which he (presently) “carries out a non-transitory economic activity with human means and goods or services”. On the facts, such a conclusion would be a mere fiction.’ *Williams v Simpson* [2011] 2 NZLR 380 at [28], [50], [62], [64]–[65], per Heath J

ESTATE

[For 39(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 2 see now 87 Halsbury’s Laws of England (5th Edn) (2017) para 2.]

Estate or interest

[Landlord and Tenant Act 1985, s 11(1A)(a). Repairing covenant implied into a subtenancy of a residential flat.] ‘[14] In a case such as this, where the “dwelling-house” in question forms “part only of a building”, s 11(1A)(a) requires s 11(1)(a) to be read as if it required a landlord “to keep in repair the structure and exterior of any part of the building in which [he] has an estate or interest”. As Lewison LJ said in para [6] of his judgment, when discussing the argument then advanced by counsel then appearing for Mr Kumarasamy:

“He argues that the extended covenant only applies to a part of the building in which Mr Kumarasamy has an estate or interest. The word ‘building’ in section 11(1A)(a) is not defined, and should be given its ordinary dictionary meaning of ‘structure with a roof and walls’. The paved area in which Mr Edwards sustained his accident does not fall within this definition. I agree that, viewed on its own, the paved area where Mr Edwards tripped is not itself a building. But that is not the statutory question. The statutory question is whether the paved area is part of *the structure or exterior* of part of the building in which

Mr Kumarasamy has an estate or interest... In my judgment Mr Kumarasamy's legal easement over the front hall means that the front hall is a part of a building in which he has an estate or interest.'

'[15] In the light of that analysis this appeal raises three questions. The first is whether, to quote again from Lewison LJ, "the paved area which leads from the front door to the car park [can] be described as part of the exterior of the front hall" within s 11(1A)(a). The second question is whether Mr Kumarasamy had an "estate or interest" in the front hall within s 11(1A)(a). The third question is whether Mr Kumarasamy could be liable to Mr Edwards for the disrepair in question notwithstanding that he had had no notice of the disrepair in the paved area before Mr Edwards's accident.

...
'[23] Under the Headlease, Mr Kumarasamy was granted a right of way over the front hall, and, as a matter of property law, a right of way over land constitutes an interest in that land, although it does not constitute an estate in that land—see sub-ss (1), (2)(a) and (3) of s 1 of the Law of Property Act 1925. It is true that the subsequent grant of the Subtenancy effectively deprived Mr Kumarasamy of any practical benefit from the easement so long as it continued. However, that does not alter the fact that, just as he retained his leasehold interest in the Flat, he retained his leasehold easement over the front hall, even though he had sublet the Flat and the easement to Mr Edwards (and any doubt about this is put to rest by s 1(5) of the 1925 Act). Therefore, there is obvious force in the argument, which Lewison LJ had little hesitation in accepting, that Mr Kumarasamy had an "interest" in the front hall (and indeed in the paved area), within the meaning of s 11(1A)(a).

'[24] On behalf of Mr Kumarasamy, it is argued that, at least for the purposes of s 11(1A)(a), he nonetheless did not have an "interest" in the front hall once he had effectively disposed of that right of way to Mr Edwards under the Subtenancy. There is obvious practical attraction, at least at first sight, in the contention that [it] is unlikely that Parliament can have intended that the headlessee of a single flat, whose interest in the common parts is simply as a means of access to and egress from the flat, should have an implied liability to his subtenant of the flat to repair the common parts. After all, during the currency of the subtenancy, the headlessee will have little reason to go onto the common parts and will enjoy very limited, if any, rights of any practical

value over them in his own right, because, when he visits the flat, it will normally be as an invitee of the subtenant.

'[25] However, on closer analysis, I do not consider that contention can be right. First, there would have to be a powerful reason not to give the word "interest", when it appears in a property statute, its normal meaning in law. Secondly, if the word is to be given a limited meaning, it is hard to identify a satisfactory way to cut it down, which is consistent with the general policy of s 11. The only possible way of excluding the common parts of the Building in the present case from the ambit of Mr Kumarasamy's statutory liability to Mr Edwards, would be to limit the word "interest" to an interest in possession. However, quite apart from the fact that this would involve reading words into a statute when it does not appear to be necessary, such an interpretation would scarcely be consistent with the liability of a landlord under sub-ss 11(1)(a) and 11(1A)(a), which impose repairing obligations for items demised to the tenant, which, *ex hypothesi*, are not in the possession of the landlord.

'[26] Thirdly, if the headlessee has no liability to a subtenant for disrepair in the common parts, the subtenant would be without any contractual remedy for damage suffered as a result of such disrepair ...

'[27] Fourthly, quite apart from his rights against the headlessor, it is not as if the headlessee would be without protection in such a case. ...' *Edwards v Kumarasamy* [2016] UKSC 40, [2017] 2 All ER 624 at [14]–[15], [23]–[27], per Lord Neuberger P

ESTOPPEL

[For 16(2) Halsbury's Laws of England (4th Edn) (Reissue) para 951 see now 47 Halsbury's Laws of England (5th Edn) (2014) para 301.]

Agency by

[For 2(1)1 Halsbury's Laws of England (4th Edn) (Reissue) para 40 see now 1 Halsbury's Laws of England (5th Edn) (2008) para 25.]

Approbation and reprobation

[For 16(2) Halsbury's Laws of England (4th Edn) (Reissue) para 962 see now 47 Halsbury's Laws of England (5th Edn) (2014) para 312.]

By deed

[For 16(2) Halsbury's Laws of England (4th Edn) (Reissue) para 954 see now 47 Halsbury's Laws of England (5th Edn) (2014) para 304.]

In pais

[For 16(2) Halsbury's Laws of England (4th Edn) (Reissue) para 955 see now 47 Halsbury's Laws of England (5th Edn) (2014) para 305.]

Per rem judicatam or by record

[For 16(2) Halsbury's Laws of England (4th Edn) (Reissue) para 953 see now 47 Halsbury's Laws of England (5th Edn) (2014) para 303.]

Promissory estoppel

[For 16(2) Halsbury's Laws of England (4th Edn) (Reissue) para 958 see now 47 Halsbury's Laws of England (5th Edn) (2014) para 308.]

ESTOVERS

[For 6 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 474 see now 13 Halsbury's Laws of England (5th Edn) (2017) para 358.]

ESTRAYS

[For 12(1) Halsbury's Laws of England (4th Edn) (Reissue) para 372 see now 29 Halsbury's Laws of England (5th Edn) (2014) para 286.]

EVENTS

The events

Canada [Securities Act, RSBC 1996, c 418, s 159: all proceedings under the Act 'must not be commenced more than 6 years after the date of the events that give rise to the proceedings'.] '3. At issue in this appeal is whether, for purposes of s. 161(6)(d), "the events" that trigger the six-year limitation period in s. 159 are (i) the underlying misconduct that gave rise to the settlement agreement or (ii) the settlement agreement itself. The Commission takes the position that the settlement agreement is the triggering event. On that basis, it commenced secondary proceedings against the appellant after she entered into a settlement agreement with another regulator, even though the underlying misconduct referred to in that agreement occurred roughly nine years earlier.

Had the Commission adopted the alternative interpretation, as the appellant argues it should have, the secondary proceeding would have been commenced outside the six-year limitation period and thus been statute-barred.

'4. Applying the governing standard of review, which I consider to be reasonableness, I am satisfied that the Commission's interpretation is a reasonable construction of the relevant statutory language. Significantly, the Commission's conclusion supports the legislative objective of facilitating interjurisdictional cooperation in secondary proceedings and does so without undercutting the crucial role of limitation periods. Accordingly, I see no reason to interfere and would dismiss the appeal.

... '34. In a nutshell, the appellant argues that s. 161(6) merely "codifies the [Commission's] already-existing ability to rely on convictions, findings, orders, or agreements as *evidence* of a person's conduct contrary to the public interest" (A.F., at para. 40 (emphasis in original)). The law is clear that the Commission could—and did—issue reciprocal orders using its existing power under s. 161(1) on the strength of factual findings in other jurisdictions prior to the introduction of s. 161(6); see, e.g., *Woods (Re)*, 1997 LNBCSC 11 (QL), at p. 5 (where the Commission relied on "the findings of fact and law of the Ontario courts, and the enforcement orders made by the Ontario Securities Commission"); *Seto (Re)*, 2006 BCSECCOM 569 (CanLII), at para. 4 (where the Commission drew the facts "solely from the decision and order of the [Alberta Securities Commission] and the judgment of the Alberta Provincial Court").

'35. In those earlier cases, "the events" meant the underlying misconduct—and no one suggests otherwise. As such, the Commission's choice to rely on the "procedural shortcut" reflected in s. 161(6)(d) does not change the nature of the proceedings such that the *agreement* becomes the *event* (A.F., at para. 40). Rather, because s. 161(6)(d) must be fused with s. 161(1), the proceedings remain s. 161(1) proceedings—and "the events" must thus remain the underlying misconduct.

'36. The respondent says that the appellant's argument is untenable because the plain wording of s. 161(6) says nothing about decisions, orders, or settlement agreements being admissible as "evidence". Rather, "the provisions empower the Commission to make an order in specific circumstances (*i.e.*, if a person is subject to another regulator's order or has agreed to be subject to sanctions)" (R.F., at

para. 53). Because securities investigations do not always conclude within the six-year window, the purpose of s. 161(6)(d) would be undermined if the Commission were “barred from making an order in any case where the extra-provincial proceeding concludes more than six years after the date of the wrongdoer’s misconduct” (R.F., at para. 84). Put simply, on the appellant’s interpretation, the limitation period could expire before the event referred to in s. 161(6)(d) ever occurs—and that would all but defeat the purpose of the provision.

‘37. For the reasons that follow, I conclude that both interpretations are reasonable. Here, the statutory language is less than crystal clear. Or, as Professor Willis once put it, “the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning” (J. Willis, “Statute Interpretation in a Nutshell” (1938), 16 *Can. Bar Rev.* 1, at pp. 4–5, cited in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 30).

‘42. Beginning with the ordinary meaning of “the events”, on the surface it would appear that “the even[t]” giving rise to a proceeding under s. 161(6)(d) is the fact of “ha[ving] agreed with a securities regulatory authority” to be subject to regulatory action. By ordinary meaning, I refer simply to the “natural meaning which appears when the provision is simply read through” (*Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735). The ordinary meaning would thus appear to support the Commission’s interpretation.

‘43. However, satisfying oneself as to the ordinary meaning of the phrase “is not determinative and does not constitute the end of the inquiry” (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 48). Although it is presumed that the ordinary meaning is the one intended by the legislature, courts are obliged to look at other indicators of legislative meaning as part of their work of interpretation. That is so because

[w]ords that appear clear and unambiguous may in fact prove to be ambiguous once placed in their context. The possibility of the context revealing a latent ambiguity such as this is a logical result of the modern approach to interpretation.

(*Montréal (City) v. 2952–1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at para. 10)

‘44. That possibility is realized here. Though

the ordinary meaning seems apparent enough, digging deeper into the context and purpose of the provision casts some doubt on that conclusion—and introduces the possibility of another reasonable interpretation.

...
‘70. A review of the ordinary meaning, the context, and the purpose of both ss. 159 and 161(6) reasonably supports the conclusion that “the even[t]” giving rise to a proceeding under s. 161(6)(d) is the fact of “ha[ving] agreed with a securities regulatory authority” to be subject to regulatory action. That is not to say that the appellant’s interpretation is not a reasonable alternative. But as I have said, when faced with two competing reasonable interpretations that result from a lack of clarity in its home statute, the Commission, with the benefit of its expertise, is entitled to choose between them. Courts must respect that choice.

...
‘74. KARAKATSANIS J.:—I agree with Justice Moldaver’s proposed disposition of this appeal and with much of his analysis. I accept his conclusion that the British Columbia Securities Commission was reasonable in interpreting the limitation period contained in s. 159 of the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418, to require that secondary proceedings under s. 161(6) of the Act must be initiated within six years of a person being sanctioned in another jurisdiction, not within six years of the underlying misconduct.

‘75. However, I part company with my colleague when he suggests that the opposite interpretation urged by the appellant—that the limitation period runs from the time of the underlying misconduct, not the Ontario Securities Commission order—is also reasonable. I do not agree.’ *McLean v. British Columbia (Securities Commission)* 2013 SCC 67, [2013] 3 SCR 895 at paras 3–4, 34–37, 42–44, 70, per Moldaver J and at paras 74–75, per Karakatsanis J.

EVICITION

[For 27(1) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 271 see now 62 Halsbury’s Laws of England (5th Edn) (2016) para 265.]

EVIDENCE

[For 17(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 402 see now 12 Halsbury’s Laws of England (5th Edn) (2015) para 685.]

Best evidence

[For 17(1) Halsbury's Laws of England (4th Edn) (Reissue) para 412 see now 12 Halsbury's Laws of England (5th Edn) (2015) para 694.]

Hearsay evidence

[For 17(1) Halsbury's Laws of England (4th Edn) (Reissue) para 415 see now 12 Halsbury's Laws of England (5th Edn) (2009) para 697.]

Secondary evidence

[For 17(1) Halsbury's Laws of England (4th Edn) (Reissue) para 413 see now 12 Halsbury's Laws of England (5th Edn) (2015) para 695.]

EVIDENCE AND PROCEDURE

[Proper law of tort. Parliament and Council Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (OJ 2007 L199, p 40) (Rome II), art 1(3).] [39] The relevant provision. Article 1.3 of Rome II provides: "This Regulation shall not apply to evidence and procedure, without prejudice to Articles 21 and 22." The parties disagree about what "evidence and procedure" means in this context.

[40] The rival contentions. The rival contentions are as follows.

- (i) The claimant contends that the phrase "evidence and procedure" in art 1(3) of Rome II should be given its normal meaning. Accordingly the court in the present case should follow normal English procedure in determining the extent of the claimant's injuries and the amount of his financial losses (in so far as those categories of loss are recoverable under French law). This will entail receiving expert evidence from numerous different disciplines.
- (ii) The defendant contends that the phrase "evidence and procedure" in art 1(3) of Rome II should be construed narrowly. Accordingly the court in the present case should not follow normal English procedure in determining the extent of the claimant's injuries and the amount of his financial losses (in so far as those categories of loss are recoverable under French law). Instead the court should only receive limited expert evidence. The principal expert evidence should be a French style medico-legal opinion.

[41] My view. In my view the claimant's contention is correct. I reach this conclusion for two reasons.

[42] First, the claimant's interpretation accords with the natural meaning of art 1(3). The defendant's interpretation involves imposing a strained and artificial construction on the provision. The policy argument for doing so, namely that this will achieve an outcome as near identical as possible to the decision of a French court, is unconvincing.

[43] Secondly, it is unrealistic and inefficient to expect courts to adopt the evidential practices of a different jurisdiction when determining questions of fact. The courts of each European jurisdiction have developed evidential practices with which both their judges and practitioners are comfortable. Germany, for example, has developed the "Relationsmethode", in which the judge exercises a high degree of control over the evidence to be received as the case develops. The Netherlands have a different procedure, although there too the judge takes a dominant role in the questioning of any oral witnesses. France has the procedures described by the experts in this case. If an Englishman is injured in one of those jurisdictions and sues there, it is inconceivable that the local courts will meekly adopt English evidential practices. There is no way that those courts would countenance several days of oral evidence and extensive cross-examination of experts in order to assess quantum of damages. The judges and practitioners do not have the requisite experience to adopt our evidential practices. We do not have the requisite experience to adopt theirs.

[44] The costs rules of each jurisdiction are linked to the evidential practices. Germany, for example, has a scheme of fixed costs for all categories of litigation. ... A scale of fees is prescribed according to the type of case, the sum in issue and the stage at which it is resolved. For example, in a commercial claim for EUR 30m, the costs payable by the losing party at trial are EUR 558,510.50. This statutory costs regime would become unworkable if the German courts were suddenly required to adopt English evidential practices.

[45] Conclusion. In the present case the court should follow English evidential practices. Accordingly the court should follow its usual practice in relation to receiving expert evidence concerning the extent of the claimant's injuries, the amount of the claimant's financial losses (in so far as such losses are recoverable under French law) and similar matters.' *Wall v Mutuelle de Poitiers Assurances* [2014] EWCA

Civ 13,8 [2014] 3 All ER 340 at [39]–[45], per Jackson LJ

EXCEPT (VERB)

Australia [Migration Act 1958 (Cth), s 9A(6): power to make a determination to ‘except’ an operation or an activity for the purposes of s 9A(5)(a) and (b).] ‘[65] First, s 9A(1) effectively creates a rule or proposition that a person who is engaged in an offshore resources activity as defined in s 9A(5) is deemed to be in the migration zone. That rule or proposition operates by reference to the definition of offshore resources activity in s 9A(5). The deeming rule applies except where the minister has made a relevant determination under s 9A(6). Section 9A(5)(a) and (b) manifest a clear statement of parliamentary intention to bring within the regulatory ambit of the Act persons who are engaged in operations and activities carried out under the two specified and existing Commonwealth Acts which regulate a large part of Australia’s offshore resources industry. However, the minister has a power to determine exceptions to that state of affairs. In the case of s 9A(5)(c), which relates to other non-specific legislation of the Commonwealth, a state or a territory, any activity, operation or undertaking which is carried out under such legislation is captured by the Act only if the minister so determines. Accordingly, the minister’s power of determination under s 9A(6) operates differently in relation to s 9A(5)(a) and (b) than it does with (c).

‘[66] In our view, particular significance attaches to the fact that the term “except” was deliberately chosen in s 9A(5) in defining “offshore resources activity” by reference to a potentially wide range of operations or activities carried out under the Offshore Petroleum Act or the Offshore Minerals Act *except* an operation or activity determined by the minister under s 9A(6). When used in that context, we consider that the term “except” (which appears in s 9A(5)(a) and (b), but not in s 9A(5)(c)) does not denote that the minister’s power of determination can be exercised so as completely to extinguish the items within the relevant category or class in s 9A(5)(a) or s 9A(5)(b). Indeed, we consider that the term should be given its ordinary meaning, which is reflected in the following extract from *Cockle* [*Cockle v Isaksen* (1957) 99 CLR 155 at 165; [1958] ALR 63] per Dixon CJ, McTiernan and Kitto JJ:

An exception assumes a general rule or proposition and specifies a particular case

or description of case which would be subsumed under the rule or proposition but which, because it possesses special features or characteristics, is to be excluded from the application of the rule or proposition. It is not a conception that can be defined in the abstract with exactness or applied with precision; it must depend very much upon context.

To similar effect, Williams J in *Cockle* at CLR 168 said the following about the concept of an “exception” (which applies equally to the verb “except”):

It is a particular thing or things excepted out of the general thing granted.

‘[67] Having regard to these textual matters, we consider that the minister’s power under s 9A(6) to create an exception to the rule cannot be used to eviscerate a substantial part of the rule by denuding s 9A(5)(a) and (b) of any content. That construction is not avoided by the possibility that the minister might in the future make a determination in relation to s 9A(5)(c) which has the effect of adding a further activity, operation or undertaking to the Act’s regulatory scheme. It is evident that, under the 2013 Amending Act, while the minister was given a power to adjust the particular activities which were captured by the regulatory scheme of the Act by the combined operation of s 9A(1) and (5), it was not intended that the minister could use that power to restore the position which existed when *Allseas* [*Allseas Construction SA v Minister for Immigration and Citizenship* (2012) 203 FCR 200; 290 ALR 295; 127 ALD 88; [2012] FCA 529] was decided.

‘[73] These extracts from the explanatory memorandum support the textual construction of s 9A(6) in [65]–[67] above. In particular, the explanatory memorandum makes it clear that the primary purpose of the amendments was to have the Act apply to foreign workers who are engaged in offshore resource activities or operations, by requiring them to hold specified visas. Recognising, however, that there may need to be some particular exceptions or exemptions from such regulation, the minister was empowered to make a determination to that effect. The parliament’s intention was to confer upon the minister a power to except or exempt particular activities or operations carried out under the Offshore Petroleum Act or Offshore Minerals Act, not to reverse the parliament’s desire and intention to bring within the Act non-citizens who are engaged in operations and

activities under the Offshore Petroleum Act or the Offshore Minerals Act.’ *Australian Maritime Officers’ Union v Assistant Minister for Immigration and Border Protection* (NSD 1004 of 2014) [2015] FCAFC 45, (2015) 321 ALR 155 at [65]–[67], [73], per Gordon, Katzmann and Griffiths JJ

EXCEPTIONAL

Exceptional circumstances

New Zealand [Legal aid travel expenses.] ‘[47] The [Legal Aid Review] Panel based its decision on a distinction between exceptional and special circumstances. However, in none of the cases relating to the guidelines of administrative bodies is there any particular focus on the distinction between exceptional or special circumstances. Banks LJ in *R v Port of London Authority* [ex p *Kynoch Ltd* [1919] 1 KB 176] used the word “exceptional” in the passage cited in *British Oxygen [Co Ltd v Board of Trade* [1971] AC 610]. In *Practical Shooting Institute [Practical Shooting Institute (NZ) Inc v Commissioner of Police* [1992] 1 NZLR 709] Tipping J used the phrase “sufficiently special”.

‘[48] Lord Bingham of Cornhill in *R v Kelly* [1999] 2 All ER 13 at p 20, when construing a reference to “exceptional circumstances”, stated:

“We must construe ‘exceptional’ as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly or routinely or normally encountered.”

‘[49] In *Creedy v Commissioner of Police* [[2008] 3 NZLR 7 (SCNZ)] at para [32] this approach to the meaning of “exceptional” was regarded as in accordance with ordinary English usage. A statement in *Wilkins & Field Ltd v Fortune* (1998) 5 NZELC 95,793 (CA) treating “exceptional circumstances” as those which are “unusual, outside the common run, perhaps something more than special and less than extraordinary” was not followed. The approach in *Creedy* equated the meaning of “exceptional” with the meaning of “special”. It is to be noted, however, that the issue in that case arose in the

different context of s 114 of the Employment Relations Act 2000.

‘[50] It cannot be asserted that confining unfettered discretion to “exceptional” as distinct from “special” circumstances is an unlawful fetter of a public body’s discretion per se. Any decision on the exact meaning of “exceptional circumstances” will always turn on the particular context in which the word “exceptional” is used and the nature of the decision to be made. In this case the threshold of “exceptional” can be seen as connoting no more than an exception to a guideline or rule devised to deal with the ordinary run of cases. It is an adjective, derived from the noun “exception”: a thing excepted from the normal rule. The word does not of itself create an unreasonably high threshold, as the word “extraordinary” might do. In the circumstances of travel expenses, I consider that a discretion limited to “exceptional circumstances” in these guidelines on travel even without the word “special” would be lawful, as it gives the officer the power to depart from the guidelines in the event of the particular merits demanding such a departure. Any particular factor or combination of factors could be sufficient. Indeed, that is expressly indicated at the beginning of the “Exceptional Circumstances” section.

‘[51] I conclude, therefore, that the Panel was wrong to assume that the phrase “exceptional circumstances” created a higher threshold than “special circumstances” and was therefore unlawful. I do not express any view on the lawfulness or otherwise of other uses of the phrase “exceptional circumstances” in other Agency guidelines. Any decision will in the end turn on the words and context of the particular guideline.

‘[52] I conclude, therefore, that the Panel was in error in two respects: first, in its assumption that “exceptional circumstances” was the only basis for the use of the discretion, when the guidelines also provided for special circumstances; and, secondly, in its conclusion that the phrase “exceptional circumstances” fettered the Agency’s discretion to such an extent that it was wrong in law.’ *Legal Services Agency v Sylva* [2009] 1 NZLR 279 at [47]–[52], per Asher J

EXCISE DUTIES

[For 12(3) Halsbury’s Laws of England (4th Edn) (2007 Reissue) para 389 see now 30 Halsbury’s Laws of England (5th Edn) (2012) para 385.]

EXCUSE (NOUN)

Just excuse

New Zealand '[8] There is no authoritative decision providing a definition of what constitutes "just excuse" in terms of s 352 [of the Crimes Act 1961: for a witness not to give evidence].

'[9] Counsel for the witness relied primarily on the approach taken by Williamson J in *R v C T B (No 2)* (High Court, Dunedin, T 16/91, 18 February 1992). In that case the witness was living with the accused and was also the victim of the crime with which he had been charged. She sought to be excused from giving evidence on the basis that it would adversely affect her family's future. By family she included herself, the accused, their two-year-old son, and the child that she was expecting in three months' time. The witness was just 20 years of age at the time. Moreover, her evidence was to the effect that the accused had benefited from counselling and treatment during the lengthy period that had elapsed since the alleged offending.

'[10] Williamson J noted that the Act did not give any guidance to what is meant by just excuse. In concluding that a just excuse had in fact been offered he said at p 2:

"Viewed in the context of overall justice or fairness, from her personal viewpoint I do not consider that the Court can exclude her excuse as being other than a just one. Such a determination must be made, however, not only on the basis of the person offering the excuse but also in the context of an objective assessment. It could well be argued that the task of the law is to consider the circumstances of the community as a whole and that persons who commit offences of the nature alleged in this case are dangerous and consequently that an excuse not to give evidence in relation to such activities could hardly ever be a just one. The decision though must be made in the context of the particular allegations, the overall circumstances, the relationship between the persons and the circumstances of the witness at the time when the refusal to give evidence is made."

'[11] The issue of "just excuse" was considered again, albeit in a different context, by the Court of Appeal in *Controller and Auditor-General v Sir Ronald Davison* [1996] 2 NZLR 278. In that case the Court was considering sections in the Commissions of Inquiry Amendment Act 1995 that empowered a commissioner to impose

sanctions, including detention, on witnesses who, without offering any just excuse, refused to answer questions or produce documents. The "just excuse" offered by the applicants in that case was based on several grounds including reliance on the doctrine of sovereign immunity and exposure to the risks of prosecution in another jurisdiction (the Cook Islands) for failure to comply with the secrecy laws of that jurisdiction. In other words, they claimed protection against self-incrimination.

'[12] Richardson J considered at p 330 that the commissioner needed to take into account several considerations. These included:

- (a) an assessment by the commission of the vital national interests of New Zealand in the inquiry, including New Zealand's international relationships with the Cook Islands and other states;
- (b) the importance to the commission's inquiry of the information sought;
- (c) any alternative means of accessing that information from other sources;
- (d) the nationality and ordinary residence of the prospective witnesses and the location of the document;
- (e) the nature and extent of the witnesses' commercial and personal connections with the Cook Islands; and
- (f) the nature and extent of the risk to the witnesses and any other immediately affected that requiring testimony would impose and personal consequences for them.

'[13] The Court of Appeal therefore took into account a range of competing considerations relating to the adverse affects on the applicants in the event that they were required to give evidence, and the adverse affect on the commission if that evidence was not given.

'[14] The decision in the *Controller and Auditor-General* case was affirmed by the Privy Council in *Brannigan v Sir Ronald Davison* [1997] 1 NZLR 140. Their Lordships considered that the statutory exceptions of "sufficient cause" and "just excuse" provided ample scope for all the circumstances to be taken into account. The Bench said at pp 147-148:

"Inherent in these two expressions, which are synonymous in this context, is the concept of weighing all the consequences of the refusal to give evidence: the adverse consequences to the enquiry if the questions are not answered, and the adverse consequences to the witness if he is compelled to answer."

'[15] In the present case I consider that I must

undertake a similar exercise in which I weigh the adverse consequences to the witness if she is compelled to give evidence against the adverse consequences for the administration of justice if she is not required to do so. ...’ *R v Lologa* [2007] 3 NZLR 844 at [8]–[15], per Lang J

EXECUTION

Irregular or wrongful

[For 17(1) Halsbury’s Laws of England (4th Edn) (Reissue) paras 213, 215 see now 12A Halsbury’s Laws of England (5th Edn) (2015) para 1372 et seq.]

EXECUTOR

[For 17(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 2 see now 103 Halsbury’s Laws of England (5th Edn) (2010) para 606.]

EXIGENT CIRCUMSTANCES

Canada [Controlled Drugs and Substances Act, SC 1996, c 19, s 11(7).] ‘26. Before us, no one disputed that the police officers’ warrantless entry into the appellant’s residence constituted a search. At issue, however, is whether it was justified by “exigent circumstances” making it, within the meaning of s 11(7) of the *CDSA*, “impracticable” to obtain a warrant.

‘30. The appellant’s submission, in essence, is that the definition of “exigent circumstances” found in s 529.3(2) of the *Criminal Code* should be applied to define “exigent circumstances” as it appears in s 11(7) of the *CDSA*. This would have the effect of requiring police to demonstrate either that entry is necessary to prevent imminent bodily harm or death, or that entry is necessary to prevent the imminent loss or destruction of evidence relating to the commission of an indictable offence—neither of which could have been established on the facts known to Constables Dykeman and Bell prior to entry.

‘31. I reject this submission. Section 11 of the *CDSA* lacks the express language of s 529.3(2) limiting its scope, where applied to the preservation of evidence, to *indictable* offences. Parliament, which regularly and expertly legislates pursuant to its criminal law power, could have easily conditioned warrantless searches under s 11(7) in precisely the same terms as contained in s 529.3(2). That it chose not to do so is unsurprising, when s 529.3(2) is

considered alongside other provisions in the *Criminal Code* authorizing warrantless entry—an important consideration, given that statutory interpretation entails discerning Parliament’s intent by examining the words of a statute in their entire context and in their grammatical and ordinary sense, in harmony with the statute’s schemes and objects: *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, at para 21. For example, the general provision on warrantless entry by reason of exigent circumstances (s 487.11) and the provision authorizing warrantless entry to search for and seize firearms or other weapons in exigent circumstances (s 117.02(1)) contain no statutory definition of “exigent circumstances”. In light of those provisions, there is no good reason to believe that Parliament intended the definition of “exigent circumstances” in s 529.3(2) of the *Criminal Code* to be read into s 11(7) of the *CDSA*. I therefore decline the appellant’s invitation to “do by ‘interpretation’ what Parliament chose not to do by enactment” (*Canadian Broadcasting Corp v SODRAC 2003 Inc*, 2015 SCC 57, [2015] 3 SCR 615, at para 53).

‘32. All that said, circumstances in which “exigent circumstances” have been recognized have borne close resemblance to the definitional categories in s 529.3(2). This Court’s jurisprudence considering s 10 of the *Narcotic Control Act*, RSC 1985, c N-1 (which was repealed and replaced by the *CDSA*), which permitted a peace officer to search a place that was not a dwelling-house without a warrant so long as he or she believed on reasonable grounds that a narcotic offence had been committed, is instructive. That provision was held in *R v Grant* [1993] 3 SCR 223 (“*Grant* 1993”), to be consistent with s 8 of the *Charter* if it were read down to permit warrantless searches only where there were exigent circumstances. Such exigent circumstances were then described to exist where there is an “imminent danger of the loss, removal, destruction or disappearance of the evidence if the search or seizure is delayed” (*Grant* 1993, at p 243; *R v Feeney* [1997] 2 SCR 13, at para 153, per L’Heureux-Dubé J, dissenting; and *R v Silveira* [1995] 2 SCR 297, at para 51, per La Forest J, dissenting). Similarly, circumstances in which “immediate action is required for the safety of the police” were also found to qualify as “exigent” (*Feeney*, at para 52; see also, in respect of searches to preserve officer safety, this Court’s statement in *R v MacDonald*, 2014 SCC 3, [2014] 1 SCR 37, at para 32, that such searches will be responsive to “dangerous situations created by individuals,

to which the police must react ‘on the sudden’”). In *Feeney*, at para 47, exigency was also said to possibly arise when police officers are in “hot pursuit” of a suspect (see also *R v Macooh* [1993] 2 SCR 802, at pp 820–821).

‘33. The common theme emerging from these descriptions of “exigent circumstances” in s 11(7) denotes not merely convenience, propitiousness or economy, but rather *urgency*, arising from circumstances calling for immediate police action to preserve evidence, officer safety or public safety. This threshold is affirmed by the French version of s 11(7), which reads “*l’urgence de la situation*”.’ *R v Paterson* [2017] SCJ No 15, 2017 SCC 15 at paras 26, 30–33, per Brown J

EXONERATION

[For 3(2) Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 649 see now 5 Halsbury’s Laws of England (5th Edn) (2013) para 674.]

EXPENSE INCURRED FOR THE BENEFIT OF THE WHOLE ESTATE

[Income and Corporation Taxes Act 1988, s 686(2AA).] ‘[4] It was common ground that the effect of s 686(2AA) of the 1988 Act was that, to the extent that income had been applied in defraying expenses which were properly chargeable to income, that income did not suffer tax at the higher rates applicable to the income of accumulation and discretionary trusts. The dispute between the trustees and the Revenue was whether it was proper for trustees to charge part of certain annual expenses to the income of the trust on the footing that that was what the proper application of the general law as to the incidence of trustees’ expenses required. Put shortly, the trustees contended that, where a particular expense of managing the trust related partly to income, that expense could and should be apportioned fairly between income and capital; so that part was attributed to income. The Revenue contended that apportionment between capital and income was not permissible in such a case: it was only those expenses which related wholly and exclusively to income that could be attributed to income: an expense which related partly to income and partly to capital was to be charged wholly to capital.

‘[21] In their grounds of appeal, annexed to the appellants’ notice, the trustees do not seek to challenge the principle that capital must bear all costs charges and expenses incurred for the

benefit of the whole estate. But it is said on their behalf that the judge was in error in failing to recognise that trustees’ fees and remuneration are in part incurred not for the benefit of capital but for the distinct benefit of income “in so far as it is necessary to get in, account for (and make tax returns of) income as such, and distribute or determine how to deal with the income (depending on the terms of the trust)”, that these are concerns of trustees which do not in any way impinge on capital, and that accordingly part of the burden of such fees and remuneration (not being incurred for the benefit of the whole estate) is not covered by the *Carver v Duncan* principle and should be charged to income. Further, it is said that all costs of dealing with any income should be charged to that income; and that the costs of capitalising income (like costs incurred in distributing income) are themselves costs of dealing with the income in question and should be charged to that income.

‘[22] As I have said it is common ground that expenses incurred “for the benefit of the whole estate” are chargeable to capital. But there is, I think, no true consensus between the parties as to the meaning of the expression “for the benefit of the whole estate”. It is necessary, therefore, to examine the judgments of this court in *Re Bennett, Jones v Bennett* [1896] 1 Ch 778 and the speeches in the House of Lords in *Carver v Duncan* [1985] 2 All ER 645, [1985] AC 1082 in order to understand the sense in which that expression is used.

‘[23] In *Bennett* the principal asset of the deceased’s estate was an unsecured interest-bearing loan to a firm of wine merchants of which he had formerly been a partner. Under the agreement made on his retirement the loan was repayable on demand in the event of the breach of certain conditions intended to ensure the continued solvency of the firm. The question for the court was whether the costs of an annual audit and stock-taking of the debtor firm—which the executor and trustee deemed necessary to enable him to determine whether the conditions had been observed or the loan had become repayable—should be charged against capital or against income. It was held at first instance that expenses already incurred in connection with the first audit and stock-taking should be borne by capital; but that future expenses of that nature should be charged against income. The Court of Appeal took a different view in respect of future expenses. Lindley LJ said this ([1896] 1 Ch 778 at 784):

"... Why is this expense to be thrown upon the tenant for life? *For whose benefit is it incurred? It is really for the benefit of the whole estate*, though the practical effect of throwing it upon the whole estate will be that the tenant for life will lose the income of the sums expended.' (My emphasis.)

Kay LJ was of the same opinion ([1896] 1 Ch 778 at 786):

"Then comes the question out of what should the expense of the examination come—out of capital or out of income? In the first place the object of the provisions in the agreement is to ensure repayment of the capital... Surely [the provision for examination] is a provision which the testator deliberately introduced into this agreement for the purpose of making himself safe as to the repayment of this capital which he had not charged in terms upon the capital of the business. The expense is one in which the persons entitled to the capital ought to share: why then should it all be thrown upon the tenant for life? ..."

And AL Smith LJ said this ([1896] 1 Ch 778 at 787):

"Here the payment is one which the trustee, for the benefit of the tenant for life as well as of the remaindermen, may properly incur in order to see whether the 15,000*l.*, of which the tenant for life receives the present income, and the persons entitled in remainder take the ultimate benefit, is safe or not. It is quite clear, in my judgment that the expenses of these audits *are costs, charges and expenses incurred for the benefit of the whole estate*, and therefore ought to come out of capital and not out of income." (My emphasis.)

'[24] Two points emerge from those passages. First, the annual audit was for the benefit of both life tenant and remaindermen. It was for the benefit of the life tenant (who was entitled to the interest on the loan until repayment; and thereafter to the income derived from the monies repaid) and for the benefit of the remaindermen (who were entitled to capital on the death of the life tenant) that the firm should not default on the loan. Second, the effect of charging the expense of the audit against capital was that both life tenant and remaindermen shared the burden of that expense according to their respective interests. The life tenant bore part of the burden because (as Lindley LJ

explained) she lost the income on the sums expended.

'[25] The expenses under consideration in *Carver v Duncan* included (so far as material in the present context) premiums paid in respect of life assurance policies, and the fees of professional investment managers. The question whether those expenses were chargeable against income arose under s 16(2)(d) of the Finance Act 1973; which, for present purposes, posed a test indistinguishable from that under s 686(2AA)(b) of the 1988 Act. Lord Templeman (with whose speech three other members of the House, Lord Fraser of Tullybelton, Lord Roskill and Lord Brandon of Oakbrook, expressed agreement) explained the nature of those expenses in the following passages ([1985] 2 All ER 645 at 652 and 653, [1985] AC 1082 at 1120 and 1120–1121):

"In the present appeals, the trustees of the Paul settlement paid the annual premiums on assurance policies effected by the trustees in order to obtain policy moneys corresponding to the amount of capital transfer tax payable out of the trust fund in the event of the death of the settlor before 20 November 1979. The trustees of the Devonshire settlement paid the annual premiums on endowment policies assigned to the trustees and on other endowment policies effected by the trustees. All these premiums were paid by the Paul settlement trustees and the Devonshire settlement trustees *for the benefit of the whole of their respective trust funds* because the capital of the trust will be augmented by the policy moneys which will be received if and when the policies mature, and the income of the trust will be increased as and when such augmentation of capital takes place, but not before that event takes place ...

"The Devonshire settlement trustees also paid annual fees to a firm of investment advisers to keep under review and to advise changes in investments comprised in the trust fund. This was a recurrent charge but not an ordinary outgoing *and was incurred for the benefit of the estate as a whole* because the advice of the investment advisers will affect the future value of the capital of the trust fund and the future level of income arising from that capital." (My emphases.)

'[26] It is important to note that, in the paragraphs of his speech which I have just cited, Lord Templeman set out the reason why the

expenses under consideration were incurred for the benefit of ‘the whole of their respective trust funds’ or ‘the estate as a whole’: expressions which, as the context shows, he must be taken to have treated as synonymous with the expression “the whole estate”. In the first of those two paragraphs he explained that the premiums paid in respect of the life assurance policies were for the benefit of the estate as a whole *because* “the capital of the trust will be augmented by the policy moneys which will be received if and when the policies mature, and the income of the trust will be increased as and when such augmentation of capital takes place, but not before that event takes place”. In the second of those paragraphs he explained that the annual fees paid to the investment advisers were for the benefit of the estate as a whole *because* “the advice of the investment advisers will affect the future value of the capital of the trust fund and the future level of income arising from that capital”. As in *Bennett*, the relevant expenses were incurred for the benefit both of the income beneficiaries and of those entitled to capital on the determination of the income trusts.

[27] Lord Templeman then cited the passages from the judgments of Lindley and AL Smith LJ in *Bennett* to which I have already referred. He went on to say this ([1985] 2 All ER 645 at 653, [1985] AC 1082 at 1121):

“*Re Bennett*, which has been accepted law for nearly 90 years, affirms the trust principle that expenditure incurred for the benefit of the whole estate is a capital expense. In accordance with the authorities and in accordance with principle, the premiums paid by the Paul and Devonshire settlement trustees in respect of capital transfer tax protection and on endowment policies and the fees paid to investment advisers were capital expenses and not income expenses.”

[28] In the light of those passages in the judgments in *Bennett* and the speech of Lord Templeman in *Carver v Duncan* it is, I think, beyond argument that an expense is incurred “for the benefit of the whole estate” in the present context when the purpose or object for which that expense is incurred is to confer benefit both on the income beneficiaries and on those entitled to capital on the determination of the income trusts. The expression “expenses incurred for the benefit of the whole estate” must be understood in that sense. It is common ground—and, if it were not, this court would be

bound by the authority of *Carver v Duncan* so to hold—that expenses which are of that nature are to be charged against capital.

[29] It follows, in my view, that it was not open to the Special Commissioners to approach their task on the basis that: “... in the light of the general principle of fairness ‘expenses incurred for the benefit of the whole estate’ should not be understood widely as meaning anything that is for the benefit of both the income and capital beneficiaries should be charged to capital and should not be attributed”: [2007] STC (SCD) 362 at para 17. The judge was correct to hold ([2008] 2 All ER 283 at [36]) that the Special Commissioners had erred in law in that respect. They were required to accept that, under the general law, expenses incurred for the benefit of both the income and capital beneficiaries must be charged against capital. It is only those expenses which are incurred exclusively for the benefit of the income beneficiaries that may be charged against income.’ *Revenue and Customs Commissioners v Trustees of the Peter Clay Discretionary Trust* [2008] EWCA Civ 1441, [2009] 2 All ER 683 at [4], [21]–[29], per Sir John Chadwick

EXPENSE INCURRED FOR THE BENEFIT OF THE WHOLE ESTATE

[For the Income and Corporation Taxes Act 1988, s 686(2AA) see now the Income Tax Act 2007, s 484(5).]

EXPENSES

[Courts and Legal Services Act 1990, s 58(2)(a): conditional fee agreements.] [35] With that policy in mind, it is necessary to turn to the legislation. Section 58 of the Courts and Legal Services Act 1990 (as amended) makes CFAs lawful. A CFA is defined by s 58(2)(a) as “an agreement with a person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances”. The term “expenses” is not defined by the Act and at the core of this appeal has been its true meaning. Mr Carpenter for the solicitors, supported by Mr Holland QC for the Law Society, argues that as a matter of ordinary language and on authority the word “expenses” includes own side’s disbursements; Mr Brown for the insurers argues that, as a matter of principle and established use, a disbursement is to be distinguished from a solicitor’s expense, which

has important and practical implications in areas such as VAT.

‘[36] Mr Brown argues that because disbursements are not included within the permissible category of costs, they cannot be made the subject of payment by the client conditional on success. That is not to say that the solicitor must insist on prepayment of disbursements by the client; the agreement, however, must require the client to remain responsible for them (whether or not the solicitor goes to the trouble and expense of pursuing repayment if the client, having lost his action, is impecunious). Mr Carpenter and Mr Holland argue that as a matter of ordinary language, once the solicitor has paid the cost of a disbursement (such as a court fee or a medical report) it becomes an expense and can be subject to a prior agreement that it will not have to be reimbursed (as opposed to a subsequent decision that it is not worth pursuing). This distinction can be remarkably fine: if photocopying of the court bundle is done in-house, it is a cost to the solicitor; if it is sent out to a copying firm, it is a disbursement.

‘[38] Mr Brown took the court to different examples of the use of the terms “expenses” and “disbursements” but it seems to me that the phrase “fees and expenses” must be construed in the context of the legislation in which it appears. On the face of it, once it is conceded (as seems to me is inevitable) that the solicitor does not have to be in funds before incurring costs (such as the obtaining of a medical report), that cost has been borne by the solicitor (at least for the time being) and becomes an expense of providing advocacy or litigation services. To put it another way (which may be more relevant to the precise question which has to be answered), the cost may have to be the subject of an account to the client as a disbursement but the credit afforded to the client in respect of that cost is part of the service provided by the solicitor to his client.

‘[45] In my judgment, therefore, the legislation does visualise the possibility that a solicitor might fund disbursements and, in that event, it would not be right to conclude that such a solicitor was “the real party” or even “a real party” to the litigation. As for the policy imperative argued by Mr Brown, after the event insurance is not a prerequisite of bringing a claim on a CFA (see *King v Telegraph Group Ltd*, *Practice Note* [2004] EWCA Civ 613 at [100], [2005] 1 WLR 2282 at [100] and the *Floods of Queensferry* case [*Floods of*

Queensferry Ltd v Shand Construction Ltd [2002] EWCA Civ 918, [2003] Lloyd’s Rep IR 181] at [37]). The fact that a litigant can (or cannot) afford an expert report or the court fee says nothing about his or her ability to fund the costs incurred by opponents in an unsuccessful claim and, indeed, Eady J (at [25]) recognised that the solicitor could advance disbursements with a technical (albeit improbable) obligation for repayment.

‘[46] That much is also clear from the fact that solicitors are entitled to act on a normal fee or conditional fee for an impecunious client whom they know or suspect will not be able to pay own (or other side’s costs) if unsuccessful (see *Morris v Southwark London BC (Law Society intervening)*, *Sibthorpe v Southwark London BC (Law Society intervening)* [2011] EWCA Civ 25 at [50], [2011] 2 All ER 240 at [50], [2011] 1 WLR 2111, *Awad v Geraghty & Co (a firm)* [2000] 1 All ER 608 at 623, [2001] QB 570 at 588, *Dolphin Quays Development Ltd v Mills* [2008] EWCA Civ 385 at [75], [2008] 4 All ER 58 at [75], [2008] 1 WLR 1829.

‘[47] In those circumstances, contrary to the submissions of Mr Brown, I agree with the issue of principle advanced by the Law Society (and Mr Carpenter) that payment of disbursements, without more, does not incur any potential liability to an adverse costs order. That, however, is not an end of this appeal because the issue in fact decided by Judge Maloney and Eady J was not to order costs but, rather, to order disclosure of information prior to the insurers considering whether to apply for an order of costs. That is a different question and requires separate consideration.’ *Flatman v Germany; Weddall v Barchester Health Care Ltd* [2013] EWCA Civ 278, [2013] 4 All ER 349 at [35]–[36], [38], [45]–[47], per Leveson LJ

Canada ‘1. The Canadian Human Rights Tribunal may order a person who has engaged in a discriminatory practice contrary to the *Canadian Human Rights Act*, RSC 1985, c H-6 (“CHRA” or “Act”), to compensate the victim for any lost wages, for all additional costs of obtaining alternative goods, services, facilities or accommodation, and “for any expenses incurred by the victim as a result of the discriminatory practice” (s 53(2)). The main question before us is whether the Tribunal made a reviewable error in deciding that this power to order compensation for “any expenses incurred by the victim as a result of the discriminatory practice” permits it to order payment of all or a

portion of the victim's legal costs.

...
 '32. The Tribunal held that any authority to award legal costs must come from either s 53(2)(c) or (d) of the Act (costs decision, at para 11). The appellant and the Commission have not raised any other provisions capable of supporting the result sought and conceded during oral argument that they were relying on both provisions together. The precise interpretative question before the Tribunal, therefore, was whether the words of s 53(2)(c) and (d), which authorize the Tribunal to "compensate the victim... for any expenses incurred by the victim as a result of the discriminatory practice", permit an award of legal costs. The Tribunal decided they did. However, in our view, this interpretation of these provisions is not reasonable, as a careful examination of the text, context and purpose of the provisions reveal.

...
 '64. In our view, the text, context and purpose of the legislation clearly show that there is no authority in the Tribunal to award legal costs and that there is no other reasonable interpretation of the relevant provisions. Faced with a difficult point of statutory interpretation and conflicting judicial authority, the Tribunal adopted a dictionary meaning of "expenses" and articulated what it considered to be a beneficial policy outcome rather than engage in an interpretative process taking account of the text, context and purpose of the provisions in issue. In our respectful view, this led the Tribunal to adopt an unreasonable interpretation of the provisions. The Court of Appeal was justified in reviewing and quashing the order of the Tribunal.' *Canada (Canadian Human Rights Commission) v Canada (Attorney General)* [2011] SCJ No 53, [2011] 3 SCR 471 at paras 1, 32, 64, per LeBel and Cromwell JJ

EXPERT

[The Companies Act 1985, s 62 is repealed by the Companies Act 2006 and the definition is not reproduced in the 2006 Act.]

EXPRESSED IN WHATEVER WORDS TO BE EXECUTED BY THE COMPANY

[By the Companies Act 2006, s 44(2), a document is validly executed by a company if it is signed on behalf of the company—(a) by two authorised signatories, or (b) by a director of the company in the presence of a witness who

attests the signature; and under s 44(4) a document signed in accordance with subsection (2) and expressed, in whatever words, to be executed by the company has the same effect as if executed under the common seal of the company.] '[1] This appeal turns on the construction of s 44(4) of the Companies Act 2006, a statute that enjoys the dubious distinction of being the longest Act of Parliament ever passed. In this judgment reference is made to only three of the 1,300 sections. No reference is made to any of the 16 schedules.

'[2] Section 44, which came into force on 6 April 2008, relates to the execution of documents by a company. It allows the use of more informal methods than the affixing of its common seal. The section is in a group of sections in Pt 4 of the 2006 Act—s 43 (Company contracts), s 44 (Execution of documents) and s 45 (Common seal)—under the general heading "Formalities of doing business ...".

'[3] A company neither needs to have a common seal nor does it have to execute a document under its common seal: see s 45. Subject to detailed provisions s 44 extended the changes made to the Companies Act 1985 by the insertion of s 36A by the Companies Act 1989. It is enacted that a document signed on behalf of the company by two authorised signatories or by the attested signature of a director and expressed to be executed by the company has the same effect as if executed under the common seal of the company. (As there was no attestation of signatures here, this judgment deals only with the case of signatures on behalf of a company by authorised signatories.)

...
 '[23] The appeal turns on what the words "expressed, in whatever words, to be executed by the company" in s 44(4) of the 2006 Act adds to the presence of signatures by two authorised signatories in accordance with sub-s (2) and whether that added requirement was satisfied in this case.

'[24] I agree with Mr Dutton that those words must add something to the provision in sub-s (2) that a document is validly executed by a company if it is signed on behalf of the company by two authorised signatures. Subsection (4) does not simply provide that a document signed in accordance with sub-s (2) has the same effect as if executed under the common seal of the company.

'[25] I am unable to agree with Mr Dutton that the critical words require that, in addition to

the signatures of the individuals who are the authorised signatories, there must be words spelling out that those signatures are “by or on behalf of” the company. Let us suppose that in this case the contract for the sale of the freehold and the leasehold interests was the same and that, instead of being put into one composite document, there were two separate documents. Also suppose that, in the separate contract for the sale of the freehold interest, Redcard was, as here, defined as “Seller” and that the signatures of two authorised signatories appeared, as here, under the words “SIGNED ... SELLER”, but without stating that the signatures were “by or on behalf of” Redcard. In my judgment, it would be absurd in such circumstances to say that the contract for the sale of the freehold by Redcard was not expressed to be executed by Redcard. If Redcard is defined as “Seller” the signatures at the end of the agreement under the words “SIGNED ... SELLER” could only mean that the document was expressed to be executed by Redcard.

‘[26] Why should the legal position regarding execution by Redcard be any different when, as here, the freehold and the leasehold transactions are combined in the same document, the authorised signatories being parties to the contract and the defined term “the Seller” including both the individual leaseholders and Redcard? In my judgment, there is no conceivable sensible reason why the legal position should be any different in the case of one document rather than two, especially when the statutory provisions were intended to expand the range of formalities that would count as execution by a company.

‘[27] That this is a simple case within sub-s (4) can be clearly demonstrated: the signatures to the supplementary agreement are under the words “SIGNED ... SELLER”; “SELLER” is defined in the supplementary agreement as including both Redcard selling its freehold and the individuals selling their leaseholds; the signatures include the signatures of two authorised signatories;

...

‘[30] From a practical point of view it may just be worth stating the obvious: expensive and long drawn-out litigation about the execution of a document by a company can be avoided by taking more care over compliance with the formalities at the time of execution by, for example, adding words that expressly state the capacity in which an individual is signing a document to which a company is a party.’ *Williams v Redcard* [2011] EWCA Civ 466,

[2011] 4 All ER 444 at [1]–[3], [26]–[27], [30], per Mummery LJ

EXTINGUISHMENT

Australia [Native Title Act 1993 (Cth).] ‘[8] Section 223 of the NT Act relevantly provides:

Native title

Common law rights and interests

- (1) The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
 - (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
 - (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
 - (c) the rights and interests are recognised by the common law of Australia.

Hunting, gathering and fishing covered

- (2) Without limiting subsection (1), *rights and interests* in that subsection includes hunting, gathering, or fishing, rights and interests.

...

‘[10] Extinguishment is the obverse of recognition. It does not mean that native title rights and interests are extinguished for the purposes of the traditional laws acknowledged and customs observed by the native title holders. By way of example apposite to this case, the plurality pointed out in *Yanner v Eaton* [(1999) 201 CLR 351; 166 ALR 258; [1999] HCA 5] that to tell a group of Aboriginal people that they may not hunt or fish without a permit (at [38]):

[38] ... does not sever their connection with the land concerned and does not deny the continued exercise of the rights and interests that Aboriginal law and custom recognises them as possessing.

“Extinguishment” means that the native title rights and interests cease to be recognised by the common law and thereupon cease to be native title rights and interests within the meaning of s 223 of the NT Act. As six justices

of this court said in *Fejo v Northern Territory* [(1998) 195 CLR 96; 156 ALR 721; [1998] HCA 58] (at [46]):

[46]... The underlying existence of the traditional laws and customs is a *necessary* pre-requisite for native title but their existence is not a *sufficient* basis for recognising native title. [Emphasis in original.]

In this appeal “extinguishment” is said, by the respondents, to result from statutory regimes affecting the exercise of a broadly stated native title right in a way that is not consistent with the recognition of an incident or lesser right comprised within that broadly stated native title right.’ *Akiba (on behalf of the Torres Strait Regional Seas Claim Group) v Commonwealth* [2013] HCA 33 (2013) 300 ALR 1 at [8], [10], per French CJ and Crennan J

EXTRADITION

[For 17(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 1101 see now 47 Halsbury’s Laws of England (5th Edn) (2014) para 601.]

EXTRADITION CRIME

[‘66] What is the position under the 1989 Act [Extradition Act 1989]? “[E]xtradition crime’ ... is to be construed by reference to the [relevant] Order in Council” (see para 20 of Sch 1 to the 1989 Act). What if, as must often now be the case, the crime is not listed in the Order in Council, but reliance is placed on the extension clause in the Treaty? The effect of this is that extradition can be granted in respect of any crime for which under the laws of both the contracting parties a grant of extradition can be made. So, having referred to the Order in Council one has to look outside it to see whether the conduct of which the fugitive is accused constitutes an extraditable crime under the law of the foreign party to the Treaty and the United Kingdom. So far as the United Kingdom is concerned, this leads one back to the Schedule to the 1870 Act [Extradition Act 1870], as amended. If the conduct alleged falls within the description of an offence in one

of the statutes in the Schedule, it will constitute an extradition crime.

[‘67] It has always been accepted that the appellant is accused of a crime that is extraditable under the law of the Netherlands. The issue has been whether he is accused of an extradition crime so far as the law of Bermuda is concerned. The Court of Appeal identified the Theft Act 1968 as the statute in the amended schedule to the 1870 Act that rendered the conduct alleged against the appellant an extradition crime. The 1968 Act was added to the Schedule by an amendment made by the 1968 Act which substituted the 1968 Act for the 1861 Act. The Court of Appeal did not refer to s 33(4) of the 1968 Act, which their Lordships have set out at [54], above. Having regard to that section it is arguable that the relevant statute is the 1861 Act [Larceny Act 1861] “or any Act amending or substituted for the same”, albeit that for all other purposes these earlier statutes were repealed by the 1968 Act. Whichever may be the true position does not matter for present purposes.

[‘68] The Court of Appeal did not adopt the correct approach to the issue of whether the appellant was accused of an extradition crime. They did not focus on the conduct alleged against the appellant and consider whether that conduct was (i) a crime under the law of Bermuda and (ii) an extradition crime. Instead they simply considered whether the description of the appellant’s crime under the law of the Netherlands, “handling stolen property” matched a similar description under the law of Bermuda and under the 1968 Act. If instead of the 1968 Act, they had considered the 1861 Act, or the subsequent Acts that “amended or substituted for” its provisions, namely the Larceny Act 1896 and the Larceny Act 1916, they would have found that these contained offences of receiving stolen property and reached the same conclusion.’ *Deuss v A-G of Bermuda* [2009] UKPC 38, [2010] 1 All ER 1059 at [66]–[68], per Lord Phillips

EXTRAORDINARY TRAFFIC

[For 21 Halsbury’s Laws of England (4th Edn) (2004 Reissue) paras 313–315 see now 55 Halsbury’s Laws of England (5th Edn) (2012) paras 316–318.]

F

FACTOR

[For 2(1) Halsbury's Laws of England (4th Edn) (Reissue) para 12 see now 1 Halsbury's Laws of England (5th Edn) (2008) para 12.]

FAILED TO DEAL WITH THE AMOUNT OF THE TAX ... DEDUCTED

New Zealand [Tax Administration Act 1994, s 167(2). Application of assets where an amount of tax has been deducted under the PAYE rules and the employer has failed to deal with the amount of the tax deducted (or any part of it) in the required manner.] '[25] Section 167(2) applies to PAYE deducted and neither paid by the employer to the Commissioner, nor held by the employer in its bank accounts available for payment to the Commissioner. That in our view is what the legislature intended by the wording "and the employer has failed to deal with the amount of the tax ... deducted ... in the manner required by subs (1) or the PAYE rules ...". The employer will fail to deal with the PAYE in the manner required by s 167(1) if it no longer holds the PAYE it has deducted but not yet paid to the Commissioner. In other words, if the employer has misapplied the monies held in trust for the Crown. The employer will fail to deal with the PAYE as required by the PAYE rules if it has not paid the PAYE to the Commissioner as required by s RD 4 of the Income Tax Act 2007 (the ITA). Section RD 2(1) of the ITA defines "the PAYE rules" as meaning a series of sections of the ITA and TAA which it lists. Those sections include ss RD 3 to RD 24 of the ITA. Section RD 4 requires an employer to pay the PAYE it has withheld to the Commissioner within specified periods.' *Commissioner of Inland Revenue v Jennings Roadfreight Ltd (in liquidation)* [2013] NZCA 455, [2014] 2 NZLR 569 at [25], per Wild J

FAIR COMMENT

See now HONEST COMMENT

[For 28 Halsbury's Laws of England (4th Edn) (Reissue) paras 135–136 see now 32 Halsbury's

Laws of England (5th Edn) (2012) paras 637–638.]

Rolled-up plea

[Note that 28 Halsbury's Laws of England (4th Edn) (Reissue) para 192 is not reproduced in 32 Halsbury's Laws of England (5th Edn) (2012).]

FALSE

New Zealand [Local Electoral Act 2001, s 134(1): offence of transmitting a return of electoral expenses, knowing it to be false in one or more material particulars.] '[32] The word "false" was also not defined in the Act. As a matter of ordinary English usage, the word has two distinct meanings—erroneous and purposely untrue. This was noted by the Court of Appeal in the context of the Customs Act 1966. It said as follows [*Minister of Customs v Admail International Ltd* CA71/89, 31 October 1989 at 4; see also *R v Gill* (1999) 19 NZTC 15–526 (CA) at [17]–[21]]:

Recourse to any standard dictionary demonstrates that the word "false" has two distinct and well recognised meanings, both of which may be used in relation to statements or representations: erroneous, wrong, not true; or purposely untrue, mendacious, deceitful. The sense in which it is used depends on the context in which it appears ...

... '[35] In my judgment, the word "false" used in s 134(1) should properly be construed to mean erroneous, wrong or untrue. There is no need to go further and require that an electoral return is false only where it is purposely untrue, mendacious or deceitful. It is unnecessary to attribute to the word any mens rea element, because knowledge of the falsity was a separate element to the offence created by s 134(1).' *R v Banks* [Reasons for verdict] [2014] NZHC 1244, [2014] 3 NZLR 256 at [32], [35], per Wylie J

FALSE CASE

New Zealand [Setting aside judgment obtained by fraud on basis of a false case.] '[33] In New Zealand also, fraud in a legal sense is required. In *Shannon Potter J* adopted the common law definition of "fraud" from *Derry v Peek* [(1889) LR 14 App Cas 337 at 374, HL],

namely a false statement made knowingly or without belief in its truth, or recklessly, careless as to whether it be true or false was required. That approach was expressly noted and approved without adverse comment by the Court of Appeal in *Shannon* [*Shannon v Shannon* (2005) 17 PRNZ 587, CA].

‘[34] As to the issue of what is meant by a “false case”, Mr Forbes referred to a number of Australian and other authorities to support his submission that a broader range of conduct than actual fraud was capable of supporting an action to set aside a judgment. A number of the cases refer to a “false case”, the phrase used by the plaintiffs in their pleading. ...

‘[42] The cases relied on by the plaintiffs do not support the proposition that a general allegation of equitable fraud is sufficient to set aside a judgment. Further, where the authorities refer to a false case in this context, it is to be understood to mean the deliberate presentation of false evidence (perjury) or the deliberate suppression of material facts which effectively amounts to the presentation of false evidence to the court. Fraud in the strict legal sense as discussed by Lord Wilberforce [in *The Amptill Peerage* [1977] AC 547, [1976] 2 All ER 411, HL] is required to make out the false case.’ *Redcliffe Forestry Venture Ltd v Comr of Inland Revenue* [2011] 1 NZLR 336 at [33]–[34], [42], per Venning J

FALSE IMPRISONMENT

[For 45(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 442 see now 97 Halsbury’s Laws of England (5th Edn) (2015) para 543.]

FAMILY ARRANGEMENT

[For 42 Halsbury’s Laws of England (4th Edn) (Reissue) paras 1002, 1005 see now 91 Halsbury’s Laws of England (5th Edn) (2012) paras 903, 906.]

FARM

[Note that the Income and Corporation Taxes Act 1988, s 832(1) has been repealed.]

FARM MORTGAGE

Australia [Farm Debt Mediation Act 1994 (NSW): whether successive farm debts created a new “farm mortgage” requiring satisfactory

mediation before creditor could pursue enforcement action.] ‘[9] The term “farm mortgage” is defined in the Act broadly and non-exhaustively. It is sufficiently broadly defined to cover a mortgage at general law which includes “a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given”. It encompasses a “mortgage” within the meaning of the Conveyancing Act 1919 (NSW) which includes “a charge on any property for securing money or money’s worth”. It also covers a Torrens System mortgage defined in the Real Property Act 1900 (NSW) as “[a]ny charge on land (other than a covenant charge) created merely for securing the payment of a debt”. The latter definition and the provisions of the Real Property Act attract to a mortgage registered under that Act the description in *English Scottish and Australian Bank Ltd v Phillips* [(1937) 57 CLR 302 at 321; [1937] ALR 104 at 110]:

Under the system of registration... the statutory charge described as a mortgage is a distinct interest. It involves no ownership of the land the subject of the security.

‘[10] The definition of “farm mortgage”, however, extends beyond the general law and statutory categories mentioned above. It extends to an “interest” or a “power” over farm property securing obligations of the farmer “as a debtor”. It thereby includes an interest or a power securing an obligation to repay, or pay interest on, a “farm debt”. If an “interest” or “power” is granted by a farmer as security for repayment of a farm debt and the debt is thereafter repaid or extinguished, the interest or power so granted no longer secures any obligations of the farmer as a debtor. The “interest” or “power” constituting the farm mortgage then ceases to exist.

‘[12]... The question in contention in this appeal was whether the extinguishment of the debts under the first and second loan agreements and the creation of new obligations under the second and third loan agreements respectively, gave rise in each case to a new “interest” or “power” over the farm property within the meaning of the definition of “farm mortgage”. The answer to that question turns upon the particular language of the Act and the statutory purpose.

‘[13] Analogous cases demonstrate the determinative significance of the specific statutory text and purpose and the particular

terms of the relevant securities. ...

'[14] The Act here in question adopts a definition of "farm mortgage" which is considerably wider than the definition of "mortgage" in the analogous cases just mentioned. The terminology of "interest" and "power" is also wider than that of "charge" in the Corporations Act.

...
'[16] The successive discharge of the debts secured by HSI's registered mortgage under the first and second loan agreements extinguished Ms Waller's obligations arising under that mortgage by reason of those agreements. No enforcement action could thereafter be taken under the mortgage by reference to obligations arising under those agreements. The answer to the question whether the third loan agreement, read with the HSI mortgage, created a new interest or power over Ms Waller's farm, is in the affirmative. The question of construction should be answered in favour of Ms Waller. That answer could be met in this case by a general appeal to absurdities that might arise in particular circumstances. Absurd or unintended consequences of this broadly drawn legislation can be conjured in opposition to the competing constructions. The policy of the statute is remedial. The construction advanced by Ms Waller is within the scope of its remedial purpose.' *Waller v Hargraves Secured Investments Ltd* [2012] HCA 4, (2012) 285 ALR 41 at [9]–[10], [12]–[14], [16], per French CJ, Crennan and Kiefel JJ

FARMING

In the Corporation Tax Acts 'farming' means the occupation of land wholly or mainly for the purposes of husbandry, but does not include market gardening. 'Husbandry' includes: (a) hop growing, and (b) the breeding and rearing of horses and the grazing of horses in connection with those activities. (Corporation Tax Act 2010 s 1125(1), (2))

FEE FARM RENT

[For 39(2) Halsbury's Laws of England (4th Edn) (Reissue) para 756 see now 87 Halsbury's Laws of England (5th Edn) (2017) para 1046.]

FEE SIMPLE

[For 39(2) Halsbury's Laws of England (4th Edn) (Reissue) para 91 see now 87 Halsbury's

Laws of England (5th Edn) (2017) para 66.]

FELLOW EMPLOYEE

Australia [Sex Discrimination Act 1984 (Cth), s 28B(2).] '[16] Ms Ewin disputed that any difficulties arose for her case by reason of the place at which any of the alleged sexual harassment occurred. However to fortify her claims, Ms Ewin also contended that Mr Vergara was an "employee" and that she was "a fellow employee" protected from sexual harassment by the terms of s 28B(2). There is no place based requirement to establish a contravention of s 28B(2). However, while there was no issue that each of Ms Ewin and Mr Vergara were "employees", Mr Vergara contended that as they each had different employers, Ms Ewin was not "a fellow employee" within the meaning of s 28B(2) and therefore that provision was inapplicable.

'[17] I accept the construction of s 28B(2) for which Mr Vergara contends.

'[18] The ordinary meaning of the phrase "a fellow employee" does not necessarily connote two employees employed by the same employer. Each of Mr Vergara and Ms Ewin had different employers but were both employees working in the same business and vis-à-vis each other capable of being regarded as fellow employees within the ordinary meaning of that phrase. Their situation was by no means uncommon. Corporate structures used to run and organise contemporary businesses often result in employees of multiple employers working as a single workforce in the one workplace.

'[19] However, the terms of s 28B(2) and the context provided by s 28B more broadly, suggest that a narrower use of the phrase was intended. While the words "with the same employer" in s 28B(2) are principally directed to protecting against harassment between an existing employee and a prospective employee of the same employer, the use of that reference suggests that the need for a common employer was also contemplated as between existing fellow employees.

'[20] Ms Ewin's contention may have been stronger if s 28B failed to provide any protection for employees of different employers working in the same workplace. It would have been odd if harassment between co-workers of that kind had been excluded from protection. However co-workers employed by different employers working in the same workplace are covered by s 28B(6) and, in my view, it is only

s 28B(6) that was intended to provide relief in those circumstances.’ *Ewin v Vergara (No 3)* [2013] FCA 1311, (2013) 307 ALR 576 at [16]–[20], per Bromberg J

FENCE

[For 4(1) Halsbury’s Laws of England (4th Edn) (2002 Reissue) para 947 see now 4 Halsbury’s Laws of England (5th Edn) (2011) para 350.]

FIERI FACIAS

[Note that with effect from 6 April 2014, writs of fieri facias (except writs of fieri facias de bonis ecclesiasticis) have been renamed writs of control: see the Tribunals, Courts and Enforcement Act 2007, s 62(4)(a).]

[For 17(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 102 see now 12A Halsbury’s Laws of England (5th Edn) (2015) para 1379.]

De bonis ecclesiasticis

[For 17(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 115 see now 12A Halsbury’s Laws of England (5th Edn) (2015) para 1380.]

FINANCIAL PRODUCT

Australia [Australian Securities and Investments Commission Act 2001 (Cth), s 12BAB.] [‘176] ... It is apparent from the way in which the expression “financial product” is used in s 12BAB (which defines the concept of “provide a financial service”) that the products involved include not only those which presently exist but also those which will in the future exist. For example, s 12BAB(8) makes clear that arranging for a person to apply for, or acquire, a financial product will be “dealing” in the financial product and by reason of s 12BAB(1)(b) that, in turn, will be the provision of a financial service. ASIC’s pleaded case in relation to the Polimenis did not rely directly upon s 12BAB(1)(b) although it was put during final submissions. The point for present purposes is not to embrace a case not pleaded; it is instead merely to observe that the submission that a financial product cannot be inchoate cannot be reconciled with the text of s 12BAB(8).

[‘177] ALC submitted that this conclusion put at nought the words “or possible supply” in

ss 12CB and 12DB. Here the argument was that if “financial product” extended to inchoate financial products those words would be otiose.

[‘178] With that proposition I agree. There exists therefore a conflict between two principles of statutory interpretation: the first, the necessity of construing “financial product” coherently and uniformly throughout s 12BAB; the second, the need to ensure, so far as possible, that the words “or possible supply” in ss 12CB and 12DB have some work to do. In this case it is more likely Parliament’s intention that the words “or possible supply” are surplusage than it is that ss 12CA and 12DA—central principal provisions dealing with unconscionable and misleading conduct—were not intended to apply to any conduct unless it related to an actual and extant financial product.’ *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd (No 3)* [2012] FCA 43, (2012) 287 ALR 693 at [176]–[178], per Perram J

FINANCIAL RESOURCE

Australia

[Family Law Act 1975 (Cth), s 75: matters for court to take into account in making a maintenance order.] [‘53] The matters referred to in s 75(2)(b) are matters which bear on the practical ability of one party to support the other, and of the other party to support himself or herself. Hence the concluding reference is to the matter of “the physical and mental capacity of each of them for appropriate gainful employment”. Hence also the opening reference to the matter of “the income, property and financial resources of each of the parties” cannot be confined to the present legal entitlements of the parties.

[‘54] The reference to “financial resources” in the context of s 75(2)(b) has long been correctly interpreted by the Family Court to refer to “a source of financial support which a party can reasonably expect will be available to him or her to supply a financial need or deficiency”. The requirement that the financial resource be that “of” a party no doubt implies that the source of financial support be one on which the party is capable of drawing. It must involve something more than an expectation of benevolence on the part of another. But it goes too far to suggest that the party must control the source of financial support. Thus, it has long correctly been recognised that a nominated beneficiary of a discretionary trust, who has no control over the trustee but who has a reasonable expectation

that the trustee's discretion will be exercised in his or her favour, has a financial resource to the extent of that expectation.

'[55] Whether a potential source of financial support amounts to a financial resource of a party turns in most cases on a factual inquiry as to whether or not support from that source could reasonably be expected to be forthcoming were the party to call on it.' *Hall v Hall* [2016] HCA 23, (2016) 332 ALR 1 at [53]–[55], per French CJ, Gageler, Keane and Nettle JJ

FINANCIAL YEAR

[For the Income and Corporation Taxes Act 1988, s 2 see now the Income Tax Act 2007, s 4(3).]

FIRE

[For 25 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 592 see now 60 Halsbury's Laws of England (5th Edn) (2011) para 566.]

Loss by fire: marine insurance

[For 25 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 334 see now 60 Halsbury's Laws of England (5th Edn) (2011) para 325.]

FIREARM

[Firearms Act 1968, ss. 1, 5(1)(aba), 57(1); Firearms Act 1982, s 1. Whether a starting pistol made capable of firing bullets was a prohibited firearm, possession of which was contrary to the Firearms Act 1968, s 5(1)(aba).] '[9] The first and essential question was that posed by the statute in the opening words to s 57(1). There being no dispute but that the starting pistol was a lethal barrelled weapon, the statutory question was whether any shot, bullet or other missile could be discharged from it. This was the question which the judge in her ruling answered in the affirmative.

'[10] This argument was founded in part upon the decision of this court in *R v Law* [1999] Crim LR 837. The charge in that case was brought under s 5(1)(a) which relates to "any firearm which is so designed or adapted that two or more missiles can be successively discharged without repeated pressure on the trigger". The weapon in issue had been designed to be used as a semi-automatic weapon but was modified (in so far as it is possible to follow the short summary) with the intention that it should

not be capable of burst fire. However, it did remain capable of burst fire if used by an expert.

'[11] The court rejected an argument that the prosecution had to prove that the firearm had been designed or adapted with the intention of being used as a semi-automatic weapon. As the commentary to the short report points out, the decision of the court probably went further than it needed. The section requires no more than proof that the firearm was designed or adapted to be capable of burst fire; it does not require proof that it was, in fact, capable of burst fire. But the court focussed on the firearm's capacity.

'[12] It is for that reason that the authority is significant in this appeal. The only statutory question is whether any shot, bullet or other missile could be discharged from the weapon. *R v Law* is authority for the proposition that the mere fact that a weapon's capacity to discharge a missile could only be demonstrated by an expert is irrelevant to whether the weapon falls within the statutory definition of firearm. (*R v Pannell* (1982) 76 Cr App Rep 53 also establishes that proposition: the ability of the carbines to fire automatically required an operation of some delicacy achieved only by an expert.)

...
'[15] The question in the instant appeal is not whether the gun was designed or adapted to discharge a shot, bullet or other missile, as in *R v Law*, *R v Clarke*, *R v Jobling* and *R v Pannell* but whether it had the capacity to do so. Those cases are of significance in that they teach that the mere fact that only an expert could discharge a missile from the starting pistol does not mean that it did not have the capacity to discharge a missile and thus did not remove it from the scope of the definition in s 57(1).

'[16] Although s 57(1) uses the present tense, "can be discharged", a weapon may fall within the definition in s 57(1) despite some temporary fault at the time it is in the possession of the accused. Even Taylor J in *R v Jobling* [1981] Crim LR 625 acknowledged that a mere temporary fault would not preclude the weapon from the prohibition. So did Eveleigh LJ in *R v Pannell* (1982) 76 Cr App Rep 53 at 55–56 (cited in *R v Clarke* [1986] 1 All ER 846 at 849, [1986] 1 WLR 209 at 213). The very notion of the capacity of a weapon must refer not only to its condition at the time of possession but to its construction and its potential as a means of discharging a missile. But once it is recognised that a gun might fall within the definition of firearm, even if its condition at the time renders it incapable of firing, the question arises as to

the extent to which it is permissible to look to possible alterations to the gun from the condition in which it is found in the possession of the accused. If a minor repair is all that is needed, the gun is a firearm. But what if it needs a major conversion, adaptation or repair before it can discharge a missile?

...
 '[23] Since the 1968 Act came into force, the Firearms Act 1982 has widened the scope of the 1968 Act to embrace imitation firearms readily convertible into firearms to which s 1 of the 1968 Act applies. Section 1 of the 1968 Act, which imposes the requirement of a firearms certificate, applies to every firearm except shotguns as defined (see s 1(3)) and those air weapons which fall out with rules made by the Secretary of State (see s 1(3)). Section 1 of the 1982 Act includes within the scope of the 1968 Act, subject to specific exclusions (such as s 4(3) and (4) of the 1968 Act) imitation firearms if they have the appearance of a firearm to which s 1 of the 1968 Act applies and are so constructed or adapted as to be readily convertible into a firearm to which s 1 applies (see s 1(1) of the 1982 Act). Whether an imitation firearm is readily convertible must be ascertained by reference to s 1(6) of the 1982 Act:

"For the purposes of this section an imitation firearm shall be regarded as readily convertible into a firearm to which section 1 of the 1968 Act applies if—(a) it can be so converted without any special skill on the part of the person converting it in the construction or adaptation of firearms of any description; and (b) the work involved in converting it does not require equipment or tools other than such as are in common use by persons carrying out works of construction and maintenance in their own homes."

'[24] The 1982 Act also provides that it is a defence for an accused to show that he did not know and had no reason to suspect that an imitation firearm could be readily convertible into a firearm to which s 1 of the 1968 Act applies (see s 1(5)). An imitation firearm is defined by reference to s 57(4) of the 1968 Act (see s 1(3) of the 1982 Act): "imitation firearm" means any thing which has the appearance of being a firearm (other than such a weapon as is mentioned in section 5(1)(b) of this Act) whether or not it is capable of discharging any shot, bullet or other missile".

'[25] The question then arises as to whether

the addition of imitation firearms readily convertible into firearms to the scope of the 1968 Act changes the meaning of firearm in s 57(1) as interpreted by this court in *R v Freeman* [1970] 2 All ER 413, [1970] 1 WLR 788. Section 57(1) was unaltered. Is it to be construed as including a gun which could be easily turned into a lethal barrelled weapon (as Sachs LJ thought in *R v Freeman*) or is that section now to be interpreted in the light of the 1982 Act? Strictly, the 1982 Act does not directly amend the 1968 Act. But it seems to us that it is to be regarded as an Act which amends the 1968 Act by enlarging its reach to those imitation firearms which fall within the provisions of s 1(1) of the 1982 Act.

...
 '[27]... It is plain that Parliament intended to widen the scope of the meaning of firearm to include an imitation firearm falling within s 1(1) of the 1982 Act. But it is equally plain that Parliament intended only to widen that description in cases where the conversion could be achieved without any special skill and without the use of equipment or tools other than those in common use. By imposing what could loosely be described as safeguards, Parliament clearly expressed the intention to exclude from the application of the 1968 Act imitation firearms which could not be readily convertible into a firearm by equipment or tools which were not in common use.

'[28] Accordingly, the principle identified in *R v Freeman* is, under the current statutory scheme, no longer of any application. If the item can be easily adapted into a lethal weapon, to adopt Sachs LJ's words (see [1970] 2 All ER 413 at 416, [1970] 1 WLR 788 at 792), with the use of equipment described in s 1(6) of the 1982 Act, then it will, subject to the statutory defence, fall within the 1968 Act. But no conclusion can be reached as to whether an imitation firearm is readily convertible without proper consideration of s 1(6) and, if it is raised, the defence in s 1(5). Those subsections raise questions of fact which must be resolved. Whether an item falls within s 57(1) of the 1968 Act should no longer be answered by reference to *R v Freeman* or to *Cafferata's* case [*Cafferata v Wilson, Reeve v Wilson* [1936] 3 All ER 149, DC]. Courts should look to the 1982 Act read with the 1968 Act. It would be absurd to allow the prosecution to sidestep the safeguards within the 1982 Act merely by construing firearm as meaning an item which could "easily" be converted into a lethal barrelled weapon, capable of discharging a missile, in the application of the principle in *R v Freeman*.

...
 '[30] It seems to us that reading the 1968 Act in the context of the 1982 Act also assists in understanding what is meant by conversion. The words in s 1(1)(b) "readily convertible into a firearm" are sufficiently broad to include the use of equipment or tools in conjunction with the use of an imitation firearm in a way which enables it to be used to discharge a missile as much as if those tools are used permanently to alter its construction. There is no reason to restrict the application of the 1982 Act to a conversion which permanently alters the construction of the imitation firearm in question. The 1982 Act contemplates converting an item from which a missile cannot be discharged into one from which a missile can be discharged. It matters not whether that process involves the permanent alteration of the construction of the firearm such as by drilling or by some other more temporary means. An item may be converted not merely by changing its capacity or by altering its construction, but also by adapting the way it can be used.

'[31] The starting pistol could only discharge a missile with the aid of other implements external to the weapon itself. It required the use of a vice to hold it, a hammer and a punch thin enough to be inserted into the off-centre hole running through the part of the barrel that was blocked, with a diameter of approximately 2 mm. The specially selected pellet could only be discharged if it was rammed home with a mallet and punch to ensure as tight a fit as possible. The use of those extraneous tools was a process of conversion. For the reasons we have given, after the 1982 Act came into force, s 57(1) of the 1968 Act refers to the capacity of the weapon without regard to its potential conversion, unless that conversion falls within the scope of the 1982 Act. We reject the prosecution contention that the use of the vice to clamp the pistol and the mallet and punch to ram the pellet home did not constitute conversion of the starting pistol.

'[32] Once we exclude consideration of any conversion, we must acknowledge that the starting pistol itself had no capacity to discharge any shot, bullet or other missile. A missile could only be discharged from the barrel in combination with other pieces of equipment, namely, the vice with which the pistol could be clamped, the punch and the mallet. There is no warrant for including within the definition in s 57(1) an item which can only discharge a missile in combination with other tools extraneous to that item. The opening words of s 57(1) refer to the capacity of a particular item and not its capacity

in combination with other pieces of equipment.

'[33] For those reasons we would conclude that the starting pistol fell outwith the definition in s 57(1). It was not a lethal barrelled weapon from which any shot, bullet or other missile can be discharged. It was plainly an imitation firearm within the meaning of s 57(4). Whether it fell within the scope of the 1982 Act cannot be determined in this appeal. No facts were advanced to show that the starting pistol could be readily converted in accordance with the provisions of s 1(1)(b) and s 1(6) of the 1982 Act. No opportunity was given for the accused to put forward the defence in s 1(5) of that Act.

'[34] The question then arises as to whether the starting pistol could be regarded as a component part of "such a lethal or prohibited weapon". The Divisional Court in *Cafferata's* case would, no doubt, have concluded that it could be so regarded. That seems to us to be an impossible construction of s 57(1)(b). The definition of firearm cannot include a component part of a lethal barrelled weapon of any description from which any shot, bullet or other missile can *not* be discharged. Any other construction would ignore the use of the word "such". If the starting pistol does not fall within the definition of firearm within s 57(1), no part of it could do so. The Lord Justice-General in *Kelly v MacKinnon* 1982 SCCR 205 at 210 said that the proposition that all parts of the dummy which did not require to be bored should be regarded as parts of a lethal weapon was "untenable". We agree. We do not think that *Cafferata's* case accurately expresses the law.' *R v Bewley* [2012] EWCA Crim 1457, [2013] 1 All ER 1 at [9]–[12], [15]–[16], [23]–[25], [27]–[28], [30]–[34], per Moses LJ

FIXED CAPITAL

[For 7(1) Halsbury's Laws of England (4th Edn) (2004 Reissue) para 524 see now 15A Halsbury's Laws of England (5th Edn) (2016) para 1231.]

FIXTURES

[For 27(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 173 see now 62 Halsbury's Laws of England (5th Edn) (2016) para 167.]

FLOATING CHARGE

[For 7(2) Halsbury's Laws of England (4th Edn) (2004 Reissue) para 1544 see now 15A

Halsbury's Laws of England (5th Edn) (2016) para 1455.]

FLOTSAM

[For 12(1) Halsbury's Laws of England (4th Edn) (Reissue) para 271n see now 29 Halsbury's Laws of England (5th Edn) (2014) para 185n.]

FOLDCOURSE

[Note that the passage from 6 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 470 is not reproduced in 13 Halsbury's Laws of England (5th Edn) (2009).]

FOOT OR END

[For 50 Halsbury's Laws of England (4th Edn) (2005 Reissue) paras 356–358 see now 102 Halsbury's Laws of England (5th Edn) (2010) paras 65–66.]

FORECAST

Australia '[75] Last, Village argued that the draft ANEF [Australian noise exposure forecast under the Air Services Act 1975 (Cth)] was not a forecast at all. This is because, it argued, a projection as to when Canberra Airport's maximum capacity would be reached is not "based on present indications". For this, Village relied on one definition of "forecast" in the *Oxford English Dictionary* (2nd ed, vol VI) to support its argument, namely:

... a forecasting or anticipation; a conjectural estimate or account, *based on present indications*, of the course of events or state of things in the future. [Emphasis added.]

'[76] But the same dictionary gives a definition of the verb "forecast" as "to estimate, conjecture, or imagine beforehand (the course of events or future condition of things)". Conjecture involves the formation of an opinion or supposition as to facts on grounds which themselves are insufficient and includes guessing and surmising: see the definition in the *Oxford English Dictionary* (2nd ed). In my opinion, the ordinary and natural meaning of the word "forecast" as used in the term "ANEF" must connote conjecture, at least to some degree. This is so whether the ANEF is made under the Air Services Act, the Airports Act or the standard. So, a forecast can involve a

number of inputs, some more certain or capable of proof than others. The formula from which an ANEF is derived is complex. It involves both technical calculations about the particular noise that will be produced in certain circumstances and assumptions as to what might produce those circumstances. There is no necessity that every element of a forecast in an ANEF be founded in fact or be based on a prediction with which all reasonable people will agree. Businesses, entrepreneurs and governments all make budgets or forecasts of their projected economic performance. It is unsurprising that a good many do not come true and there is informed debate about whether the assumptions underlying them are appropriate.' *The Village Building Co Ltd* (ACN 056 509 025) v *Airservices Australia* [2007] FCA 1242, (2007) 241 ALR 685, BC200706932 at [75]–[76], per Rares J

FORFEITURE

Canada '[9] The word "forfeiture" (*confiscation*) means, in law, "a divestiture of specific property without compensation" (*Black's Law Dictionary*, 8th ed, 2004, at page 667). That definition was cited by the Supreme Court of Canada in *R v Ulybel Enterprises Ltd* [2001] 2 SCR 867, at paragraph 44, which dealt with the word "forfeiture" (*confiscation*) in subsection 72(1) [as am. by SC 1991, c 1, s 21] of the *Fisheries Act*, RSC, 1985, c F-14.' *Tourki v Canada* (*Minister of Public Safety and Emergency Preparedness*) [2008] 1 FCR 331, 284 DLR (4th) 356, 2007 FC 186, [2007] FCJ No 685 at [9], per Desjardins JA

FORTHWITH

Canada [The Criminal Code, RSC 1985, c C-46, s 254(2) permits a peace officer who suspects that a driver has alcohol in his or her body, to require the driver to provide a breath sample forthwith and to detain the driver for that purpose.] '29. The meaning of "forthwith" as been the subject of considerable judicial scrutiny. Justice Sopinka in *R v Burnshaw* [1994] SCJ No 87 found that "forthwith" ought to be given a flexible interpretation. He indicated that it does not mean immediately; it does mean within a reasonable time having regard to the statutory provision and under the circumstances of the case. This applies in my view to alleged delay which arises both once a reasonable suspicion has formed before and

after the demand. The determination of whether there was a degree of delay which draws into question *Charter* compliance or statutory compliance is fact specific.

'30. I have determined that in the present case the eleven minute period which fell between the officer formulating a reasonable suspicion and administering the ASD upon arrival of the apparatus fell within the meaning of "forthwith" in Section 254(2) of the *Criminal Code*. Realistically, the Court of Appeal noted in *R v Oduneye* (1995) 169 AR 353 at paragraph 10 a delay in making observations, preparing and using the device is not necessarily objectionable. The Court of Appeal accepted that the best definition of "forthwith" to be:

"The demand should be made as soon as is reasonably possible allowing only such delay as is reasonably necessary for the police officer to carry out his duties."

'31. As Justice Macklin notes in *R v Martens* [2008] ABQB 223 is the total period of delay that is of concern. It matters not whether the officer postpones making the demand or postpones administering the test after making the demand. The impact is the same. The total period of delay is of concern in determining whether the "forthwith" requirement is met.

...

'33. What the various cases illustrate is that there is no requirement that the test be performed within a certain number of minutes of a reasonable suspicion being formed. All of the circumstances must be examined to properly determine whether the "forthwith" requirement has been met.' *R v Mujcin* [2010] AJ No 702, 2010 ABPC 198, Alta Provincial Court, at paras 29–31, 33, per D R Valgardson Prov Ct J

FRAGMENTATION

Australia '[70] Counsel for Mr Maiolo did not, in either his written or oral submissions, press the proposition that I should refuse the order sought by the director on the basis that it would amount to fragmentation of Mr Maiolo's trial.

'[71] There is a well established principle that criminal proceedings should not be fragmented by other courts hearing applications relevant to the conduct of the trial by or against one or more of the participants in the criminal trial, except in exceptional or extraordinary circumstances.

'[72] However, there are exceptions to this principle. The points determined by her Honour

occurred prior to the empanelment of the jury. Each required the application of the legal principle. As the Appeal division of this court made clear in *Rozenes v Beljaiev* [[1995] 1 VR 533; (1994) 126 ALR 481], there is a significant difference between interfering with the decision of a trial judge at a preliminary stage as opposed to during the course of a trial. Subsequently, the Full Court of the Federal Court in [*Flanagan v Commissioner of the Australian Federal Police* (1996) 60 FCR 149 at 188; 134 ALR 495 at 529–30] held that questions of law brought forward at an appropriate time may be viewed as an exception to the fragmentation principle and may be entertained on application for judicial review.

'[73] Given the issues dealt with by her Honour and the stage at which the trial had reached, this application is an appropriate exception to the fragmentation rule.' *Director of Public Prosecutions (Vic) v County Court (Vic)* [2010] VSC 157, (2010) 267 ALR 786 at [70]–[73], per Forrest J

FRANCHISE (BUSINESS)

Franchisee

Australia [Franchising Code of Conduct, cl 3.]

'[163] The Code defines (in cl 3) a "franchisee" as "a person to whom a franchise is granted". Santora was not the corporate vehicle to whom the franchise was granted. The Code (in cl 3) further provides that a "franchise" is to include "an interest in a franchise"; and this latter expression is defined (in cl 3) to include "a legal or beneficial interest in ... shares or voting rights in a corporation ... that owns a franchised business". As Santora held 1,700,000 shares in T2W, Santora was a franchisee for the purposes of the Code.

'[164] ... By virtue of cl 3, however, the Code extends the definition of "franchisee" beyond a person "to whom a franchise is granted" to include a person "who otherwise participates in a franchise as a franchisee". This extends the protection of the Code beyond persons who are the direct franchisees or shareholders of such franchisees, to a person who participates in some other way in a franchise as a franchisee. Whether or not a person is properly so described is a question of fact, to be answered by reference to the facts and circumstances of the particular case. ...' *Rafferty v Madgwicks* [2012] FCAFC 37, (2012) 287 ALR 437 at [163]–[164], per Kenny, Stone and Logan JJ

FRAUD

[For 16(2) Halsbury's Laws of England (4th Edn) (Reissue) para 413 see now 47 Halsbury's Laws of England (5th Edn) (2014) para 13.]

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

New Zealand [Insolvency Act 2006, s 304(2)(a). 'The bankrupt is not released from the following debts: (a) any debt or liability incurred by fraud or fraudulent breach of trust to which the bankrupt was a party ...'] '[44] The first submission was that s 304(2)(a) of the Act only applies to a debt or liability incurred by fraud where such was by action perpetrated by a principal party. The submission was that liability as a secondary party fell outside the scope of the section. I disagree. The section is not limited in the way suggested on behalf of the first defendant. The reference to party is not limited to a principal rather than a secondary party.

'[45] I am satisfied that there is no policy reason for interpreting s 304(2) of the Act restrictively so as to only include the principal party. The section is designed to protect the interests of creditors and assist in recovery or restitution of debts or liabilities incurred by fraud. The fact that the action alleged against the plaintiff may not have caused loss to the bankrupt estate, as opposed in this case to the company which the first defendant controlled, does not alter the position.

... '[48] Ms Hall argued that the term "fraud" in s 304(2)(a) of the Act was not apt to include equitable fraud or dishonest assistance. I disagree. I prefer the view of the learned commentator in *Heath and Whale on Insolvency* at 9.17 who noted as follows:

"The Court has interpreted 'fraud' as used in other legislation to include equitable fraud which encompasses breach of fiduciary duty. [See *Collier v Creighton* [1993] 2 NZLR 534 (CA) in the context of s 28 of the Limitation Act 1950. See also *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525, at 534-5 (per Tipping J).] It is submitted that there is no reason why 'fraud' as used in the Insolvency Act 2006 should be interpreted any differently."

'[49] With reference to the legislative history, a provision with similar wording has been part of New Zealand legislation since 1867. Section 120 of the Bankruptcy Act 1867 was the first Act to adopt a similar provision from the

United Kingdom Bills that led to the enactment of the Bankruptcy Act 1869 (UK). Section 120 of the 1867 Act provided:

"120. Whether the order of discharge is opposed or not the court may if it thinks fit in and by the order suspend the order from taking effect as follows namely for any time not exceeding three years from the date of the order if it appears to the satisfaction of the court.

- ...
- (6) That any debt or liability of the bankrupt subsisting at the time of adjudication, or paid or discharged within three months next before adjudication, was contracted or incurred by him without any reasonable expectation of his being able to pay or discharge it or by or through any fraud, or false pretence, or breach of trust, committed by him or that forbearance of any such debt or liability had been obtained by the bankrupt by fraud or false pretence or that any such debt or liability had been contracted or incurred by him by reason of any prosecution or proceeding wherein he was found guilty of any offence, or of a breach of the revenue laws, or by reason of any action of proceeding for libel, slander, assault, battery, adultery, seduction, breach of promise of marriage, malicious arrest, malicious prosecution, malicious trespass, malicious injury, or the malicious filing or prosecution of a petition for adjudication of bankruptcy."

'[50] Since then, the statutory provision has been modified and the law has developed in relation to causes of action involving fraudulent conduct, that is, equitable fraud. But it is important to note that the term "fraud" has remained throughout all amendments to the original provision.

'[51] It is noteworthy that, when the legislature originally determined the extent of the exception, it was based upon the general concept of fraud. The legislation did not choose to refer to the technical forms of action. Had that been the case, reference would undoubtedly have been made to deceit, which was a common way of pleading fraud.

'[52] In summary, I am satisfied that the exclusion should not be read down in the manner contended for by the first defendant. ...' *FE Investments Ltd v Klisser* [2010] 2 NZLR 217 at [44]-[45], [48]-[52], per Stevens J

Constructive fraud

[For 31 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 838 see now 16(2) Halsbury's Laws of England (4th Edn) (Reissue) para 416; and for 16(2) Halsbury's Laws of England (4th Edn) (Reissue) para 416 see now 47 Halsbury's Laws of England (5th Edn) (2014) para 16.]

FRAUDULENT CONCEALMENT

Australia [Limitation of Actions Act 1958 (Vic), s 27: postponement of start of limitation period in cases of fraud.] '[79] As my analysis above attempts to demonstrate, when a thief converts property by stealing it, the very failure of the thief to disclose his or her identity to the true owner constitutes fraudulent concealment within 27(b).' *Levy v Watt* [2014] VSCA 60, (2014) 308 ALR 748 at [79], per Santamaria J

FREE

Free expression of the opinion of the people in the choice of the legislature

[European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 Protocol No 1 art 3 (as set out in Sch 1 to the Human Rights Act 1998).] '[2] The proceedings giving rise to the appeal were applications for judicial review of the Scottish Independence Referendum (Franchise) Act 2013 ("the Franchise Act"), an Act of the Scottish Parliament. The Franchise Act based the franchise for the referendum on the franchise for local government elections, which is determined by the Representation of the People Act 1983 ("the 1983 Act"), and extended it to young voters over the age of 16. Section 2(1)(b) of the 1983 Act provides that a person who is subject to any legal incapacity to vote is not entitled to vote as an elector at a local government election. Section 3(1) of the 1983 Act incapacitates convicted prisoners from voting. Such prisoners have lacked the legal capacity to vote since 1969. Before then, there were other legal provisions which disenfranchised felons or had the effect of preventing prisoners from being registered to vote.

'[3] The challenges follow on from decisions of the European Court of Human Rights ("the Strasbourg Court") concerning the disenfranchisement of convicted prisoners. In *Hirst v UK* (No 2) (2005) 19 BHRC 546 the Grand Chamber held that the general and automatic

disenfranchisement of convicted prisoners was a violation of art 3 of Protocol No 1 ("A3P1") of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) ("ECHR"). In *Scoppola v Italy* (No 3) (2012) 33 BHRC 126 the Grand Chamber confirmed its judgment in *Hirst*. More recently, this court in *R (on the application of Chester) v Secretary of State for Justice, McGeoch v Lord President of the Council* [2013] UKSC 63, [2014] 1 All ER 683, [2014] AC 271 has applied the principles in *Hirst* and *Scoppola* in claims under the Human Rights Act 1998 ("HRA 1998"). The appellants did not claim that, if their appeal were to succeed, they would necessarily have a right to vote in the referendum but asserted that it was important to review the lawfulness of the legislation, which was a matter of general public importance. The Lord Advocate and the Advocate General for Scotland did not challenge that assertion.

...
[7] A3P1 is entitled "Right to free elections". It provides:

"The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

The article requires the contracting states to hold elections at reasonable intervals and the Strasbourg Court, drawing on the travaux préparatoires, has interpreted it as also conferring a right of participation, both by standing for election and voting, in the election of representatives to the legislature: *Mathieu-Mohin v Belgium* (1987) 10 EHRR 1 (paras 46–51). The natural meaning of the article is that the phrase—"the free expression of the opinion of the people in the choice of the legislature"—is the product of the free elections at reasonable intervals by secret ballot. The article states that the elections are to be held "under conditions which will ensure" that free expression.

'[8] Article 31(1) of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) provides, as a general rule of interpretation:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

In my view the ordinary meaning of the words of A3P1 strongly supports the view that the signatories of the ECHR were undertaking to hold periodic elections to a democratically elected legislature. The requirement that the elections are held "at reasonable intervals" also suggests that the drafters of A3P1 did not have referendums in mind. The words in their ordinary meaning do not support a wider view that A3P1 was intended to cover any major political decision which was put to a popular vote, however important that decision might be.

'[9] That the object and purpose of A3P1 is so limited is confirmed by the consistent case law of the European Commission on Human Rights and the Strasbourg Court. The Lord Ordinary, Lord Glennie, in para [22] of his opinion referred to *X v UK* (1975) 3 DR 165 and 11 subsequent decisions on admissibility which vouched the principle that A3P1 applies to elections to the legislature and has no application to voting in other elections or in a referendum. Lady Paton, delivering the succinct opinion of the First Division, agreed in para [24]. It is not necessary to analyse all of those decisions, which vouch a consistent line of reasoning. ...

'[15] There is thus no real support for the appellants' position in the Strasbourg jurisprudence. There is no clear direction of travel in that jurisprudence to extend A3P1 to referendums. On the contrary, between 1975 and 2013 there have been at least 12 applications in which claims under A3P1 concerning a right to vote in referendums have been rejected as inadmissible. The fact that in some cases the Strasbourg Court has not set out detailed reasoning does not assist the appellants. The applications were treated as manifestly ill-founded, avoiding the need for such reasoning.

'[18] ... A referendum which results in the creation of a new legislature or the transfer of powers from one legislature to another could have an equal effect on the democratic validity of the resulting Parliament. But A3P1, as currently worded, does not protect such a wider right of participation in public life. The appellants' claim under A3P1 therefore fails.

'[42] Given the issue on this appeal, namely whether the Referendum would be or was unlawful because people in prison who would otherwise be entitled to vote are excluded from the franchise, it is important to note the structure of the article. The first half of the article imposes a duty, which is to hold free

elections at reasonable intervals by secret ballot. The second half of the article is directed to what is required of that ballot. The phrase on which the appeal rests, namely "which will ensure the free expression of the opinion of the people", thus does not apply to every national ballot: it only applies to a ballot in which the expression of opinion can be said to involve "the choice of the legislature".

'[43] My agreement with Lord Hodge and the courts below that the respondent is right and that A3P1 does not apply to the Referendum is founded on four reasons based on the language of the article. Three of those reasons rely on the natural meaning of the words, and the fourth reason arises from the Strasbourg Court's jurisprudence. It is perhaps worth emphasising that, in my view, the second reason is enough on its own to justify this conclusion, and that may well also be true of the third and fourth reasons.

'[44] The first reason, which would probably not be enough on its own, is that the word "elections" is not a word that naturally covers a referendum which does not involve electing anyone to any post. Of course, it might be said (perhaps particularly by a lawyer) that the Referendum required the Scottish people to "elect" whether to leave the United Kingdom, but that is a pedantic or syntactical point, which avoids addressing the natural meaning of the word "election". Save in technical contexts (such as English legal terminology), which plainly do not arise here, an "election" is a ballot where people choose between more than one candidate.

'[45] The second reason is based on the expression "at reasonable intervals". It is appropriate, indeed necessary, in the present age that every democratic state has a national election to select the members of the national legislature "at reasonable intervals". And no one can doubt that A3P1 requires what we in the United Kingdom call general elections to be held at reasonable intervals. However, it would be little short of absurd to suggest that there can be an obligation on a government to have a referendum, particularly one such as the Referendum the subject of this appeal which is concerned with a classic "one-off" issue, "at reasonable intervals". There could be no objection under A3P1, for instance, if no further referendum was ever held in relation to Scottish independence. "At reasonable intervals" cannot mean "once".

'[46] Thirdly the requirement that people are entitled to vote "in the choice of the legislature" does not naturally suggest a choice as to which legislature governs or does not govern. The

definite article before “legislature” strongly suggests that the legislature to which the article refers is a specific and established entity, and that it is its membership to which the article refers. Indeed, there is no doubt that A3P1 refers to general elections, ie to elections for the membership of the legislature, and it is a little difficult to see how the words ‘the choice of the legislature’ can do double duty, and refer to such elections and to referenda or other ballots which have a different aim.

‘[47] Fourthly, decisions of the Strasbourg Court indicate that A3P1 only applies to directly effective elections—ie to elections which ipso facto result in what the people voted for, and not to ballots which require some further legal step to produce that result. Thus, in a general election in the UK, a member of Parliament is elected as soon as all the votes are cast. Nothing else is needed, apart from the pure machinery of counting the votes and announcing the result. On the other hand, while the main political parties had committed themselves to accept the result of the Referendum, a “yes” vote would not of itself have triggered independence for Scotland. If there had been a “yes” vote, Scotland would not have achieved independence unless and until the UK Parliament had voted in favour, and, whatever the main parties had promised, members of Parliament would have been free, indeed constitutionally bound, to vote as they saw fit.

‘[48] The Strasbourg Court appears to have consistently considered that a referendum which was not automatic, and only advisory, in nature was not within the ambit of A3P1. It can be traced to the Commission’s admissibility decision *X v UK* (1975) 3 DR 165, where it was held that A3P1 did not apply to the 1975 UK referendum on whether to leave the EEC (as it then was), because it was “of a purely consultative character”. That formulation has been impliedly adopted in subsequent decisions of the Commission and the Court, some of which are considered in paras [10]–[16] of Lord Hodge’s judgment. The 1975 referendum, which was considered in *X v UK*, would almost certainly have been regarded as committing the UK to leaving the EU in practice, but it could not have been legally binding any more than the Referendum was or would have been.

‘[50] There is, I accept, some initial attraction in the argument that, if a provision such as A3P1 is meant to apply to the membership of a legislature, then it ought a fortiori to apply to the logically anterior, and arguably more fundamental, issue of the

existence or nature of the legislature itself. However, quite apart from the fact that the article does not apply to such an issue as a matter of language, I do not consider that this argument can in fact withstand scrutiny. The purpose of A3P1 is to ensure that the membership of any national legislature is the subject of elections which must be (i) reasonable in terms of frequency, and (ii) on the basis of universal (or close to universal) suffrage. There is no reason in terms of practice or principle why this should apply to a vote on the form of the legislature.

‘[51] The effect of the article is that, whatever the form of the legislature and, however that form is determined, it must be a legislature whose membership is elected in accordance with A3P1. Thus, the UK Parliament could decide to dissolve itself and to be replaced by a new legislature without a national ballot approving the decision, but election to the membership of the new legislature would have to be effected by a national ballot, as it must comply with A3P1. Taken to its logical conclusion, it appears to me that, because its membership of the EU involves the UK being in some way subject to the European Parliament, the appellants’ argument would mean that leaving the EU would actually require a national ballot—and joining the EU in 1973 without a national ballot must have infringed A3P1.

‘[52] For these reasons, which are little more than a footnote to Lord Hodge’s reasons, I would reject this appeal, but, as he points out, there is a further ground for doing so. The decisions starting with *X v UK* and referred to by Lord Hodge in his paras [10]–[16], above, show that there is a clear and consistent view in Strasbourg that A3P1 does not apply to referenda. It is open to us to go further than the Strasbourg Court in deciding on the ambit of a provision in the convention, but such an unusual course would require sound justification. I can see no such justification in the present case.’ *Moohan v Lord Advocate* [2014] UKSC 67, [2015] 2 All ER 361 at [2]–[3], [7]–[9], [15], [18], per Lord Hodge and at [42]–[48], [50]–[52], per Lord Neuberger P

FREE ON BOARD

[For 41 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 13 see now 91 Halsbury’s Laws of England (5th Edn) (2012) para 14.]

FREIGHT

[For 43(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 1753 et seq see now 7

Halsbury's Laws of England (5th Edn) (2015) para 568 et seq.]

Contract of affreightment

[For 43(2) Halsbury's Laws of England (4th Edn) (Reissue) para 1410 see now 7 Halsbury's Laws of England (5th Edn) (2015) para 206.]

Dead freight

[For 43(2) Halsbury's Laws of England (4th Edn) (Reissue) para 1646 see now 7 Halsbury's Laws of England (5th Edn) (2015) para 461.]

FRIENDLY SOCIETY

[For 19(1) Halsbury's Laws of England (4th Edn) (Reissue) para 103 see now 48 Halsbury's Laws of England (5th Edn) (2015) para 557.]

FROM AMONG

Canada '1. The Supreme Court Act provides that three of the nine judges of the Supreme Court of Canada must be appointed "from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province": R.S.C. 1985, c. S-26, s. 6. This reference seeks our opinion on two aspects of the eligibility requirements for appointment to these three Quebec seats.

'2. The first is whether a person who was at any time an advocate of at least 10 years standing at the Barreau du Québec qualifies for appointment under s. 6 as being "from among the advocates of that Province".

...
'39. The language of s. 5 is general ("[a]ny person may be appointed a judge"), whereas the language of s. 6 is restrictive ("[a]t least three of the judges shall be appointed from among"). As such, s. 6 limits the pool of candidates. It is undisputed that s. 6 does so geographically by requiring that the appointments be made from one of the listed institutions in Quebec. The issue is whether s. 6 also imposes a requirement of current membership in one of the listed institutions.

'40. The Attorney General of Canada argues that the plain meaning of s. 6 does not require current membership in the bar of Quebec. He submits that the phrase "from among" (*"parmi"* in French) does not contain a temporal element and, as a result, s. 6 imports s. 5's temporal

specifications ("is or has been").

'41. We do not agree. There is an important change in language between s. 5 and s. 6. Section 5 refers to both present and former membership in the listed institutions by using the words "is or has been" in the English version and "*actuels ou anciens*" in the French version. By contrast, s. 6 refers only to the pool of individuals who are presently members of the bar ("shall be appointed from among" and "*sont choisis parmi*"). The significance of this change is made clear by the plain meaning of the words used: the words "from among the judges" and "*parmi les juges*" do not mean "from among the former judges" and "*parmi les anciens juges*", and the words "from among the advocates" and "*parmi les avocats*" do not mean "from among the former advocates" and "*parmi les anciens avocats*".

...
'45. In summary, on a plain reading, s. 5 creates four groups of people eligible for appointment: current and former judges of a superior court and current and former barristers or advocates of at least 10 years standing at the bar. But s. 6 imposes a requirement that persons appointed to the three Quebec seats must, in addition to meeting the general requirements of s. 5, be current members of the listed Quebec institutions. Thus, s. 6 narrows eligibility to only two groups for Quebec appointments: current judges of the Court of Appeal or Superior Court of Quebec and current advocates of at least 10 years standing at the bar of Quebec.

...
'59. We earlier concluded that a textual interpretation of s. 6 excludes former advocates from appointment to the Court. We come to the same conclusion on purposive grounds. The underlying purpose of the general eligibility provision, s. 5, is to articulate minimum general requirements for the appointment of all Supreme Court judges. In contrast, the underlying purpose of s. 6 is to enshrine the historical compromise that led to the creation of the Court by narrowing the eligibility for the Quebec seats. Its function is to limit the Governor in Council's otherwise broad discretion to appoint judges, in order to ensure expertise in civil law and that Quebec's legal traditions and social values are reflected in the judges on the Supreme Court, and to enhance the confidence of the people of Quebec in the Court.

...
'70. We conclude that a person who was, at any time, an advocate of at least 10 years standing at the Barreau du Québec, may be

appointed to the Supreme Court pursuant to s. 5 of the *Supreme Court Act*, but not s. 6. The three appointments under s. 6 require, in addition to the criteria set out in s. 5, current membership of the Barreau du Québec or of the Court of Appeal or Superior Court of Quebec. Therefore, a judge of the Federal Court or Federal Court of Appeal is ineligible for appointment under s. 6 of the Act.’ *Reference re Supreme Court Act*, ss 5 and 6 2014 SCC 21, [2014] 1 SCR 433 at paras 1–2, 39–41, 45, 59, 70, per McLachlin CJ and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ

FRUSTRATION

[For 9(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 897 see now 22 Halsbury’s Laws of England (5th Edn) (2012) para 468.]

FUGITIVE CRIMINAL

[For 17(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 1194 et seq see now 47 Halsbury’s Laws of England (5th Edn) (2014) para 620 et seq.]

FURNITURE

[For 27(2) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 872 see now 63 Halsbury’s Laws of England (5th Edn) (2016) para 715, n 2.]

FUTILE

‘[28] Under [the Mental Capacity Act 2005,] s 42(1)(b) the Lord Chancellor must prepare and issue one or more codes of practice for the guidance of persons acting in connection with the care and treatment of another person and sub-s (5) requires that if it appears to a court that a provision of a code is relevant to a question arising in the proceedings, the provision or failure must be taken into account in deciding the question. Paragraph 5.31 of the Mental Capacity Act Code of Practice provides relevant guidance:

“All reasonable steps which are in the person’s best interests should be taken to prolong their life. There will be a limited number of cases where treatment is futile, overly burdensome to the patient or where there is no prospect of recovery. In circumstances such as these, it may be that an assessment of best interests leads to the

conclusion that it would be in the best interests of the patient to withdraw or withhold life-sustaining treatment, even if this may result in the person’s death. The decision-maker must make a decision based on the best interests of the person who lacks capacity. They must not be motivated by a desire to bring about the person’s death for whatever reason, even if this is from a sense of compassion. Healthcare and social care staff should also refer to relevant professional guidance when making decisions regarding life-sustaining treatment.”

...

‘[35] In my judgment to answer the question whether the proposed treatment would be futile one has to ask what result the treatment seeks to produce. Futility is an ethically controversial concept because what is worthwhile can only be assessed relative to its goal. Thus the crucial question is to determine what the proper goal is for life-sustaining treatment, defined in s 4(10) of the Act to be “treatment which in the view of the person providing health care for the person concerned” (and by necessary extension, the view of the court which is called upon to sanction that treatment) “is necessary to sustain life”. The goal can be stated in one, or perhaps more than one, of these ways:

- (1) The goal may be to prevent the patient’s imminent death from the particular ailment which the treatment is designed to overcome (to give again an example in crude and unscientific terms, CPR is necessary and effective in the case of a heart attack to get the heart beating again).
- (2) Having prevented imminent death, the goal may be to prolong life even though it is recognised that it will be for a relatively brief time only.
- (3) The goal may be to delay death even though it will not result in any significant alleviation of the patient’s suffering.
- (4) The goal may be to provide for the patient a minimum quality of life for the remainder of his life.
- (5) The goal may be to allow the patient to achieve the goal (or the wish) he has set for himself.
- (6) The goal may be to secure therapeutic benefit for the patient, that is to say the treatment must, standing alone or with other medical care, have the real prospect of curing or at least palliating

the life threatening disease or illness from which the patient is suffering.

[36] I do not see that futility should be judged simply by the ability to score goals (1)–(3). There is no duty to maintain the life of a patient at all costs. There is no duty needlessly to prolong dying. Even John Keown, who with John Finnis believes that human life is itself a basic intrinsic good, does not support the “vitalist” view that regardless of the pain and suffering that life-prolonging treatment entails, it must be administered since human life is to be preserved at all costs. As for the fourth goal, it is difficult to deny that there is implicit in every judgment about whether treatment is futile or worthwhile a judgment about the quality of life the patient will have with or without that treatment. Like it or not lurking within the question or perhaps behind it is the ethically controversial question: is it worthwhile keeping this patient alive? ... The fifth goal raises a question which cannot be avoided when considering the best interests of the patient, namely, what does the patient wish for himself. But the patient’s wishes are not the deciding factor in working out his best interests and do not determine what treatment he should receive. The patient’s own wishes have a part to play, as I shall show, in the final question of what is in his best interests but his wishes do not dictate what is in his best *medical* interests.

[37] My judgment is that the futility of treatment must be judged in the light of the answer to the sixth question I posed in the preceding paragraphs. This happens to accord with John Keown’s view that the right question to ask in these end-of-life decisions is whether the treatment is worthwhile in the sense that it will bring therapeutic benefit to the patient. It accords with *Mason & McCall Smith’s Law and Medical Ethics* (8th edn, 2010) view that, “We much prefer to speak of non-productive treatment, which places the problem firmly in the medical field ...”: see their discussion at paras 14.04–14.06. It coincides with the definition preferred in the 3rd edition of what started as Kennedy and Grubb *Principles of Medical Law* (2010) at 10.214: “Treatment can properly be categorised as futile if it cannot cure or palliate the disease or illness from which the patient is suffering and thus serves no therapeutic purpose of any kind”. *Aintree University Hospitals NHS Foundation Trust v James* [2013] EWCA Civ 65, [2013] 4 All ER 67 at [28], [35]–[37], per Sir Alan Ward

[30] In concluding that he was not persuaded that treatment would be futile or overly burdensome or that there was no

prospect of recovery, Peter Jackson J said this:

“(a) In Mr James’s case, the treatments in question cannot be said to be futile, based on the evidence of their effect so far.

(b) Nor can they be said to be futile in the sense that they could only return Mr James to a quality of life which is not worth living.

(c) Although the burdens of treatment are very great indeed, they have to be weighed against the benefits of a continued existence.

(d) Nor can it be said that there is no prospect of recovery: recovery does not mean a return to full health, but the resumption of a quality of life that Mr James would regard as worthwhile. The references, noted above, to a cure or a return to the former pleasures of life set the standard unduly high.” [2012] EWHC 3524 (COP), [2012] All ER (D) 169 (Dec).]

[31] In the Court of Appeal, Sir Alan Ward regarded the “real question” as whether the judge correctly applied the guidance and in particular whether he was right to find that the treatments could not be said to be futile. He considered that futility had to be judged against the goal which was sought to be achieved. He listed six possible goals, ending with this:

“The goal may be to secure therapeutic benefit for the patient, that is to say the treatment must, standing alone or with other medical care, have the real prospect of curing or at least palliating the life-threatening disease or illness from which the patient is suffering.” ([2013] 4 All ER 67 at [35].)

In his view, this was the goal against which futility should be judged (at [37]). The judge had adopted too narrow a view of the futility of treatment. He should have had regard, not just to its effectiveness in coping with the current crisis, but to the improvement or lack of improvement which the treatment would bring to the general health of the patient (at [38]).

[32] He also took the view that the judge was wrong to conclude that the three treatments in question were not overly burdensome (at [40]). Moreover, the judge had applied the wrong test of a “recovery”. In his view, the focus was on the medical interests of the patient. In a case where “life was ebbing away”, “no prospect of recovery means no prospect of recovering such a state of good health as will

avert the looming prospect of death if the life-sustaining treatment is given" (at [44]).

...
 '[39] The most that can be said, therefore, is that in considering the best interests of this particular patient at this particular time, decision-makers must look at his welfare in the widest sense, not just medical but social and psychological; they must consider the nature of the medical treatment in question, what it involves and its prospects of success; they must consider what the outcome of that treatment for the patient is likely to be; they must try and put themselves in the place of the individual patient and ask what his attitude to the treatment is or would be likely to be; and they must consult others who are looking after him or interested in his welfare, in particular for their view of what his attitude would be.

'[40] In my view, therefore, Peter Jackson J was correct in his approach. Given the genesis of the concepts used in the Code of Practice, he was correct to consider whether the proposed treatments would be futile in the sense of being ineffective or being of no benefit to the patient. Two of the treatments had been tried before and had worked. He was also correct to say that "recovery does not mean a return to full health, but the resumption of a quality of life which Mr James would regard as worthwhile". He clearly did consider that the treatments in question were very burdensome. But he considered that those burdens had to be weighed against the benefits of a continued existence. He was also correct to see the assessment of the medical effects of the treatment as only part of the equation. Regard had to be had to the patient's welfare in the widest sense, and great weight to be given to Mr James's family life which was "of the closest and most meaningful kind".

...

'[43] It follows that I respectfully disagree with the statements of principle in the Court of Appeal where they differ from those of the judge. Thus it is setting the goal too high to say that treatment is futile unless it has "a real prospect of curing or at least palliating the life-threatening disease or illness from which the patient is suffering". This phrase may be a partial quotation from Grubb, Laing and McHale *Principles of Medical Law* (3rd edn, 2010) para 10.214, where the authors suggest that "Treatment can properly be categorised as futile if it cannot cure or palliate the disease or illness from which the patient is suffering *and thus serves no therapeutic purpose of any kind*". Earlier, they had used the words "useless" or "pointless". Given its genesis in *Bland's* case [*Airedale NHS Trust v Bland* [1993] AC 789, [1993] 1 All ER 821, HL], this seems the more likely meaning to be attributed to the word as used in the Code of Practice. A treatment may bring some benefit to the patient even though it has no effect upon the underlying disease or disability. The Intensive Care Society and the Faculty of Intensive Medicine, who have helpfully intervened in this appeal, supported the test proposed by Sir Alan Ward. But this was because they believed that it reflected clinical practice in which "futility" would normally be understood as meaning that the patient cannot benefit from a medical intervention because he or she will not survive with treatment". That is much closer to the definition adopted by the judge than by Sir Alan.' *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, [2014] 1 All ER 573 at [30]–[32], [39]–[40], [43], per Lady Hale SCJ

G

GAIN

[For 7(1) Halsbury's Laws of England (4th Edn) (2004 Reissue) para 201n see now 14 Halsbury's Laws of England (5th Edn) (2016) para 1n.]

GALE

[For 31 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 611 see now 76 Halsbury's Laws of England (5th Edn) (2013) para 614.]

GAME (ANIMALS OR BIRDS)

[For 2(1) Halsbury's Laws of England (4th Edn) (2003 Reissue) para 517 see now 2 Halsbury's Laws of England (5th Edn) (2017) para 14.]

GAME OF CHANCE

'[1] In 1960, Parliament by enacting the Betting and Gaming Act 1960 made significant changes to many centuries of legislation in respect of betting and gaming. The Act repealed many old Acts of Parliament, gave a new definition to "gaming" and established a licensing regime for those who provided premises for gaming. Those and other provisions were consolidated into the Gaming Act 1968. Section 52(1) of that Act (substantially re-enacting s 28 of the 1960 Act) defined "gaming", subject to provisions that are immaterial, as "the playing of a game of chance for winnings in money or money's worth" and a "game of chance" as:

"game of chance" does not include any athletic game or sport, but, with that exception, and subject to subsection (6) of this section, includes a game of chance and skill combined and a pretended game of chance or of chance and skill combined."

Subsection (6) provided:

"In determining for the purposes of this Act whether a game, which is played otherwise than against one or more other players, is a game of chance and skill combined, the

possibility of superlative skill eliminating the element of chance shall be disregarded."

'[2] Sections 3 and 4 of the 1968 Act prohibited levying a charge in respect of gaming or a charge on stakes or winnings, unless the premises were licensed; s 8 provided that if gaming took place contrary to the prohibitions, an offence was committed. The issue on this appeal is whether the judge correctly directed the jury in respect of the statutory definitions of a game of chance in circumstances where the appellant organised a specific type of poker game at unlicensed premises.

'[3] There has been no decision which can be found on the meaning of the provision defining a game of chance since the change in the law over 40 years ago. It is not clear why this is the position. It has proved very difficult to ascertain whether there have been many prosecutions, as no records were kept where there was an acquittal and convictions were deleted after a given period of time. We are grateful to counsel for the Crown for ascertaining in these difficult circumstances that since the change in the law in 1960, it can now only be established that the first recorded conviction was in 1998 and thereafter there have been a few convictions each year. The report of a Joint Committee of the Lords and Commons published in April 2004 (HL Paper 63-I, HC Paper 139-I) recorded that the Gaming Board and the police acknowledged difficulties in tackling illegal gaming due to a lack of police expertise and police time.

'[4] In 2005 Parliament amended the provisions again by the Gambling Act 2005; a game of chance in s 6 of that Act is defined:

"(2) In this Act 'game of chance'—(a) includes—(i) a game that involves both an element of chance and an element of skill, (ii) a game that involves an element of chance that can be eliminated by superlative skill, and (iii) a game that is presented as involving an element of chance, but (b) does not include a sport."

Subsection (6) gives the Secretary of State a power by regulation to provide that a specified activity carried on in specified circumstances is or is not to be treated as a game, a game of chance or a sport. It is not necessary to refer to these provisions any further as no contention was advanced that the provisions are relevant to the construction of the 1968 Act.

'[5] ... The appellant contended (on the basis which we will set out) that the test as to whether

TH poker was a game of chance depended on whether skill predominated over chance; as TH poker was predominantly a game of skill, it was not a game of chance within the meaning of s 52(1). The judge in a short ruling rejected that submission and held that no gloss was required on the definition in the 1968 Act, though he accepted the prosecution submission that the prosecution had to prove that there must be a significant element of chance, though not necessarily a predominant one, as most games contained some elements of chance even to an infinitesimal extent.

...
 '[6] The contention elegantly and succinctly advanced by Mr Luba QC on behalf of the appellant was that Parliament had radically altered the law in 1960, that it was no longer relevant to examine the old cases and that on the true construction of the 1968 Act, the judge should have directed the jury that a game where skill predominated over chance was not a game of chance within s 52(1) of the 1968 Act.

...
 '[8] Mr Luba submitted that the change in the law effected by the 1960 Act had the consequence that it was no longer appropriate to rely on the older cases to which he had referred us. The 1960 Act effected a fundamental change, as the short summary which we have set out demonstrates; the Act rendered gaming lawful on the conditions set out in the Act and repealed the old statutes. The complexity of the old law with different tests applicable to cards and automatic machines was no longer relevant. The test as to gaming and a game of chance was set out in the Act and it was for the jury to determine whether on the facts the game was a game of chance as defined in the Act.

'[9] We agree with that submission. As Parliament had made a significant change of the applicable law and provided a statutory definition of a game of chance, it is, in our view, no longer necessary or helpful to refer to the old cases. In the present case, reference was made to *R v Thompson* [[1943] 2 All ER 130, [1943] 1 KB 650] before the judge; we can quite understand why, in the absence of any authority on the post-1960 regime, it was done. However, Mr Luba QC was correct in saying that it was wrong to do so.

'[10] In relation to the definition in the 1968 Act to which the judge should have sole regard, Mr Luba QC submitted that it was clear that the definition in the Act could not be applied literally; construed properly, he contended that it was clear that a game which was predominantly a game of skill was not a game of chance

within the statutory definition ...

'[11] Although, for the reasons we have given we agree with Mr Luba that it was not appropriate to have regard to the old law and that the issue is one of construction of the provisions of the 1968 Act, we consider that the judge directed the jury correctly on the 1968 Act.

(i) The meaning of a game of chance set out in s 52(1) of the 1968 Act is not by its terms an exhaustive definition, as the word "include" is used. However, it does not seem to us that this was intended by Parliament to enable a more restrictive definition to be given. It is clear that Parliament could have adopted a test of preponderance; it did not and we see no reason to write into the Act a further restriction or qualification which Parliament could easily have included but which it did not.

(ii) In our view, the definition in the Act is in simple terms and needed little elaboration; it was a question of fact for the jury to determine whether on the statutory definition TH poker was a game of chance.

(iii) It may be in some cases the definition would need some elaboration. If a prosecution was brought where the element of chance was insignificant or *de minimis*, then it would be necessary to spell out that that element of chance should be ignored in determining whether the game is a game of chance. For example, if chance was to be used to determine which player had the right to start a game, but the game was otherwise a game of skill, then that element should be regarded as insignificant or *de minimis* and therefore should be ignored.

(iv) In his direction to the jury the judge may have gone further than this in favour of the appellant. He directed the jury that there must be a significant or meaningful element of chance as opposed to an element which was simply token, notional or a *scintilla*. In our view, as Parliament has provided that games of combined skill and chance are to be treated as games of skill without any qualification, then the only circumstance where chance should not be taken to make a game of skill and chance a game of chance is where the element of chance is such that it should on ordinary principles be ignored—that is to say where it is so insignificant as not to matter. Parliament did not provide that in a game of mixed skill and chance that the element of chance had to be significant for the game to be a game of chance; there is no reason for the courts to do so.

(v) It seems to us that the element of absurdity to which so much weight was attached on behalf of the appellant is properly catered for

by ignoring chance where the element of chance is so insignificant as not to matter.

(vi) We have reached this conclusion on the basis of our interpretation of s 52(1) of the 1968 Act. It was common ground that s 52(6) was directed at the operation of games played against “the bank” such as in casinos or where gaming machines are used, as it refers to games “played otherwise than against one or more other players”. It was argued on behalf of the appellant that, as Parliament had considered it necessary to refer to “superlative skill eliminating the element of chance” in relation to games played against “the bank”, Parliament had envisaged courts would, in determining whether a game of combined skill and chance was a game of chance, have regard to the predominance of the elements of skill and chance. We do not consider that this in any way follows; on the contrary, on the definition of a game of chance as set out in the 1968 Act, if there was no element of chance (as that had been eliminated by superlative skill), it would not be a game of chance and skill combined. The subsection was therefore directed at bringing within the definition games against the bank where (if such exist) skill had eliminated any element of chance.

(vii) Argument was also directed to the question of whether assistance as to the statutory definition of a game of chance could be derived from s 40(2) which provided an exemption from s 3 in certain circumstances in respect of miners’ welfare institutes or clubs. It was contended by the Crown that the exemption was directed in part at bridge clubs and, if the test was one of predominance of chance over skill, then that provision would have been unnecessary. We do not think that this subsection really assists either way.

(viii) We were grateful to Mr Luba for referring us to the United States and Canadian authorities. We do not think that any real help can be derived from the United States authorities where the concept of predominance has become embedded. Although the definition of game in the Canadian statute under consideration was exhaustive, the approach of the majority of the Supreme Court of Canada in *Ross v R* [(1968) 70 DLR (2d) 606, Can SC] to the construction of the Canadian legislation is very much the approach we have adopted in relation to the United Kingdom legislation; for the reasons that are evident from this judgment, we were not persuaded by the views of Spence J.’ *R v Kelly* [2008] EWCA Crim 137, [2008] 2 All ER 840 at [1]–[6], [8]–[11], per Thomas LJ

GAMING

[For 4(1) Halsbury’s Laws of England (4th Edn) (2002 Reissue) para 3 see now 67 Halsbury’s Laws of England (5th Edn) (2016) para 258.]

GAMING MACHINE

[Value Added Tax Act 1994, Schedule 9, Group 4, item 1: exemption from value added tax (‘VAT’) in respect of, inter alia, the provision of facilities for the playing of games of chance. Note (1)(d) to Group 4 provided that the exemption in item 1 did not include the provision of a ‘gaming machine’.] [1] The narrow question raised by this appeal is whether, during the period 1 October 2002 to 5 December 2005, the takings on a particular category of machines (“the disputed machines”) operated by the appellants (“Rank”) were subject to value added tax (“VAT”). The answer depends on whether the takings resulted from the provision of a “gaming machine” as defined in note (3) to Group 4 Sch 9 to the Value Added Tax Act 1994, as it was at the material time, more particularly whether for the purposes of that definition the element of chance in the game was “provided by means of the machine”. If not, the takings were exempt.

‘[5] As Rimer LJ noted (para [24]) it has always been common ground that the definition of “gaming machine” in note (3) is satisfied by at least one form of slot machine: that is the type of machine in which the element of chance was provided by “an electronic or mechanical component within, and forming an integral part of, the body of the machine”. The debate before the tribunal turned on the treatment of different forms of system using RNGs [random number generators], either “single-terminal RNGs” or “multi-terminal RNGs”. As Rimer LJ explained (paras [31]–[35]) the tribunal made findings on certain forms of single-terminal RNGs. ... The tribunal ((2008) VAT Decision 20777) concluded (paras 54–56; summary of conclusions para 2) that terminals constructed with dedicated RNGs were gaming machines within note (3) “where the RNG was used with the machine whether or not the RNG had been detached”, although they observed that the position might have been different if ‘the cable could be unplugged, the RNG did have an independent power source and was ordered and supplied separately’ (para 55).

‘[6] The machines in issue in the present appeal are all multi-terminal systems. ... It seems that in each case the RNG was connected

by a wire to the playing terminals, but had its own power supply, and it might be housed in a separate box or hung on the wall. Up to six terminals might be served by a single remote RNG. Further, according to evidence summarised in the agreed statement of facts (para 20), each terminal was designed to be used with the RNG obtained from the manufacturer of the terminal, the terminals and RNGs were sold together, and each RNG was "manufacturer-specific" so that a replacement if needed would have been obtained from the same manufacturer. Though linked to a single RNG, each terminal could be operated independently and could offer the same or different games as the operator wished.

[24] Much of the argument in the tribunal and the lower courts turned on the meaning of the word "machine". The tribunal did not refer to any dictionary definition of the term. However, they seem to have proceeded on the assumption that the word connoted a single item of equipment, which in the context of para (b) of the definition, had to be that which was "played" by the player, and into which he inserted his coin or token. Accordingly, for both (b) and (c) to be satisfied "both the terminal and the RNG had to refer to the same machine", that being made clear by the use of the definite article before the word "machine" in both. Where the RNG was situated outside the terminal and served a number of terminals, it was a separate item of equipment, so that the element of chance was not provided by means of the machine containing the slot. Norris J took a similar view. He also treated the relevant "machine" as that "which has the slot in it and which the player is playing". It was then a question of fact whether the outcome of the game is "determined by an external event which the machine records or is produced by the machine itself". The Court of Appeal interpreted the word "machine" in a broader sense, as extending to a "configuration of separate, but connected, items of equipment that together enable the playing of a game of chance at the terminal". Again they made no reference to any dictionary definition, relying instead on what they deemed the absurdity of a more narrow interpretation, which they thought would deprive the provisions of 'sensible and practical effect'.

[25] I see some force in the appellants' criticisms of the Court of Appeal's reliance on arguments of absurdity, which seem difficult to reconcile with HMRC's own acceptance in the past of a narrow interpretation. However, their

approach can arguably be supported by reference to the natural meaning of the word "machine" in its context. We have not been referred to any dictionary definitions of the word "machine", but reference to the standard dictionaries does not indicate any linguistic reason to confine the word to a single item of equipment. It is in some ways a chameleon-like word, and the dictionaries contain a variety of meanings. A typical and in my view accurate definition, taken from the Concise Oxford English Dictionary, is: "an apparatus using or applying mechanical power, having several parts, each with a definite function and together performing certain kinds of work".

[30] In my view, it is not necessary to resolve this debate, since one can arrive at the same practical answer as the Court of Appeal, without departing from the view that the word "machine", where it matters, can refer to an individual terminal. The relevant phrase is "the element of chance in the game is provided by means of the machine". In the words of Norris J, it is "the determining event which governs the outcome of the game being played on the machine... which the player is playing". Chance is the possibility of something happening, not in the abstract, but for a particular player in the context of a particular game; in other words, the possibility of that player getting the combination of numbers which wins a prize or conversely a combination which does not.

[31] Here what determines the outcome of the game is the pressing of a button (or pulling a lever) on the terminal. The pressing of the lever is a more sophisticated equivalent of a player rolling a dice. In that context, it can fairly be said, the winning number is produced "by means of" the player's action in throwing the dice. So here the RNG produces a pre-programmed sequence of numbers which changes very rapidly. The element of chance in any game is provided 'by means of' the action of the particular player in pressing the button and so interrupting that ever-changing sequence at a particular moment. The terminal is not simply communicating information from the RNG, but is the active means by which the winning or losing combination is generated. The RNG is a necessary part of that process, but its response (wherever situated) is entirely automatic. In those circumstances, it is a fair use of language in my view, and consistent with the apparent policy of the legislation, to describe the element of chance as provided 'by means of' the terminal.' *Revenue and Customs*

Commissioners v Rank Group plc [2015] UKSC 48, [2015] 4 All ER 77 at [1], [4]–[6], [24]–[25], [30]–[31], per Lord Carnwath

GARNISHEE PROCEEDINGS

[For 17(1) Halsbury's Laws of England (4th Edn) (Reissue) para 251 see now 12A Halsbury's Laws of England (5th Edn) (2015) para 1406.]

GATING ORDER

'[2] Part 8A was inserted into the [Highways Act 1980] by s 2 of the Clean Neighbourhoods and Environment Act 2005 with effect from 1 April 2006. It empowers highway authorities to make, vary, and revoke orders restricting the public right of way over highways in their areas, and enforce those restrictions by physical barriers, for the purposes and on the conditions prescribed by the statute. Orders made under its provisions are known as "Gating Orders".' *Ramblers' Association v Coventry City Council* [2008] EWHC 796 (Admin), [2009] 1 All ER 130 at [2], per Michael Supperstone QC (sitting as a Deputy High Court Judge)

GAVELKIND

[For 39(2) Halsbury's Laws of England (4th Edn) (Reissue) para 14 see now 87 Halsbury's Laws of England (5th Edn) (2017) para 32.]

GIFT

[For the Income and Corporation Taxes Act 1988, s 506C(9) see now the Income Tax Act 2007, s 557(1)(c) and the Corporation Tax Act 2010, s 510(1)(c) (both repealed by the Finance Act 2011).]

Class gift

[For 50 Halsbury's Laws of England (4th Edn) (2005 Reissue) para 465 see now 102 Halsbury's Laws of England (5th Edn) (2010) para 175.]

Inter vivos

[For 20(1) Halsbury's Laws of England (4th Edn) (Reissue) para 1 see now 52 Halsbury's Laws of England (5th Edn) (2014) para 201.]

GLEBE

[For 14 Halsbury's Laws of England (4th Edn) para 1139 see now 34 Halsbury's Laws of England (5th Edn) (2011) para 915.]

GOLD

[For 32 Halsbury's Laws of England (4th Edn) (2005 Reissue) para 124 see now 49 Halsbury's Laws of England (5th Edn) (2015) para 25.]

GOOD AND SUFFICIENT REASONS

[CPR PD 52A, para 6.4: appeal court may set aside or vary the order of the lower court by consent and without determining the merits of the appeal if it is satisfied that there are good and sufficient reasons for so doing.] '[26] The appeal court, therefore, has a discretion to allow an appeal by consent on the papers without determining the merits at a hearing if it is satisfied that there are good and sufficient reasons for doing so. What are good and sufficient reasons? The answer will depend on the circumstances of the case, but we think that it would be helpful to provide some guidance. If the appeal court is satisfied that (i) the parties' consent to the allowing of the appeal is based on apparently competent legal advice, and (ii) the parties advance plausible reasons to show that the decision of the lower court was wrong, it is likely to make an order allowing the appeal on the papers and without determining the merits. In such circumstances, it would involve unnecessary cost and delay to require the parties to attend a hearing to persuade the appeal court definitively on the point.

'[27] At para [14] of his judgment, the judge said that, where a merits based decision has been reached at first instance which all parties agree should be set aside on appeal, para 6.4 requires there to be a hearing and a judgment. He added: "The judge whose decision is being impugned is surely entitled to no less, and there is a plain need to expose error so that later legal confusion does not arise". We disagree. Paragraph 6.4 does not require a decision on the merits in every case where there has been a decision on the merits in the lower court. There is no reason to restrict in this way the wide discretion conferred by para 6.4 to allow an appeal by consent without a hearing followed by a decision on the merits. The words "good and sufficient reasons" are very wide. Further, we reject the notion that the judge whose decision is under appeal has any entitlement to a

decision on the merits. In deciding whether to make a consent order without a decision on the merits, the appeal court is only concerned with the interests of the parties and the public interest. The interests of the judge are irrelevant.’ *Rochdale Metropolitan Borough Council v KW* [2015] EWCA Civ 1054, [2016] 2 All ER 181 at [26]–[27], per Lord Dyson MR

GOODS

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

In marine insurance policy

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 295 see now 60 Halsbury’s Laws of England (5th Edn) (2011) para 287.]

GOODWILL

[For 35 Halsbury’s Laws of England (4th Edn) (Reissue) paras 1206, 1209 see now 80 Halsbury’s Laws of England (5th Edn) (2013) paras 807, 810.]

GOODYEAR INDICATION

‘[8] In *Goodyear* [*R v Goodyear* [2005] EWCA Crim 888, [2005] 3 All ER 117, [2005] 1 WLR 2532] this court introduced a procedure by which defendants can make a written application to a Crown Court for an indication of the level of sentence which the court will be minded to pass in the event of a guilty plea. The court, if minded to accede to this application, will indicate in open court the maximum sentence which it is minded to impose if a guilty plea is entered within a reasonable time. If a guilty plea is entered the court is bound to comply with this indication.’ *R v Transco plc* [2006] EWCA Crim 838 at [8], per Lord Phillips of Worth Matravers CJ

GOVERNMENT

[For 8(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 5 see now 20 Halsbury’s Laws of England (5th Edn) (2014) para 5.]

Canada [State Immunity Act, RSC 1985, c S-18, s 2.] ’79. The final issue relating to statutory interpretation is whether Saeed Mortazavi and Mohammad Bakhshi are immune from legal action by operation of the *SIA*. The

resolution of this issue hinges on answering three questions, namely: (1) Are public officials acting in their official capacity included in the term “government” as it is used in the *SIA*? (2) Were Mr Mortazavi and Mr Bakhshi acting in their official capacity in their interactions with Ms. Kazemi? and (3) Can acts of torture be “official acts” for the purposes of the *SIA*? In my view, the above questions must be answered in the affirmative, with the result that Mr Mortazavi and Mr Bakhshi are immune from civil suit in the underlying claim pursuant to s. 3(1) of the *SIA*.

’84. On the plain wording of the Act, it is unclear which actors Parliament intended to capture when it included the term “government” in the definition of “foreign state”. The term “government” is capable of referring to many different entities and individuals, including but not limited to: legislatures, the executive, entities receiving government funding and which are subject to government control, and public officials. The absence of an explicit reference to “public officials” in the Act requires that the term “government” be interpreted in context, and, as previously mentioned, against the backdrop of international law.

’85. At the outset, I note that the definition of the term “foreign state” at s. 2 of the *SIA* is open-ended, as indicated by the use of the word “includes”. When this statutory language is placed in context, in conjunction with the purpose of the Act, it becomes clear that public officials must be included in the meaning of “government” in s. 2 of the *SIA*. The reality is that governmental decisions are carried out by a state’s servants and agents. States are abstract entities that can only act through individuals. Significantly, s. 14(1)(c) of the Act provides that a certificate issued by the Minister of Foreign Affairs as to whether a person or persons are to be regarded as the head or government of a foreign state is conclusive evidence of any matter that is stated in it. It is difficult to conceive of a reason for which “persons” might be regarded as “government” under the Act if not to be provided immunity pursuant to s. 3(1).

’93. Given the above, I conclude that public officials, being necessary instruments of the state, are included in the term “government” as used in the *SIA*. That being said, public officials will only benefit from state immunity when acting in their official capacity. This conclusion leads me to the question of whether the individual respondents were acting in their

official capacity when they allegedly tortured Ms. Kazemi so as to render them immune from civil proceedings in Canada.

...
 '95. Though the acts allegedly committed by Mr Mortazavi and Mr Bakhshi shock the conscience, I am not prepared to accept that the acts were unofficial merely because they were atrocious. The question to be answered is not whether the acts were horrific, but rather, whether the acts were carried out by the named respondents in their role as "government". The heinous nature of torture does not transform the actions of Mr Mortazavi and Mr Bakhshi into private acts, undertaken outside of their official capacity. On the contrary, it is the state-sanctioned or official nature of torture that makes it such a despicable crime.' *Kazemi Estate v Islamic Republic of Iran* [2014] SCJ No 62, [2014] 3 SCR 176 at paras 79, 84–85, 93, 95, per LeBel J

GOVERNOR

Of dependent territory

[For 6 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 826 see now 13 Halsbury's Laws of England (5th Edn) (2017) para 718.]

GRANT

Australia [Native Title Act 1993 (Cth), s 47A.]

'[29] The applicant contends that s 47A applies to both the freehold land and the perpetual lease land, so that s 47A(2) operates so the extinguishment of the native title rights and interests of the applicant in that land by the original grants of perpetual leases are to be disregarded for all purposes of the NT Act. The savings provisions, following the operation of s 47A(2), prescribed by s 47A(3) and (4) are said to have no relevance to the land under consideration.

...
 '[82] The focus of the applicant in this matter, at least in part, is upon the meaning of the term "grant of the freehold estate or lease" in s 47A(1)(b)(i). Section 44H is said to avoid doubt. It prescribes that the rights under a "lease, licence, permit or authority" and their exercise have priority over native title rights. Section 44H(a) refers to the valid "grant, issue or creation of a lease, licence, permit or authority". The wording used, namely "grant, issue or creation", does not readily encompass a focus on particular rights or restrictions or

limitations on those rights by an agreement effecting, or supporting, or being effective conditional upon, the transfer of a lease. While the relevant wording in s 47A(1)(b)(i) is a little different, relating to a freehold estate or a lease, it cannot easily be said that the grant of a lease as there used is intended to encompass the transfer, or the circumstances surrounding the transfer, of a lease. In essence, that is the applicant's first contention, namely that the term "grant" covers the transfer of leases issued under the Crown Lands Act 1929 (SA) or its predecessors.

'[83] In my view, the text of s 47A(1)(b)(i) supports the specific technical conveyancing meaning for "grant".

...
 '[95] I do not consider that the subsequent dealings with the perpetual lease land and the freehold land engage s 49A(1)(b)(i) the way primarily contended by the applicant, that is by the proposition that "grant" in s 47A(1)(b)(i) includes the processes by which the perpetual lease land and the freehold land came to be held by VYAC.

'[96] In the case of the perpetual lease land, the relevant transfers of the leases were first to ILC in February 2000 and then by ILC to VYAC on 5 February 2001 subject to the caveat to ILC (other than the lease over the land in Item 4 of Attachment 3, which was transferred by ILC to VYAC on 17 June 2002). For the reasons I have given, those transfers did not constitute the grant of the leases within that provision.

'[97] I do not think that the wording of s 47A(1)(b)(i) is expressed widely enough to encompass the transfer of the perpetual leases to VYAC by ILC, or to encompass the processes by which the freehold land came to be granted to VYAC.

'[98] In relation to the perpetual leases, those vested in VYAC at the time of the application must have the quality of being granted under legislation of a particular character. The word "grant" would not have a different meaning when applied to freehold land from that when applied to leasehold land. The grant of the freehold estate by the state to VYAC in 2009 was not made under legislation of the required character. Typical legislation where that would arise would include the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) and in South Australia the Aboriginal Lands Trust Act 1966 (SA), Anangu Pitjantjatjara Land Rights Act 1981 (SA) and Maralinga Tjaruta Land Rights Act 1984 (SA).

'[99] The wider legislative context referred

to by the applicant, in my view, does not point to a different conclusion.’ *Coulthard (on behalf of the Adnyamathanha People No 3 Native Title Claim) v South Australia* [2014] FCA 101, (2014) 311 ALR 94 at [29], [82]–[83], [95]–[99], per Mansfield J

Of watercourse

[For 16(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 189 see now 87 Halsbury’s Laws of England (5th Edn) (2017) para 918.]

GRANT OF NEW LICENCES

Australia [Gambling Regulation Act 2003 (Vic), s 4.3.12(1).] ‘[7] Was there a “grant of new licences” within the meaning of s 4.3.12(1) of the 2003 Act which entitled Tabcorp to payment under that sub-section? In particular, does the phrase “grant of new licences” in s 4.3.12(1) mean the grant of a new wagering licence and gaming licence under Pt 3 of Ch 4 of the 2003 Act, as the State contends, or does it extend to the grant of other entitlements, not previously existing, the substantive operation of which was to authorise wagering and gaming activities in Victoria, as Tabcorp contends?’

‘[8] For the reasons that follow, the phrase “grant of new licences” in s 4.3.12(1) of the 2003 Act means the grant of a wagering licence and a gaming licence issued under Pt 3 of Ch 4 of the 2003 Act. That construction is supported by reference to the plain and ordinary meaning of the text of s 4.3.12(1) as well as its context, including its legislative history.’ *Tabcorp Holdings Ltd (ACN 063 780 709) v Victoria* [2016] HCA 4, (2016) 328 ALR 375 at [7]–[8], per French CJ, Kiefel, Bell, Keane and Gordon JJ

GRAPHIC

‘[78] The Court of Appeal recognised that the appellant had a right to tell his story, but they held for the purposes of an interlocutory injunction that it was arguably unjustifiable for him to do so in graphic language. The injunction permits publication of the book only in a bowdlerised version. This presents problems both as a matter of principle and in the form of the injunction. As to the former, the book’s revelation of what it meant to the appellant to undergo his experience of abuse as a child, and how it has continued to affect him throughout his life, is communicated through the brutal language which he uses. His writing contains

dark descriptions of emotional hell, self-hatred and rage, as can be seen in the extracts which we have set out. The reader gains an insight into his pain but also his resilience and achievements. To lighten the darkness would reduce its effect. The court has taken editorial control over the manner in which the appellant’s story is expressed. A right to convey information to the public carries with it a right to choose the language in which it is expressed in order to convey the information most effectively. (See *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 All ER 995, [2004] 2 AC 457 (at [59]) and *Re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 All ER 799, [2010] 2 AC 697 (at [63]).)

‘[79] The problem with the form of the injunction is that Schedule 2 defines the information which it is forbidden to publish not only by reference to its substantive content, but also by the descriptive quality of being “graphic”. What is sufficiently “graphic” to fall within the ban is a matter of impression. The amplification of “graphic” in the court’s supplementary judgment as meaning “seriously liable to being understood by a child as vividly descriptive so as to be disturbing” similarly lacks the clarity and certainty which an injunction properly requires. Any injunction must be framed in terms sufficiently specific to leave no uncertainty about what the affected person is or is not allowed to do. The principle has been stated in many cases and nowhere more clearly than by Lord Nicholls in *A-G v Punch Ltd* [2002] UKHL 50, [2003] 1 All ER 289, [2003] 1 AC 1046 (at [35]):

“An interlocutory injunction, like any other injunction, must be expressed in terms which are clear and certain. The injunction must define precisely what acts are prohibited. The court must ensure that the language of its order makes plain what is permitted and what is prohibited. This is a well-established, soundly-based principle. A person should not be put at risk of being in contempt of court by an ambiguous prohibition, or a prohibition the scope of which is obviously open to dispute.”

OPO v Rhodes [2015] UKSC 32, [2015] 4 All ER 1 at [78]–[79], per Lady Hale DP and Lord Toulson

GREEN

[For 6 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 43 and 34 Halsbury’s Laws

of England (4th Edn) (Reissue) para 293 see now 78 Halsbury's Laws of England (5th Edn) (2010) para 535.]

[Whether a tidal beach could be registered as a town or village green under the Commons Act 2006, s 15p; claimant applying for judicial review of decision to allow registration.] '[11] Newhaven Port contends that a tidal beach cannot be registered as a town or village green, as a matter of statutory construction. It contends that a town or village green must be an area mainly of grass, in or on the edge of a town or village. That was what a town or village green was in popular parlance, the town or village playground. That was of the essence of what Parliament was making registrable, even though it had to be expressed as a more exact legal definition. A variety of dictionaries defined a 'village green' in such a way; the Oxford English Dictionary 1989, for example, defined it as 'a piece of public or common grassy land situated in or near a village ...' It cannot have been Parliament's intention that all tidal beaches near a town or village, where they would be probably used for sports and pastimes, would be registrable under the 2006 Act. It was contrary to a sensible or common understanding of the words Parliament used for them to cover a tidal beach.

...
[29] Mr Stephen Sauvain QC for the county council submitted that Parliament, on three occasions, in 1965, 2000 and again in 2006, had chosen to legislate in terms which did not incorporate the notion that the land to be registered had to be green, could not be covered for part of the time at least by water, or had to reflect, by whatever language, the traditional concept of a town or village green. It had focused on the activities, by whom carried out, for how long and on what basis. The criteria it had chosen did not necessarily accord with any traditional view of what a town or village green was. The Royal Commission's concept had clearly not been adopted, for whatever reasons, but it could clearly omit some greens which met all traditional concepts of what a village green should be, and it was clearly not the concept for which Mr George [for the claimant] contended.

[30] The sort of words which Mr George sought to imply were unwarranted, as illustrated by the very uncertainty over what those words should be. There was no need for such words to be implied. Their application would be uncertain, and they would apply to greens registered on the basis of allotment or customary right. The words Parliament had used were sufficiently clear to need no additions. The reasoning

of the majority in *Oxfordshire CC v Oxford City Council* [[2006] UKHL 25, [2006] 4 All ER 817, [2006] 2 AC 674] was to be preferred, even if it were not binding.

[31] Mr Sauvain contended that the early parts of Lord Hoffmann's speech in *Oxfordshire CC v Oxford City Council*, paras [4] and [6] for example, supported his contention that the law had always been more concerned with the character of the use than with the physical characteristics of the land over which the usage occurred. These are cases which Mr George contended were dealing with the establishment of customary rights of recreation, rather than their status as village greens. Mr Simpson for the town council adopted Mr Sauvain's arguments. These arguments had found favour with the inspector.

[32] In my judgment, Mr Sauvain's arguments are correct. I cannot conclude that their Lordships' views, on an issue in which the majority stated that what they said was obiter, were other than obiter and not binding. I am bound by the decision that they were obiter. They are closer to assumptions which are open to closer scrutiny later. Even though their Lordships' views are not strictly binding on me, and though I accept there was but limited argument on them, they are naturally authoritative and highly persuasive. I am not disposed to depart from the considered and reasoned conclusions of the clear majority. Besides, some of the points made by Lord Hoffman are themselves compelling, though not all of them. I can see no answer to the contention that the ordinary meaning of the words used by Parliament to define 'town or village green' are broad enough to permit the registration of a tidal beach, provided that the nature, quality and duration of the recreational user satisfies the statutory test. The resultant registration can only be displaced by reading words into the Act.

[33] I see no coherent legal basis for doing so. Parliament has chosen its words, on three occasions, so as to exclude any notion of a requirement that the registered green be 'grassy' or 'traditional'. It has clearly eschewed the Royal Commission's definition. It has not attempted to incorporate any other, such as that, for example, essayed by Lord Scott.

[34] There is no necessity for such words to be implied to avoid absurdity or to give effect to a clearly ascertained Parliamentary purpose.

[35] Parliament may very well have intended to permit the registration of conceptually non-traditional town or village greens on the basis that if their recreational user satisfied the same statutory criteria, their lack of

traditional qualities was no adequate basis for distinguishing them from other land which was registrable. The same conflict between landowner and recreational user should be resolved in the same way. The nature, quality and duration of the use was crucial; the quality of the land was unimportant.

[36] Parliament may also have concluded that it was difficult to produce a workable definition of a conceptually traditional green, and that the difficulty of drawing the line meant that avoiding arbitrary distinctions was more important than avoiding registrations, surprising only because of their statutory title.

[37] Although I accept that Lord Scott addressed the definition which would distinguish traditional from non-traditional greens, I am wholly unpersuaded that Parliament should be taken to have accepted that definition—whether by necessary implication or to give effect to its statutory purpose—and no other.

[38] It is important that Parliament has not so legislated in the three Acts, although it had some indication that non-traditional greens were being registered. I accept that Parliament does not necessarily respond to a handful of examples of oddities, in the application of a statute, but it cannot be said that, in 2005–2006, the effect of the unconstrained definition was beyond its ken.

[39] Accordingly, I am of the view that West Beach is not excluded from registration because it is not a traditional green or grassy. Nor is it excluded because it is wholly covered in water for part of the day and wholly uncovered for only a very short period of the day, as I shall come on to later.’ *R (on the application of Newhaven Port and Properties Ltd) v East Sussex County Council* [2012] EWHC 647 (Admin), [2012] 3 All ER 1361 at [11], [29]–[39], per Ouseley J; affirmed on this point [2013] EWCA Civ 276, [2013] 3 All ER 677

GUARANTEE

[For 20(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 101 see now 49 Halsbury’s Laws of England (5th Edn) (2015) para 638.]

[For the Income and Corporation Taxes Act 1988, Sch 28AA, para 1A(7) see now the Taxation (International and Other Provisions) Act 2010, s 154(4).]

GUARDIAN

[For 5(3) Halsbury’s Laws of England (4th Edn) (Reissue) para 143 see now 9 Halsbury’s Laws

of England (5th Edn) (2012) para 162.]

GUARDIAN AD LITEM

[Note that the term ‘Officer of the Service’ (ie the Children and Family Court Advisory and Support Service) is now used in place of ‘guardian ad litem’. For 5(3) Halsbury’s Laws of England (4th Edn) (Reissue) para 327 see now 9 Halsbury’s Laws of England (5th Edn) 2012) para 213.]

GUIDELINE

Canada [2] This appeal concerns the validity of Guideline 7 *Guidelines Issued by the Chairperson Pursuant to Section 159(1)(h) of the Immigration and Refugee Protection Act: Guideline 7: Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division*, issued in 2003 by the Chairperson of the Board pursuant to the statutory power to “issue guidelines... to assist members in carrying out their duties”: *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), paragraph 159(1)(h). The key paragraphs of Guideline 7 provide as follows: “In a claim for refugee protection, the standard practice will be for the R[efugee] P[rotection] O[fficer] to start questioning the claimant” (paragraph 19), although the member of the Refugee Protection Division (RPD) hearing the claim “may vary the order of questioning in exceptional circumstances” (paragraph 23).

...

[65] An initial question is whether guidelines issued under IRPA, paragraph 159(1)(h) constitute delegated legislation, having the full force of law “hard law”. If they do, Guideline 7 can no more be characterized as an unlawful fetter on members’ exercise of discretion with respect to the order of questioning than could a rule of procedure to the same effect issued under IRPA, paragraph 161(1)(a): *Bell Canada v Canadian Employees Association* [2003] 1 SCR 884, at paragraph 35 (*Bell Canada*).

[66] In my view, despite the express statutory authority of the Chairperson to issue guidelines, they do not have the same legal effects that statutory rules can have. In particular, guidelines cannot lay down a mandatory rule from which members have no meaningful degree of discretion to deviate, regardless of the facts of the particular case before them. The word “guideline” itself normally suggests some operating principle or general norm, which does not necessarily

determine the result of every dispute.

‘[67] However, the meaning of “guideline” in a statute may depend on context. For example, in *Friends of the Oldman River Society v Canada (Minister of Transport)* [1992] 1 SCR 3, at pages 33–37, La Forest J upheld the validity of mandatory environmental assessment guidelines issued under section 6 of the *Department of the Environment Act*, RSC, 1985, c E-10, which, he held, constituted delegated legislation and, as such, were legally binding.

‘[68] In my view, *Oldman River* is distinguishable from the case before us. Section 6 of the *Department of the Environment Act* provided that guidelines were to be issued by an “order” “*arrêté*” of the Minister and approved by the Cabinet. In contrast, only rules issued by the Chairperson require Cabinet approval, guidelines “*directives*” do not. It would make little sense for IRPA to have conferred powers on the Chairperson to issue two types of legislative instrument, guidelines and rules, specified that rules must have Cabinet approval, and yet given both the same legal effect.

‘[69] Guidelines issued by the Human Rights Commission pursuant to subsection 27(2) [as am. by SC 1998, c 9, s 20] of the *Canadian Human Rights Act*, RSC, 1985, c H-6, have also been treated as capable of having the full force of law, even though they are made by an independent administrative agency and are not subject to Cabinet approval: *Canada (Attorney General) v Public Service Alliance of Canada*

[2000] 1 FC 146 (TD), at paragraphs 136–141; *Bell Canada*, at paragraphs 35–38.

‘[70] In *Bell Canada*, LeBel J held (at paragraph 37), “[a] functional and purposive approach to the nature” of the Commission’s guidelines, that they were “akin to regulations.” a conclusion supported by the use of the word “*ordonnance*” in the French text of subsection 27(2) of the *Canadian Human Rights Act*. In addition, subsection 27(3) [as am. by SC 1998, c 9, s 20] expressly provides that guidelines issued under subsection 27(2) are binding on the Commission and on the person or panel assigned to inquire into a complaint of discrimination referred by the Commission under subsection 49(2) [as am. *idem*, s 27] of the Act.

‘[71] In my opinion, the scheme of IRPA is different, particularly the inclusion of a potentially overlapping rule-making power and the absence of a provision that guidelines are binding on adjudicators. In addition, the word “*directives*” in the French text of paragraph 159(1)(h) suggests a less legally authoritative instrument than “*ordonnance*.”

‘[72] I conclude, therefore, that, even though issued under an express statutory grant of power, guidelines issued under IRPA, paragraph 159(1)(h) cannot have the same legally binding effect on members as statutory rules may.’ *Thamotharem v Canada (Minister of Citizenship and Immigration)* [2008] 1 FCR 385, [2007] FCJ No 734, 2007 FCA 198 at [2], [66]–[72], per Evans JA

H

HARDSHIP

New Zealand '[64] A question arises as to the meaning of "any hardship" in s 48(d)(i) [of the Proceeds of Crime Act 1991]. *Adams* [*Adams on Criminal Law – Sentencing* (looseleaf ed)], para PC48.03 suggests that a comparison with the meaning of undue hardship in s 15(2)(b) of the Act is relevant. That section deals with the grounds for issuing a forfeiture order, stating that in making such an order the court must consider, inter alia, any undue hardship that might be caused to any person as a result of making a forfeiture order. At para PC15.05(2), the learned authors of *Adams* discuss the rationale for the undue hardship criterion:

"Of course, when a forfeiture order is made there will always be hardship to an offender and sometimes to a third party. The word 'undue' indicates that something more than the ordinary hardship arising in consequence of the execution of the forfeiture order is intended: *Lyll v Solicitor-General* [1997] 2 NZLR 641; (1997) 15 CRNZ 1 (CA); *Solicitor-General v Sanders* (1994) 2 HRNZ 24. Indeed, even though the equivalent Australian legislation does not include the word 'undue', Australian Courts have consistently required that hardship beyond that ordinarily contemplated by the operation of the Act is called for, on the basis that otherwise the purpose of the legislation itself would be frustrated: *R v Lake* (1989) 44 A Crim R 63 (CCA NSW); *R v Haddad* (1989) 16 NSWLR 476; 42 A Crim R 304 (CCA NSW)."

'[65] Having considered the Australian authorities cited, I doubt that it is valid in the context of s 48(d)(i) to require undue hardship to be proved when the legislation refers only to "any hardship". Those authorities deal with the issue of forfeiture orders, as does s 15. That section generally contemplates the hardship to the defendant himself or herself, requiring something more than general hardship. In contrast, s 48 of the Act deals specifically with the

interests of third parties, of whom a lesser standard of hardship may be required as that would not involve the defendant benefiting, nor allowing the defendant to benefit, from the proceeds of crime by having their interest recognised in the form of a variation to a restraining order.

'[66] Further, third parties who possess a legal interest in the property that is to be forfeited under s 15 have a right to apply for relief against forfeiture (see ss 17 and 18 of the Act). Those sections do not require them to prove hardship of any kind. This suggests that the legislature did not intend to impose a requirement of undue hardship across the board. Where there are different kinds of interest with regard to different kinds of orders, the appropriate standard must have been specifically considered. In s 48(d)(i) the adjective "undue" was not used. Accordingly, I conclude that there is no basis for adding a gloss to the meaning of "any hardship" in that subparagraph.

'[67] If any descriptor is to be added to the word "hardship", I prefer to use the notion of materiality. The need to establish "material hardship" would fit more comfortably with the following qualifier expression of hardship that is reasonably likely to be caused.

'[68] In any event, it is important to recognise that the hardship factor is only one of three non-exhaustive factors which must inform the court's decision as to whether it is satisfied that it is "in the public interest" to make an order excluding an interest from a restraining order.' *Solicitor-General v Bartlett* [2008] 1 NZLR 87 at [64]–[68], per Stevens J

HARDSTANDING

New Zealand [Depreciable land improvements under the Income Tax Act 2007, s EE 6(1), Sch 13 including hardstanding.] '[74] Brown J noted that the term "hardstanding" is not defined either in the ITA or in the Civil Aviation Rules. It is of course a term that applies to hardstanding areas generally and is not confined to airports. ...

'[76] ... In our view the term "hardstanding" is understood in ordinary parlance as referring to an area of hard material for a vehicle to stand on when not in use. Usually, such an area would be paved or at least constructed in such a way to support the weight of the vehicle for parking when not in use.

'[77] In the context of a commercial airport,

we agree with the Commissioner's submission that hardstanding denotes an area paved with a hard surface such as bitumen, concrete or heavy-duty pavers designed to bear the weight of aircraft or heavy vehicles. The expression is apt to describe areas such as airport aprons used by aircraft to stand or park when not in use. In terms of the Civil Aviation Authority Advisory Circular 139-6, taxiways and aprons are required to be constructed in a way that is at least as strong as the runway they serve and in a way that is capable of withstanding aircraft traffic.

'[78] We agree with the Judge that the eastern RESA [runway end safety area] is not "hardstanding" for the purposes of the depreciation provisions of the RESA. As the Judge said, the RESA is designed and constructed to allow aircraft to sink into its surface to decelerate the aircraft in an emergency situation. That is the opposite of an area that is "hard". Second, the "standing" element of the term "hardstanding" should not be overlooked. Plainly this is intended to refer to an area where a vehicle or aircraft may stand when not in use. The fact that the RESA might be designed to bear the weight of an aircraft for a short period in an emergency does not fall naturally within the meaning of "standing". There is nothing in the characteristics or purpose of a RESA to suggest otherwise.' *Queenstown Airport Corp Ltd v Commissioner of Inland Revenue* [2017] NZCA 20, [2017] 2 NZLR 811 at [74], [76]-[78], per Randerson J

HATRED

Canada [Saskatchewan Human Rights Code, SS 1979, c S-24.1, s 14(1)(b).] '20 The Saskatchewan courts have consistently followed the approach to defining "hatred" set out in *Taylor* [*Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892] when interpreting and applying s. 14(1)(b) of the *Code*. ...

...
'24 In assessing whether s. 13(1) [of the Canadian Human Rights Act, SC 1976-77, c 33] minimally impairs freedom of expression, Dickson C.J. rejected the submission that it was overbroad and excessively vague. In his view, there was no conflict between providing a meaningful interpretation of s. 13(1) and protecting freedom of expression "so long as the interpretation of the words 'hatred' and 'contempt' is fully informed by an awareness that Parliament's objective is to protect the equality and dignity of all individuals by

reducing the incidence of harm-causing expression" (p. 927). Dickson C.J. concluded that s. 13(1) "refers to unusually strong and deep-felt emotions of detestation, calumny and vilification" (p. 928 (emphasis added)). In his view, as long as tribunals required the ardent and extreme nature of feeling described by "hatred or contempt", there was "little danger that subjective opinion as to offensiveness will supplant the proper meaning of the section" (p. 929).

...
'46 As these examples illustrate, courts have been guided by the *Taylor* definition of hatred and have generally identified only extreme and egregious examples of delegitimizing expression as hate speech. This approach excludes merely offensive or hurtful expression from the ambit of the provision and respects the legislature's choice of a prohibition predicated on "hatred".

...
'55 As will be apparent from the preceding discussion, in my view the *Taylor* definition of "hatred", with some modifications, provides a workable approach to interpreting the word "hatred" as it is used in prohibitions of hate speech. The guidance provided by *Taylor* should reduce the risk of subjective applications of such legislative restrictions, provided that three main prescriptions are followed.

'56 First, courts are directed to apply the hate speech prohibitions *objectively*. In my view, the reference in *Taylor* to "unusually strong and deep-felt emotions" (at p. 928) should not be interpreted as imposing a subjective test or limiting the analysis to the intensity with which the author of the expression feels the emotion. The question courts must ask is whether a reasonable person, aware of the context and circumstances surrounding the expression, would view it as exposing the protected group to hatred.

'57 Second, the legislative term "hatred" or "hatred and contempt" is to be interpreted as being restricted to those extreme manifestations of the emotion described by the words "detestation" and "vilification". This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects.

'58 Third, tribunals must focus their analysis on the effect of the expression at issue. Is the expression likely to expose the targeted person or group to hatred by others? The repugnancy of the ideas being expressed is not, in itself, sufficient to justify restricting the expression.

The prohibition of hate speech is not designed to censor ideas or to compel anyone to think “correctly”. Similarly, it is irrelevant whether the author of the expression intended to incite hatred or discriminatory treatment or other harmful conduct towards the protected group. The key is to determine the likely effect of the expression on its audience, keeping in mind the legislative objectives to reduce or eliminate discrimination.

‘59 In light of these three principles, where the term “hatred” is used in the context of a prohibition of expression in human rights legislation, it should be applied objectively to determine whether a reasonable person, aware of the context and circumstances, would view the expression as likely to expose a person or persons to detestation and vilification on the basis of a prohibited ground of discrimination.’ *Saskatchewan (Human Rights Commission) v Whatcott* 2013 SCC 11, [2013] SCJ No 11 at paras 20, 24, 46, 55–59, per Rothstein J

HAVE REGARD TO

Australia [Migration Act 1958 (Cth), s 109.] ‘[57] Section 109(1)(c) of the Act obliges the tribunal to “have regard to” the prescribed circumstances set out in reg 2.41. The consideration of those prescribed circumstances is thus a jurisdictional prerequisite to the exercise of the ministerial discretion to cancel a visa under s 109. In order to comply with that prerequisite, the decision-maker must engage in what has been described as “an active intellectual process” in which each of the prescribed circumstances receives his or her “genuine” consideration: *Tickner* [*Tickner v Chapman* (1995) 57 FCR 451; 133 ALR 226] at FCR 462; ALR 238 per Black CJ and *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507; 178 ALR 421; 65 ALD 1; [2001] HCA 17 at [105] per Gleeson CJ and Gummow J.

‘[58] In the absence of any statutory or contextual indication of the weight to be given to factors to which a decision-maker must have regard, it is generally for him or her to determine the appropriate weight to be given to them: *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24; 66 ALR 299 per Mason J. The failure to give any weight to a factor to which a decision-maker is bound to have regard in circumstances where that factor is of great importance in the particular case may support an inference that the decision-maker did not have regard to that factor at all.

‘[59] Similarly, a decision-maker does not take into account a consideration that he or she must take into account if he or she simply dismisses it as irrelevant. On the other hand, it does not follow that a decision-maker who genuinely considers a factor only to dismiss it as having no application or significance in the circumstances of the particular case will have committed an error. A decision-maker is entitled to be brief in his or her consideration of a matter which has little or no practical relevance to the circumstances of a particular case. A court would not necessarily infer from the failure of a decision-maker to expressly refer to such a matter in its reasons for decision that the matter had been overlooked. But if it is apparent that the particular matter has been given cursory consideration only so that it may simply be cast aside, despite its apparent relevance, then it may be inferred that the matter has not in fact been taken into account in arriving at the relevant decision: *Elias v Commissioner of Taxation* (2002) 123 FCR 499; [2002] FCA 845 at [62] per Hely J. Whether that inference should be drawn will depend on the circumstances of the particular case.

‘[60] In some cases it may be apparent that among the factors to which a decision-maker is bound to have regard, there is one factor (or perhaps more than one) which is critical or fundamental to the making of the decision in question. This was true of the particular matter referred to by Mason J in *R v Toohey; Ex Parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 338; 44 ALR 63 at 71. As his Honour’s reasons in *R v Hunt; Ex Parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329; 25 ALR 497 at 504 show, the relevant statutory provisions may make clear that a particular factor is “a fundamental matter for consideration”. But the converse is also true. The relevant statutory provisions may show that a particular matter to which a decision-maker must have regard is not fundamental to the decision-making process in the sense discussed by his Honour: see, for example, *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 152; 194 ALR 599; [2001] FCA 389 at [57] (*Singh*) per Sackville J.

‘[61] We respectfully agree with Sackville J in *Singh* where his Honour pointed out that the expression “have regard to” is capable of different meanings depending on its context. As his Honour said at [54]:

[54]... a statutory obligation to have regard to specified matters when making an administrative decision may require the

decision-maker to take the matters into account and “give weight to them as a fundamental element in making his [or her] determination”: *R v Hunt; Ex Parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329; 25 ALR 497 at 504 per Mason J. Indeed, this is the meaning that was given to the predecessor of s 501(6)(c) of the Migration Act (relating to the character test): *Minister for Immigration and Ethnic Affairs v Baker* (1997) 73 FCR 187 at 194; 153 ALR 463 at 469; 45 ALD 136 at 141. But the phrase “have regard to” can simply mean to give consideration to something (*Shorter Oxford English Dictionary*). In this sense a direction to a decision-maker to have regard to certain factors may require him or her merely to consider them, rather than treat them as fundamental elements in the decision-making process.

[62] In our opinion, the prescribed circumstances to which the minister must have regard in the present case are of the latter kind. There are 10 different criteria that are prescribed by reg 2.41 for the purposes of s 109(1)(c) of the Act. It is hard to see why a decision-maker should be required to treat each and every one of them as fundamental for the purposes of s 109. Although the minister must have regard to each and every one of the prescribed circumstances, not all of them will be central or fundamental to every case in which the minister is called upon to make a decision under s 109(1) of the Act.’ *Minister for Immigration and Citizenship v Khadgi* [2010] FCAFC 145, (2010) 274 ALR 438 at [57]–[62], per Stone, Foster and Nicholas JJ

HEIRLOOMS

[For 17(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 1084 see now 103 Halsbury’s Laws of England (5th Edn) (2010) para 928.]

[For 39(2) Halsbury’s Laws of England (4th Edn) (Reissue) paras 89–90 see now 87 Halsbury’s Laws of England (5th Edn) (2017) paras 17–18.]

HELD

See also BARNARDISATION

[Freedom of Information (Scotland) Act 2002, s 1.] [14] The general entitlement of an applicant to receive the requested information

from a Scottish public authority applies only to information which is “held” by it at the time the request is received (s 1(4) of the 2002 Act). The agency submits that the process of barnardisation would require the production or making of information that was different from that which was held by it at the time of the request. The process required information to be created, and until this was done it was not “held” by the agency. The Secretary of State for Justice, in a helpful intervention, has drawn attention to the fact that the question whether an authority holds information which does not actually exist in the form and with the contents requested but which could be created from information which it does unquestionably hold is one which very commonly arises in practice. He submits that the obligations of public authorities ought to be limited to information which is truly held by them so that they are not put into the position of having to conduct research or create new information on behalf of requesters.

[15] It seems to me that the position that the agency has adopted to the request in this case is an unduly strict response to what the 2002 Act requires. This part of the statutory regime should, as Lord Marnoch [in the Inner House of the Court of Session 2007 SC 231, 2007 SLT 7] said, be construed in as liberal a manner as possible. The effect of barnardisation would be to apply a form of disguise, or camouflage, to information that was undoubtedly held by the agency at the time of the request. It would amount to the provision of that information in a form that concealed those parts of it that have to be withheld but which would nevertheless, to some degree, convey to the recipient information that was undoubtedly held by the agency at the time of the request. The process is similar to that of redaction, which involves doing something to information in the form in which it was held so that those parts of it which are not private or confidential can be released. It would not amount to the creation of new information, nor would it involve the carrying out of any research. It would be to do no more than was reasonable in the circumstances, having regard to the need for the form in which the information was disclosed to comply with the data protection principles.

[16] The latitude which should be given to a request which cannot be met in the form requested is indicated by s 11(2)(b) of the 2002 Act which provides for the provision of a digest or summary of the information, and by s 11(4) which provides that information may be given by any means which are reasonable in the circumstances. No hard and fast rules can be

laid down as to what it may be reasonable to ask a public authority to do to put the information which it holds into a form which will enable it to be released consistently with the data protection principles. Protection against the excessive cost of compliance is provided by s 12 of the 2002 Act. But it has not been suggested that the process of barnardisation which the commissioner said should be adopted in this case would be excessively costly. In my opinion information in that form would contain information that was “held” by the agency at the time of the request and, unless it was “personal data” and its disclosure would contravene any of the data protection principles, it would have to be released in response to it.’ *Common Services Agency v Scottish Information Comr* [2008] UKHL 47, [2008] 4 All ER 851 at [14]–[16], per Lord Hope of Craighead

HELD FOR PURPOSES ... OF JOURNALISM

See also JOURNALISM

[Information held by the BBC was only disclosable under the Freedom of Information Act 2000 (‘FOIA’), Sch 1 if it was ‘held for purposes other than those of journalism, art or literature’.] ‘[55] In my view, whatever meaning is given to “journalism” I would not be sympathetic to the notion that information about, for instance, advertising revenue, property ownership or outgoings, financial debt, and the like would normally be “held for purposes ... of journalism”’ No doubt there can be said to be a link between such information and journalism: the more that is spent on wages, rent or interest payments, the less there is for programmes. However, on that basis, literally every piece of information held by the BBC could be said to be held for the purposes of journalism. In my view, save on particular facts, such information, although it may well affect journalism-related issues and decisions, would not normally be “held for purposes ... of journalism”. The question whether information is held for the purposes of journalism should thus be considered in a relatively narrow, rather than a relatively wide, way.

‘[56] That view is reinforced by the fact that, in the expression, “journalism” is linked to “art and literature”. One cannot say that financial information which may affect the financing of an arts programme, a drama series, or a broadcast opera is *ex hypothesi* held “for purposes ... of ... art or literature”’ and such

programmes are rarely within “journalism”. It would be surprising and internally inconsistent if FOIA provided for a wholly different test when considering whether information was held “for the purposes ... of journalism” than when considering whether it was held “for the purposes ... of ... art or literature”. Having said that, I would be inclined to accept that “journalism” probably embraces significantly more activities than “art or literature” when it comes to the activities of the BBC.

‘[57] ... I am not saying that financial information held by the BBC could never escape the reach of FOIA. Far from it. Each case must be decided on its own facts, and there will no doubt be cases where such information is held for the purposes of journalism (or art or literature).

‘[58] As the tribunal rightly observed, information held at one point for purposes of journalism may, at some later point, cease (either temporarily or permanently) to be held for that purpose. In the case of journalism, above all news journalism, information “held for purposes ... of journalism” may soon stop being held for that purpose and be held, instead, for historical or archival purposes. The BBC, and the commissioner and the tribunal, will no doubt carefully consider whether this applies to the information, which originated as purely journalistic-related material.

‘[59] Finally on this aspect, some discussion was given over to the question of whether information might be “held for purposes ... of journalism” only to a *de minimis* extent. This is an unhelpful concept, at least in this context. If a court concludes that the journalistic purposes are *de minimis*, then, in reality, that would really mean that they are non-existent. Information either is, or it is not, held for a particular purpose.’ *British Broadcasting Corporation v Sugar (No 2)* [2010] EWCA Civ 715, [2011] 1 All ER 101 at [55]–[59], per Lord Neuberger MR; *affd* [2012] UKSC 4, [2012] 2 All ER 509

‘[61] The effect of the relevant provision of Pt VI of Sch 1, when read with s 7, to the Freedom of Information Act 2000, is that Pts I to V of the Act apply in the case of the BBC only to “information held for purposes other than those of journalism, art or literature” (the *definition*). I agree with the other members of the court on the following matters that are sufficient to resolve this appeal in favour of the BBC: (i) at all material times the Balen report was held by the BBC predominantly for the purposes of journalism; (ii) on the true construction of Pt VI of Sch 1 to the Act

information held predominantly for the purposes of journalism does not fall within the *definition*, even if the information is held for other purposes as well. It follows that the BBC is under no duty to disclose the Balen report and that this appeal must be dismissed. The judgments of Lord Wilson and Lord Walker have, however, disclosed an issue that is academic but is none the less of importance. Does the *definition* mean “information held *solely* for purposes other than journalism, art or literature” or “information held *predominantly* for purposes other than journalism, art or literature:?”

[62] A similar issue arises in relation to the Bank of England, where the relevant definition is

“information held for purposes other than those of its functions with respect to—(a) monetary policy, (b) financial operations intended to support financial institutions for the purposes of maintaining stability, and (c) the provision of private banking services and related services.”

[63] I am not able to find an answer to the issue in the language of the *definition* itself. It is capable of bearing either meaning. The answer to the issue must lie in adopting a purposive approach to the *definition*.

[64] We are concerned with a provision that provides protection against the disclosure obligations that are the object of the Act. What is the purpose of that protection? It is not, as is the protection against disclosure of documents protected by legal professional privilege, designed to remove inhibition on the free exchange of information. Were that the case the protection would focus on the purpose for which the information was *obtained*. The protection is designed to prevent interference with the performance of the functions of the BBC in broadcasting journalism, art and literature. That is why it focuses on the purpose for which the information is *held*. The same is true of the information provided to the Bank of England. The object of the protection is to prevent interference with the performance of the specified functions of the bank.

[65] A purposive construction of the *definition* will prevent disclosure of information when this would risk interference with the broadcasting function of the BBC. This will not depend upon the predominant purpose of holding the information. It will depend upon the likelihood that if the information is disclosed the broadcasting function will be affected. The

same is true in the case of the Bank of England. For this reason I do not agree with the approach of Lord Wilson to this issue.

[66] Lord Neuberger MR ([2010] EWCA Civ 715 at [53], [2011] 1 All ER 101 at [53], [2010] 1 WLR 2278) remarked that “today’s journalism is tomorrow’s archive” and at [58] “In the case of journalism, above all news journalism, information ‘held for purposes ... of journalism’ may soon stop being held for that purpose and be held, instead, for historical or archival purposes”. I imagine that the Bank of England also archives information initially used for the purposes of carrying out its functions. No doubt the BBC has recourse to its archives for journalistic purposes from time to time and, if “held for purposes of journalism” is given a broad meaning it could be said in relation to the BBC that one of the purposes of holding archived material is journalism, albeit a relatively remote purpose.

[67] However, Lord Neuberger MR accepted that archived material would not, as such, fall within the protection afforded by the *definition*. I consider that he was right to do so. Disclosure of material that is held only in the archives will not be likely to interfere with or inhibit the BBC’s broadcasting functions. It ought to be susceptible to disclosure under the Act. If possible “information held for purposes other than those of journalism, art or literature” should be given an interpretation that brings archived material within that phrase. Can this be achieved? I believe that Lord Walker has the answer. He has concluded, as have I, that the protection is aimed at “work in progress” and “BBC’s broadcasting output”. He suggests that the tribunal should have regard to the directness of the purpose of holding the information and the BBC’s journalistic activities. I agree. Information should only be found to be held for purposes of journalism, art or literature if an immediate object of holding the information is to use it for one of those purposes. If that test is satisfied the information will fall outside the *definition*, even if there is also some other purpose for holding the information and even if that is the predominant purpose. If it is not, the information will fall within the *definition* and be subject to disclosure in accordance with the provisions of Pts I to V of the Act.’ *British Broadcasting Corporation v Sugar (No 2)* [2012] UKSC 4, [2012] 2 All ER 509 at [61]–[67], per Lord Phillips P

HELD FOR PURPOSES OTHER THAN ...

[Freedom of Information Act 2000 Sch 1.] “[2] Central to the decision in each of these cases is the question whether the information requested was held, at the time it was requested, “for purposes other than those of journalism, art or literature” within the meaning of that phrase in Pt VI of Sch 1 to the Act. By s 7(1) of the Act, the BBC is “a public authority listed in Schedule 1 only in relation to information of a specified description”, and therefore “nothing in Parts I to V of this Act applies to any other information held by the authority”.

“[52] In my view there are, as a matter of language, only two possible readings of the test in the Schedule. They are the interpretation originally proposed by Mr Sugar and that suggested but not argued by the BBC. The phrase “held for purposes other than” can only mean “held for purposes apart from or in addition to” or “held for purposes apart from and not including”. As a matter of language I favour the latter reading. The first reading brings the following proposition: information would be held “for purposes other than journalism, art or literature”, despite the fact that it *was* held for the purposes of journalism, art or literature.

“[65] My conclusion is that the words in the Schedule mean the BBC has no obligation to disclose information which they hold to any significant extent for the purposes of journalism, art or literature, whether or not the information is also held for other purposes. The words do *not* mean that the information is disclosable if it is held for purposes distinct from journalism, art or literature, whilst it is also held to any significant extent for those listed purposes. If the information is held for mixed purposes, including to any significant extent the purposes listed in the Schedule or one of them, then the information is not disclosable.” *British Broadcasting Corporation v Sugar* (No 2) [2009] EWHC 2349 (Admin), [2010] 1 All ER 782 at [2], [52], [65], per Irwin J; affd [2010] EWCA Civ 715, [2011] 1 All ER 101; affd [2012] UKSC 4, [2012] 2 All ER 509

HENRY VIII POWER

“[25] As explained in *Craies on Legislation* (10th edn, 2012), edited by Daniel Greenberg, para 1.3.9:

“The term ‘Henry VIII power’ is commonly used to describe a delegated power under which subordinate legislation is enabled to amend primary legislation.”

When a court is considering the validity of a statutory instrument made under a Henry VIII power, its role in upholding Parliamentary supremacy is particularly striking, as the statutory instrument will be purporting to vary primary legislation passed into law by Parliament.

“[26] The interpretation of the statutory provision conferring a power to make secondary legislation is, of course, to be effected in accordance with normal principles of statutory construction. However, in the case of an “amendment that is permitted under a Henry VIII power”, to quote again from *Craies* (*op cit*) para 1.3.11:

“... as with all delegated powers the only rule for construction is to test each proposed exercise by reference to whether or not it is within the class of action that Parliament must have contemplated when delegating. Although Henry VIII powers are often cast in very wide terms, the more general the words by Parliament to delegate a power, the more likely it is that an exercise within the literal meaning of the words will nevertheless be outside the legislature’s contemplation.”

R (on the application of the Public Law Project) v Lord Chancellor and Secretary of State for Justice [2016] UKSC 39, [2017] 2 All ER 423 at [25]–[26], per Lord Neuberger P

Australia ‘The regulation-making power fell within the category of a Henry VIII clause, authorising delegated legislation which may be inconsistent with, or amend, the empowering statute.’ *Adco Constructions Pty Ltd (ABN 001 044 391) v Goudappel* [2014] HCA 18, (2014) 308 ALR 213, note 1, per French CJ, Crennan, Kiefel, and Keane JJ

HEREDITAMENT

[For 27(1) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 161 see now 62 Halsbury’s Laws of England (5th Edn) (2016) para 154.]

[For 39(2) Halsbury’s Laws of England (4th Edn) (Reissue) paras 74, 79 see now 87 Halsbury’s Laws of England (5th Edn) (2017) paras 8, 10.]

Corporeal hereditament

[For 39(2) Halsbury's Laws of England (4th Edn) (Reissue) para 80 see now 87 Halsbury's Laws of England (5th Edn) (2017) para 11.]

Incorporeal hereditament

[For 39(2) Halsbury's Laws of England (4th Edn) (Reissue) para 81 see now 87 Halsbury's Laws of England (5th Edn) (2017) para 12.]

Real and personal hereditaments

[For 39(2) Halsbury's Laws of England (4th Edn) (Reissue) para 82 see now 87 Halsbury's Laws of England (5th Edn) (2017) para 13.]

HIGH SEAS

[For 49(2) Halsbury's Laws of England (4th Edn) (2004 Reissue) para 15 see now 100 Halsbury's Laws of England (5th Edn) (2009) para 31.]

HIGHWAY

[For 21 Halsbury's Laws of England (4th Edn) (2004 Reissue) paras 1–8 see now 55 Halsbury's Laws of England (5th Edn) (2012) paras 1–8.]

HOLDS

Canada [Immigration and Refugee Protection Act, s 63(2). A Chinese citizen was issued with a Canadian permanent resident visa which was subsequently revoked but nevertheless travelled to Canada with the revoked visa.] '[4] When Ms Zhang arrived in Canada in February 2004, immigration authorities realized her visa ha[d] been revoked and referred her to an admissibility hearing. On April 3, 2004, an immigration officer found Ms Zhang inadmissible to Canada under paragraphs 20(1)(a) and 41(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), ...

'[5] Ms Zhang tried to appeal the officer's decision to the Immigration and Refugee Board's Immigration Appeal Division (the Board). And that is where she ran into problems. The Board has jurisdiction to hear appeals against removal orders from admissibility hearings. However, its jurisdiction is set out specifically at subsection 63(2) of the IRPA, which says:

63. ...

- (2) A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them. [Emphasis added.]

Thus, the section limits the Board's appeal jurisdiction to foreign nationals who hold permanent resident visas. At Ms Zhang's hearing, the Minister argued the Board had no jurisdiction under subsection 63(2). Because her visa had been revoked, the Minister said she did not "hold" a permanent resident visa.

'[6] The Board agreed with the Minister, relying on *Canada (Minister of Citizenship and Immigration) v Hundal* [1995] 3 FC 32 (TD). In that case, Justice Marshall Rothstein found four exceptions to the general principle that once a visa is issued, it remains valid. Having one's visa revoked is one of those exceptions. Ms Zhang, for her part, argued the *Hundal* decision was no longer applicable, because it was based on the former *Immigration Act* [RSC, 1985, c I-2]. She claimed the Board had to take note of the differences between subsection 63(2) of the IRPA and its equivalent provision in the former legislation, which said [paragraph 70(2)(b) (as am. by RSC, 1985 (4th Supp.), c.28, s 18)]:

70. ...

- (2) Subject to subsections (3) and (4), an appeal lies to the Appeal Division from a removal order or conditional removal order made against a person who

...

- (b) seeks landing or entry and, at the time that a report with respect to the person was made by an immigration officer pursuant to paragraph 20(1)(a), was in possession of a valid immigrant visa, in the case of a person seeking landing, or a valid visitor's visa, in the case of a person seeking entry. [Emphasis added.]

Since paragraph 70(2)(b) of the Immigration Act included the word "valid" and subsection 63(2) of the IRPA does not, Ms Zhang argued Parliament intended to remove validity as a prerequisite for the Board's jurisdiction to hear appeals of removal orders.

'[7] The Board [*Zhang v Canada (Minister of Public Safety and Emergency Preparedness)* [2006] IADD No 64 (QL)] rejected Ms Zhang's

argument, writing [at paragraph 32], "Surely, one cannot be said to be holding a permanent resident visa where the visa in question is not a valid one? Further, how can one be said to be holding a revoked visa?" While the Board acknowledged the differences between the new and old provisions, it concluded the statutory intent behind the two was largely the same. As such, it refused jurisdiction to hear Ms Zhang's appeal. This is a judicial review of that decision.

'ISSUE

Does the Board have jurisdiction, under subsection 63(2) of the IRPA, to hear the appeal of a foreign national whose visa has been revoked?

'ANALYSIS

'[8] The question at issue in this application is one of law. Accordingly, the Court will only defer to the Board's reasons if they were correct. Having said that, I am quite confident they were.

'[9] Ms Zhang's submissions to the Court were based on a literal reading of the IRPA. Just as she argued before the Board, she claimed that if legislators intended to limit appeals under subsection 63(2) to foreign nationals with valid permanent resident visas, they would not have cut the word "valid" from the section when they drafted the IRPA. Any case law discussing the notion of validity stemmed from the fact that validity was a legislative requirement at the time — one that no longer exists.

'[10] In compelling submissions, the Minister's counsel went through an extensive analysis of statutory interpretation. He explored the implications of adopting Ms Zhang's interpretation of subsection 63(2) under a textual, contextual and purposive analysis of both the individual provision and the IRPA as a whole. Under each scenario, Ms Zhang's interpretation of the IRPA would be inconsistent with legislative intent.

'[11] For example, under a textual analysis, courts should presume words have their ordinary meaning absent any proof to the contrary. Subsection 63(2) of the IRPA is written in the present tense, whereas the former paragraph 70(2)(b) was drafted in the past tense. That Ms Zhang once "held" a permanent resident visa does not place her within the ambit of subsection 63(2), according to the Minister. The provision only applies to one "who holds" a permanent resident visa. I agree.

'[12] In a contextual analysis, one looks at a provision within the broader scheme of the Act in which it is written. Various sections of the IRPA require foreign nationals to continually demonstrate they are entitled to enter Canada.

For example, under subsection 11(1) of the IRPA, a foreign national will only be issued a visa if she is not inadmissible and meets the legislative requirements. Under paragraph 20(1)(a) of the IRPA, foreign nationals trying to enter Canada must show they "hold the visa or other document required under the regulations" or they will be denied entry. Again, I fully agree with the Minister's submission that the Court would be ignoring the IRPA's overall scheme if it found Ms Zhang was someone who "holds" a permanent resident visa, despite the fact that her visa was cancelled and she would otherwise not be admitted into the country.

'[13] Under a purposive approach, one interprets statutory provisions based on Parliamentary intent. Turning to subsection 63(2), Parliament intended to give foreign nationals with legitimate permanent resident visas the chance to appeal removal orders that would have denied them entry despite having the visas. A removal order based on criminality is one example. Parliament can hardly be said to have intended that foreign nationals would be able to use visas revoked by Canadian officials in an attempt to fraudulently enter the country, and then rely on those revoked visas as a basis for their appeal rights.

'[14] As the Minister so deftly argued, Ms Zhang's analysis runs counter to the Supreme Court of Canada's decision in *Rizzo & Rizzo Shoes Ltd (Re)* [1998] 1 SCR 27, because it would lead to two absurd consequences. To find that subsection 63(2) of the IRPA applies to applicants with invalid permanent resident visas would give persons with no right to be in Canada the right to appeal a removal order denying their ability to be in Canada. Further, the same person found to violate paragraph 20(1)(a) of the IRPA for not possessing a permanent resident visa could be deemed to hold a permanent resident visa under subsection 63(2). Their right to appeal the decision would directly contradict the reason they were originally found inadmissible.

'[15] In my view, Ms Zhang's argument is based on the presumption that the best way to interpret subsection 63(2) of the IRPA is to compare it with the equivalent provision in the former *Immigration Act*. While this might be a helpful approach in certain cases, it is by no means the only means of statutory interpretation. And in this particular case, general principles of statutory interpretation make it clear that Ms Zhang's argument must fail.

'[16] If subsection 63(2) applied to "invalid" visas, like those that have been revoked, would it also apply to ones that have expired? This

logic defies common sense. From reading Ms Zhang's submissions, it appears that any foreign national holding a visa in his hand would be entitled to an appeal under subsection 63(2), regardless of whether the Canadian government intended to give that document any legal effect. The fact that Ms Zhang still held the physical copy of her visa did not change the legal consequence of its revocation. Rather than pursuing an appeal of the immigration officer's removal order before the Board, she should have sought judicial review of the officer's decision in this Court. That option was still open to her, despite the fact that she did not qualify for an appeal under subsection 63(2).' *Zhang v Canada (Minister of Citizenship and Immigration)* [2008] 1 FCR 716, 2007 FC 593, [2007] FCJ No 795 at [4]–[16], per de Montigny J

HOLIDAY

[For 45(2) Halsbury's Laws of England (4th Edn) (Reissue) para 219 see now 97 Halsbury's Laws of England (5th Edn) (2015) para 320.]

New Zealand '[16] Air New Zealand is in dispute with its pilots over the validity of aspects of their employment agreement. The first and primary issue is whether pilots who are rostered to work on any of the 11 days defined as public holidays by s 44(1) of the Holidays Act 2003 (the Act) must be paid at time and a half. This issue requires consideration of whether those days are always public holidays under the Act. If the day on which an employee works is a public holiday, the employee must be paid at time and a half for working on that day. The debate in this case is about the effect of an agreement under s 44(2), whereby the employee observes a public holiday on another day. Air New Zealand argues that such an agreement transfers public holiday status from the s 44(1) day to the day on which the holiday is to be observed. The pilots contend that the agreement effects no such transfer and simply leads in to the alternative holiday provisions set out later in the subpart. We will refer to the day on which the public holiday is to be observed pursuant to a s 44(2) agreement in deliberately neutral terms as a s 44(2) day.

'[17] Air New Zealand argued successfully in the Court of Appeal (albeit that Court was divided) that the consequence of a s 44(2) agreement is that the day on which the holiday is observed becomes a public holiday and the original s 44(1) public holiday ceases to be a public holiday. Hence employees do not have to

be paid at time and a half for working on that day because it is no longer a public holiday. The pilots challenge that interpretation, arguing that on the true construction of the legislation the s 44(1) day does not cease to be a public holiday as a consequence of a s 44(2) agreement.

...
 '[55] As we have seen, the principal question is whether s 44(2) should be read as having definitional effect. If Parliament had meant to achieve that outcome we must say that it has made its point (an important one at that) most elusively. Surely if Parliament was intending to set up two materially different consequences for those who work on a s 44(1) day, it would have done so more clearly and directly. The answer must be that Parliament did not intend to achieve the outcome which Air New Zealand's argument ascribes to it. In short, we do not consider the scheme of the Act suggests that a s 44(2) agreement removes public holiday status from a s 44(1) day.

...
 '[72] In view of the unfortunate complexity of this issue and the length of our reasons, we will summarise what we see as the key points. Air New Zealand argues that s 44(2) allows an employer and employee to redefine the public holidays listed in s 44(1), thereby removing from the s 44(1) day its status as a public holiday and attaching that status to another day. Thus, every time the Act uses the term "public holiday" it is referring to either a public holiday defined in s 44(1) or another day agreed by the parties under s 44(2). This strikes us as a strained and improbable thing for Parliament to have done.

'[73] First, Parliament has defined the term "public holiday" in very plain terms in s 44(1). If Parliament had intended individual employers and employees to be able to depart from that statutory definition, it would surely have empowered the parties to redefine "public holiday" in similarly clear terms. Section 44(2) does not do this.

'[74] Second, the 2003 Act was intended to herald significant changes to public holiday entitlements. There is a strong focus in the legislation and its history on the need to pay time and a half for working on a public holiday. The introduction of the time-and-a-half entitlement was the source of much debate, yet never was there any suggestion that matters could be arranged so that an employee might work on a public holiday (as defined in s 44(1)) and not be paid time and a half.

'[75] Third, and this is perhaps a rather colloquial point, "public holiday", as commonly

understood, means a day on which the public at large have a day's holiday. It is not consistent with this perception to describe 17 July, for example, as a particular employee's "public holiday". There is nothing "public" about that day; it is no more than an alternative holiday. It is awkward, to say the least, to read the term "public holiday", in the 70 or so places it appears in the Act, as including any other day of the year on which a particular employee may have agreed to observe a public holiday. We decline to do so in the absence of a clear statutory direction.

'[76] The effect of Air New Zealand's argument is to undermine the concept of a "public holiday": the days listed in s 44(1) are merely default holidays having no special status. But this is totally at odds with the changes made by the 2003 Act, including the introduction of the purpose in s 3(b) of providing public holidays for the observance of days of national, religious, or cultural significance. The question what interpretation should be placed on s 44(2) is to be determined from its text and in the light of its purpose. Here text and purpose each point in the same direction. The pilots' argument is to be preferred. We cannot therefore agree with the view that prevailed below.' *New Zealand Airline Pilots Association International Union of Workers Inc v Air New Zealand Ltd* [2007] NZSC 89, [2008] 2 NZLR 1 at [16]–[17], [55], [72]–[76], per Tipping J

HOME

[National Assistance (Assessment of Resources) Regulations 1992, SI 1992/297, reg 21(1), Sch 4 para 2(1)(b). Under reg 21(1) any capital specified in Sch 4 is to be disregarded in the assessment of a person's ability to pay for residential accommodation provided by a local authority. Paragraph 2(1)(b) of Sch 4 requires the value of any premises 'occupied in whole or in part as their home by the resident's: (i) partner, (ii) other family member or relative who is aged 60 or over or is incapacitated, or (iii) child' to be disregarded.] '[36] Paragraph 2(1)(b) of Sch 4 involves consideration of two concepts, "occupation" and "home", which, as Mr West observes, get elided. It was common ground between Mr West and Mr Campbell (from which Mr Adam Fullwood, on behalf of the defendant, did not dissent) that "home" is a place to which a person has a degree of attachment both physical and emotional. It is also agreed that physical presence is neither necessary nor sufficient. What is important is

the degree of occupation and the nature of the occupation. Ultimately whether a person occupies premises as their home is determined by a test which is both qualitative and quantitative.

...
 '[48] Mr West submits that the disregards in Sch 4 are an exception to the basic position that the whole of a person's capital should be taken into account in paying care home fees. That being so they should be strictly applied. They are targeted at specific instances where taking capital into account would have undesirable consequences.

'[49] In my view the terms of para 2(1)(b) support that submission. They preclude taking premises into account when they are occupied in whole or in part as the home of certain defined classes. I do consider it significant that the classes of person in para 2(1)(b) are not relatives as widely defined but rather the most immediate member (partner), relatives over a certain age or incapacitated and children. They are family members who would be most likely to be vulnerable if they have nowhere else to live. ...

... randonnée

'[51] In my judgment "home" should be construed as "only or main home". This interpretation, in my view, accords with the statutory purpose of the legislation. Home is a place to which a person has a degree of attachment both physical and emotional. The test as to whether a person occupies premises as their home is both qualitative and quantitative (see [36], above).' *R (on the application of Walford) v Worcestershire County Council* [2014] EWHC 234 (Admin), [2014] 3 All ER 128 at [36], [48]–[49], [51], per Supperstone J

HOMICIDE

[For 11(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 84 see now 25 Halsbury's Laws of England (5th Edn) (2016) para 97.]

HONEST COMMENT

[For 28 Halsbury's Laws of England (4th Edn) (Reissue) paras 135–136 (on fair comment) see now 32 Halsbury's Laws of England (5th Edn) (2012) paras 637–638.]

HOSPITIUM

[For 24 Halsbury's Laws of England (4th Edn) (Reissue) para 1127 see now 67 Halsbury's

Laws of England (5th Edn) (2016) para 63.]

HOTCHPOT

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 924 see now 91 Halsbury's Laws of England (5th Edn) (2012) para 825.]

HOTEL

[For 24 Halsbury's Laws of England (4th Edn) (Reissue) paras 1105, 1107 see now 68 Halsbury's Laws of England (5th Edn) (2016) para 648.]

HOURLY

[For 45(2) Halsbury's Laws of England (4th Edn) (Reissue) para 214 see now 97 Halsbury's Laws of England (5th Edn) (2015) paras 314, 345.]

HOUSING-RELATED

[Housing Act 1996, s 153A.] '[1] The primary issue in this appeal relates to the meaning of "housing-related conduct" in s 153A(1) of the Housing Act 1996. In effect, was there a sufficient nexus between the local authority and its ex-tenant in respect of his anti-social behaviour against victims in the neighbourhood where he used to live so as to justify, in jurisdictional terms, the local authority's continuing pursuit of a further anti-social behaviour injunction (ASBI) against its ex-tenant? "Housing-related" is there defined as follows: "housing-related" means directly or indirectly relating to or affecting the housing management functions of a relevant landlord".

...
 '[52] The question remains whether Mr Redpath's conduct, taken as a whole, was "housing-related", viz directly or indirectly relating to or affecting the council's housing management functions. It seems to me that intuitively those functions embraced concern for its tenants and property (including its garages) in Warneage Green: and a fortiori in circumstances where the threat to them came from a former tenant, and not serendipitously so but as part of a continuing campaign by him against his neighbours, whether themselves tenants of the council or owner-occupiers or even persons, like Mr Coakes, who worked in the area. As Mr Redpath said: "It's my village". It could only be upsetting and unsettling for residents in

Warneage Green, all of which at one time had been in Swindon's estate, that he should haunt and harass the area.

'[53] In my judgment, it would be most unfortunate if, having brought an end to Mr Redpath's tenancy because of his anti-social conduct, Swindon was then powerless under its housing management functions to protect his former neighbours, who include Swindon's present tenants, from his continuing campaign of intimidation. I can find nothing in the language of Swindon's housing management functions as a local authority, or in the modern version of s 153A, to lead me to that unhappy conclusion. Nor do I find anything in the history and background of what is now the 2006 [Act] s 153A, as for instance in the line of cases starting with the *Enfield* case [*Enfield London BC v B* [2000] 1 All ER 255, [2000] 1 WLR 2259, CA], to suggest that the modern statute has to be limited in some way beyond its express wording or given a narrow rather than a broad interpretation.

'[54] In effect, Mr Luba seeks to say that the critical factor is that Mr Redpath was no longer a tenant at the time of his latest bout of anti-social conduct. However, there is no requirement in the statute that a respondent be a tenant of the local authority. Mr Luba seeks to say that it is irrelevant to the council's housing management functions that (at any rate some of) the victims, and in a sense the primary victims, were owner-occupiers. However, that is not an impediment to the obtaining of an ASBI, as s 153A(3)(b) makes clear, provided of course that the conduct in question is housing-related. It seems to me, however, to be clear that the council's proper concern for at the very least its tenants, X and Y, makes Mr Redpath's conduct housing-related. Given the distress that those witnesses speak to, I can see no difficulty in viewing Mr Redpath's haunting of a bus shelter or of the council's garages, which are let to its tenants in Warneage Green, as housing-related conduct.'

'[62] So far as the meaning of "housing-related" is concerned, it is clear from the definition itself, including as it does both "directly and indirectly" and "relating to or affecting", that it is intended to have a broad sweep. It also appears to me that, in the light of the word "include" (which contrasts with "means" in s 153A(1) of the 1996 Act), the provisions of s 153E(11) of the 1996 Act, which are concerned with the housing management functions of a relevant landlord, should not be treated as being exclusive.

'[63] In my view, particularly when taken

together and viewed against his earlier behaviour, described by Rix LJ at [3]–[7], above, the acts for which the appellant, Mr Redpath, was responsible between March and June 2008 did amount to “housing-related conduct” justifying the making of the ASBI in July 2008. ...’ *Swindon Borough Council v Redpath* [2009] EWCA Civ 943, [2010] 1 All ER 1003 at [1], [52]–[54], per Rix LJ and at [62]–[63], per Lord Neuberger of Abbotsbury

HUMANITARIAN AND COMPASSIONATE CONSIDERATIONS

Canada [Immigration and Refugee Protection Act, SC 2001, c 27, s 25(1): discretion to exempt foreign nationals from the Act’s requirements if the exemption is ‘justified by humanitarian and compassionate considerations’.] ‘13. The meaning of the phrase “humanitarian and compassionate considerations” was first discussed by the Immigration Appeal Board in the case of *Chirwa v Canada* (*Minister of Citizenship and Immigration*) (1970) 4 IAC 338. The first Chair of the Board, Janet Scott, held that humanitarian and compassionate considerations refer to “those facts, established by the evidence, which would excite in a reasonable man [*sic*] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes “warrant the granting of special relief” from the effect of the provisions of the Immigration Act”: p 350. This definition was inspired by the dictionary definition of the term “compassion”, which covers “sorrow or pity excited by the distress or misfortunes of another, sympathy”: *Chirwa*, at p 350. The Board acknowledged that “this definition implies an element of subjectivity”, but said there also had to be objective evidence upon which special relief ought to be granted: *Chirwa*, at p 350.

‘14. The *Chirwa* test was crafted not only to ensure the availability of compassionate relief, but also to prevent its undue overbreadth. ...

‘15. In proceedings before the Special Joint Committee of the Senate and the House of Commons on Immigration Policy in 1975, Janet Scott elaborated on the importance of being able to guard against the unfairness of deportation in certain cases:

... it was recognized that deportation might fall with much more force on some persons ... than on others, because of their particular circumstances, and the Board was therefore empowered to mitigate the

rigidity of the law in an appropriate case. Section 15 is a humanitarian and equitable section, which gives the Board power to do what the legislator cannot do, that is, take account of particular cases. [Emphasis added.]

(Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on Immigration Policy, Issue No 49, 1st Sess, 30th Parl, September 23, 1975, at p 12)

‘17. The role of this discretion was explained by this Court in *Baker v Canada* (*Minister of Citizenship and Immigration*) [1999] 2 SCR 817:

[The] words [humanitarian and compassionate considerations] and their meaning must be central in determining whether an individual [humanitarian and compassionate] decision was a reasonable exercise of the power conferred by Parliament. The legislation and regulations direct the Minister to determine whether the person’s admission should be facilitated owing to the existence of such considerations. They show Parliament’s intention that those exercising the discretion conferred by the statute act in a humanitarian and compassionate manner. This Court has found that it is necessary for the Minister to consider [a humanitarian and compassionate] request when an application is made ... Similarly, when considering it, the request must be evaluated in a manner that is respectful of humanitarian and compassionate considerations. [Emphasis deleted; citation omitted; para 66.]

‘18. More recently, in 2001, Parliament passed another set of comprehensive reforms by enacting the *Immigration and Refugee Protection Act*. The humanitarian and compassionate discretion previously found in s 115(2) of the *Immigration Act*, 1976 was incorporated into the new s 25(1): *United States of America v Johnson* (2002) 62 OR (3d) 327 (CA), at para 47; *Diarra v Canada* (*Minister of Citizenship and Immigration*), 2006 FC 1515, at para 8 (CanLII); *Love v Canada* (*Minister of Citizenship and Immigration*) (2004) 43 Imm LR (3d) 111 (FC), at para 15.

‘19. The Legislative Summary of Bill C-11, the Bill that led to the enactment of the *Immigration and Refugee Protection Act*, explained that s 25 “continue[d] the important power of the Minister to override the provisions

of the Act and grant permanent residence, or an exemption from any applicable criteria or obligation under the Act, on humanitarian and compassionate grounds or for reasons of public policy”: Library of Parliament, “*Bill C-11: The Immigration and Refugee Protection Act*”, Legislative Summary LS-397E, by Jay Sinha and Margaret Young, March 26, 2001, at p 12 (footnote omitted); *Agraira v Canada (Public Safety and Emergency Preparedness)* [2013] 2 SCR 559, at para 41. The humanitarian and compassionate discretion in s 25(1) was, therefore, like its predecessors, seen as being a flexible and responsive exception to the ordinary operation of the Act, or, in the words of Janet Scott, a discretion “to mitigate the rigidity of the law in an appropriate case”.

20. As noted, *Chirwa* was decided in the context of an appeal to the Immigration Appeal Board under s 15 of the *Immigration Appeal Board Act*. Under the current legislative scheme, the Immigration Appeal Division can similarly exercise that discretion for a number of statutorily defined purposes: see ss. 62 to 71 of the *Immigration and Refugee Protection Act*. The exercise of humanitarian and compassionate discretion under s 25(1) of the *Immigration and Refugee Protection Act*, on the other hand, is limited to situations where a foreign national applies for permanent residency but is inadmissible or does not meet the requirements of the *Immigration and Refugee Protection Act*.

21. But as the legislative history suggests, the successive series of broadly worded “humanitarian and compassionate” provisions in various immigration statutes had a common purpose, namely, to offer equitable relief in circumstances that “would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another”: *Chirwa*, at p 350.

22. That purpose was furthered in Ministerial Guidelines designed to assist officers in determining whether humanitarian and compassionate considerations warrant relief under s 25(1). They state that the determination of whether there are sufficient grounds to justify granting a humanitarian and compassionate application under s 25(1), is done by an “assessment of hardship”.

23. There will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to

warrant relief on humanitarian and compassionate grounds under s 25(1): see *Rizvi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 463, at para 13 (CanLII); *Irimie v Canada (Minister of Citizenship and Immigration)* (2000) 10 Imm. LR 206 (FCTD), at para 12. Nor was s 25(1) intended to be an alternative immigration scheme: House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, No 19, 3rd Sess, 40th Parl, May 27, 2010, at 15: 40 (Peter MacDougall); see also *Evidence*, No 3, 1st Sess, 37th Parl, March 13, 2001, at 9: 55 to 10: 00 (Joan Atkinson).

24. And, as is stated in s 25(1.3), added to the Act in 2010 (SC 2010, c 8), s 25(1) is not meant to duplicate refugee proceedings under s 96 or s 97(1), which assess whether the applicant has established a well-founded fear of persecution, risk of torture, risk to life, or risk of cruel and unusual treatment or punishment.

25. What does warrant relief will clearly vary depending on the facts and context of the case, but officers making humanitarian and compassionate determinations must substantively consider and weigh *all* the relevant facts and factors before them: *Baker*, at paras 74–75.

26. According to the Guidelines, applicants must demonstrate either “unusual and undeserved” or “disproportionate” hardship for relief under s 25(1) to be granted. “Unusual and undeserved hardship” is defined as hardship that is “not anticipated or addressed” by the *Immigration and Refugee Protection Act* or its regulations, and is “beyond the person’s control”. “Disproportionate hardship” is defined as “an unreasonable impact on the applicant due to their personal circumstances”: Citizenship and Immigration Canada, *Inland Processing*, “IP 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds” (online), s 5.10.’ *Kanhasamy v Canada (Citizenship and Immigration)* [2015] SCJ No 61, [2015] 3 SCR 909 at paras 13–15, 17–26, per Abella J

HYPOTHECATION

[For 43(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 1691 see now 7 Halsbury’s Laws of England (5th Edn) (2015) para 506, 506n.]

I

ILLEGAL PRACTICES

Australia [Commonwealth Electoral Act 1918 (Cth), s 362(3).] '[56] Section 362(3) of the Act places two conditions on the exercise of the court's power to declare an election void, and the court's power to declare that a person returned as elected was not duly elected, on the ground of certain illegal practices. The court must be satisfied, first, "that the result of the election was likely to be affected" (scilicet by one or more of the illegal practices alleged) and, second, "that it is just that the candidate should be declared not to be duly elected or that the election should be declared void". The "result of the election" means the result as it was declared. And "result" in the Act means the return of a particular candidate, not the number of the candidate's majority.

...
[58] All three petitioners seek relief under s 360(1) and (3) on the ground that illegal practices were committed in connection with the election. All three petitioners allege that the loss of the ballot papers and the consequent failure to conduct the re-count in accordance with the Act were illegal practices.

[59] It is not necessary to identify more precisely which provisions of the Act were contravened. It is sufficient to proceed on the footing adopted in argument that the loss of the ballot papers both constituted and occasioned one or more contraventions of the Act. It is to be noted, however, that because ballot papers were lost, there was not the scrutiny required by ss 279B and 280 of all the ballot papers which were to be re-counted. There was not the opportunity for the officer conducting the re-count to allow and admit, or disallow and reject, any of the lost ballot papers. There was not the opportunity for a scrutineer to require reservation for the decision of the [Australian Electoral Officer] of any of the lost ballot papers which were disputed.

[60] So much was accepted by all parties to the petitions. Each petitioner and each respondent accepted, correctly, that the loss of ballot papers and the failure to have available at the

re-count all of the parcels of ballot papers which were to be the subject of the re-count constituted contraventions of the Act and thus illegal practices in connection with the election.

[61] Those illegal practices are of the kind to which s 362(3) applies. That is, they were (as all parties accepted) "committed by [a] person other than the candidate and without the knowledge or authority of the candidate" and were not "bribery or corruption or attempted bribery or corruption". *Australian Electoral Commission v Johnston (Matter No C17/2013)* [2014] HCA 5, (2014) 305 ALR 489 at [56], [58]–[61], per Hayne J

IMMEDIATELY (TIME)

[For 45(2) Halsbury's Laws of England (4th Edn) (Reissue) para 251 see now 97 Halsbury's Laws of England (5th Edn) (2015) para 352.]

IMMIGRATION LAW

[Immigration Act 1971, s 25(2). Under s 25(1), a person commits an offence if he—(a) does an act which facilitates the commission of a breach of immigration law by an individual who is not a citizen of the European Union, (b) knows or has reasonable cause for believing that the act facilitates the commission of a breach of immigration law by the individual, and (c) knows or has reasonable cause for believing that the individual is not a citizen of the European Union.] '[26] As we have seen, s 25 punishes the facilitation of a breach of immigration law. The principal issue in this appeal concerns the meaning of the words "immigration law". Section 25(2), as we have seen, provides that:

" 'immigration law' means a law which has effect in a member State and which controls, in respect of some or all persons who are not nationals of the State, entitlement to—(a) enter the State, (b) transit across the State, or (c) be in the State." (Our emphases.)

...

[36] In our view for the purposes of s 25(2) an immigration law is a law which determines whether a person is lawfully or unlawfully either entering the United Kingdom, or in transit or being in the United Kingdom. If a person facilitates with the necessary knowledge or reasonable cause to believe, the unlawful entry or unlawful presence in the United Kingdom of a person who is not a citizen of the EU, then he commits the offence.

‘[37] It seems to us that this reflects what the Directive [Council Directive (EC) 2002/90 defining the facilitation of unauthorised entry, transit and residence (OJ 2002 L328, p 17)] was seeking to achieve. We note the use of the words “illegal immigration”, “unauthorised crossing” and “unauthorised entry, transit and residence” in the preamble. Article 1, less clearly, refers to the breach of the laws on the entry or transit of aliens and on the residence of aliens.’ *R v Kapoor* [2012] EWCA Crim 435, [2102] 2 All ER 1205 at [26], [36]–[37], per Hooper LJ

IMPLIED TERM

[For 9(1) Halsbury’s Laws of England (4th Edn) (Reissue) paras 778–789 see now 22 Halsbury’s Laws of England (5th Edn) (2012) paras 364–376.]

IMPORT

Canada [Canada Transportation Act, SC 1996, c 10, s 147.] ‘35. No doubt, as the CTA [Canadian Transportation Agency] stated, the words “imported into Canada” are “ordinary” words in the sense that they are used and understood in “ordinary” speech by those who have no legal training. It is not suggested by counsel that they have some technical meaning in section 147.

‘36. However, that does not end the inquiry because words rarely have a single “ordinary” meaning. Rather, they normally have a range of “ordinary” meanings and the particular statutory context in which a word is used, in its “ordinary” sense, will often determine where on that range the particular shade of meaning of the word is located: *R v Clark* 2005 SCC 2, [2005] 1 SCR 6 at para 44.

‘37. So it is with the word “imported” when used in connection with grain that has entered Canada. One possible meaning is that selected in *Bell* [*R v Bell* [1983] 2 SCR 471], and adopted in the present case by the CTA, namely, brought across the border into Canada. Grain may equally be described as “imported” when it enters the Canadian market for sale or consumption in Canada. In my opinion, either is linguistically possible. The question to be decided, therefore, is whether the shade of meaning selected by the CTA was unreasonable, given the context in which the words are used and the statutory purpose.

‘57. On the basis of the legislative history of paragraph (b) of the definition of “grain” in

section 147 of the Act, I have concluded that the CTA reasonably interpreted “imported” to include foreign-grown grain brought into Canada to be transported to a west coast port for re-export to a third country. ...’ *Canadian National Railway Co v Canada* (Canadian Transportation Agency) [2010] FCJ No 427, 2010 FCA 65, 401 NR 1, FCA, at paras 35–37, 57, per Evans JA

IMPOVERISHED

Canada [Supreme Court Civil Rules r 20–5(1): exemption from court hearing fee allowed for impoverished litigants The exemption in place at the time of the trial provided that a judge could waive all fees for a person who is ‘indigent’.] ‘58. I agree with the view of the trial judge that the plain meaning of the words “impoverished” and “indigent” does not cover people of modest means who are nonetheless prevented from having a trial because of the hearing fees ...

‘59. Like the trial judge, I am of the view that the courts must read “impoverished” in its ordinary sense. A judge may waive fees for the very poor, and no one else. As the trial judge noted, while a person who cannot afford a fee of \$100 or \$200 may properly be described as “indigent” or “impoverished”, it is awkward to use these terms to describe a middle class family’s inability to pay a fee that amounts to a month’s net salary. As the trial judge found, there “may be something at odds between the indigency test and the level of the fees” (para 26).’ *Trial Lawyers Association of British Columbia v British Columbia* (Attorney General) [2014] SCJ No 59, [2014] 3 SCR 31 at paras 58–59, per McLachlin CJ

IMPRISONMENT FOR A TERM NOT EXCEEDING TWO YEARS

Canada [Criminal Code, RSC 1985, c C-46, s 731(1)(b). Whether ‘imprisonment for a term not exceeding two years’ relates only to imprisonment imposed by a sentencing court at a single sitting or the aggregate of all sentences imposed on offender.] ‘32. The Crown submits that the phrase “imprisonment for a term not exceeding two years” in s 731(1)(b) relates only to the actual term of imprisonment imposed by a sentencing court at a single sitting. The appellants argue that “term” of imprisonment referred to in that provision is the aggregate of the custodial term imposed by the sentencing

court and all other sentences then being served or later imposed on the offender. In my view, the Crown's submission is correct and the appellants' submission fails.

'33. The ordinary meaning of s 731(1)(b) is perfectly clear: A probation order may not be made where the *sentencing court* imposes a term of imprisonment exceeding two years. In determining whether two years has been exceeded, one looks at the term of imprisonment ordered by *the sentencing court on that occasion*—not at *other* sentences imposed by *other* courts on *other* occasions for *other* matters.

'34. Section 731(1)(b) admits of no ambiguity in this regard. The opening words of s 731(1) read: "Where a person is convicted of an offence, a court may". The provision authorizes *that court* to make a probation order, "in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years". On a plain reading of this provision, the phrase "imprisonment for a term not exceeding two years" refers to the sentence imposed by the court empowered by s 731(1) to make the probation order.

'35. Had Parliament intended unexpired sentences from other occasions to be included in the phrase "imprisonment for a term... exceeding two years", it would have said so. The language was close at hand. Section 743.1 of the *Criminal Code*, for example, expressly provides for the aggregation of sentences in determining whether an offender is to be sent to the penitentiary.' *R v Knott* [2012] SCJ No 42, 2012 SCC 42 at paras 32–35, per Fish J

IMPROPER, UNREASONABLE OR NEGLIGENT

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

IN THE PRESENCE OF

[For 50 Halsbury's Laws of England (4th Edn) (2005 Reissue) para 362 see now 102 Halsbury's Laws of England (5th Edn) (2010) para 70.]

INAPPROPRIATE

[Education Act 1996, s 319(1): '(1) Where a local education authority are satisfied that it would be inappropriate for—(a) the special

educational provision which a learning difficulty of a child in their area calls for, or (b) any part of any such provision, to be made in a school, they may arrange for the provision (or, as the case may be, for that part of it) to be made otherwise than in a school ...'] '[23] I have to say that the structure of the sections between ss 312 and 324 is not what I would regard as either logical or particularly easy to follow. But, having been through them with the great assistance of counsel, I think I can now place s 319 in the context of the overall process that has to be conducted by a LEA when dealing with a child that may have learning difficulties and special educational needs. It seems to me that the statutory provisions contemplate a number of stages that a LEA has to go through when deciding on how to provide for the educational needs of a child with learning difficulties, which may call for special educational provisions to be made for the child. The stages appear to me to be these: first, the LEA has to consider whether a child in its area has a learning difficulty. If the answer to that question is Yes, then it must, secondly, identify the child's special educational needs consequent upon that learning difficulty. To do this, the LEA has to undertake the assessment referred to in s 323(3) of the 1996 Act. Thirdly, having undertaken the assessment, the LEA has to decide whether special educational provision may be called for in respect of any learning difficulty the child has. If the LEA does decide that special educational provision is called for, then, as a fourth stage, the LEA must do two things. First, it must make and maintain a statement; and secondly, it must consider and then decide what special educational provisions the child, therefore, needs.

'[24] It seems to me that it is at that stage, where the LEA is considering what special educational provisions the child needs, that the LEA has to ask whether it is satisfied that it would be "inappropriate" for the special educational provision which a learning difficulty of a child in their area calls for, or any part of it, to be made in a school. This is where s 319 comes in. If the LEA does reach that conclusion, it may make arrangements for special educational provisions otherwise than in a school, after consultation with the parents. However, if the LEA is not satisfied that it would be 'inappropriate' for the special educational provisions which a learning difficulty of a child in their area to be made in a school, then the LEA must decide whether the education is to be in a maintained school under s 316(3), or if not, under s 316A.

[25] Once the proper position of s 319 in the overall scheme is clear, as I think it is, the construction of s 319 also becomes clear. That section sets out a question that the local authority has to answer before it can tackle the issues that arise under ss 316 and 316A. Sections 316 only operates, as I have already indicated, and as sub-s (1) makes clear, where a child “should be educated in a school”. In my view, the use of the word “should” is helpful in the construction of s 319 and in particular in relation to the word “inappropriate”.

[26] The question that the LEA has to address is, therefore, is it satisfied that it would be “inappropriate” for the special educational provisions of the particular child to be made in a school or not? In answering that question, it seems to me that it is not enough for the LEA to ask simply “can” the school meet the statement of needs set out in Pt 3 of the s 324 statement, as Mr Oldham submitted. To confine the question thus does not, in my view, give proper scope to the words in s 319(1), in particular the words “are satisfied that it would be inappropriate for ... the special educational provision which a ... child ... calls for, or ... any part of [it] ... to be made in a school”. It seems to me that in conducting that exercise, or answering that question, if a LEA is to give full effect to the word “inappropriate”, it has to see if a school would “not be suitable” or “would not be proper”. To do that, in my view, the LEA has to take into account all the circumstances of the case in hand. These circumstances might include, without giving any exhaustive list (which must depend on the facts of the case), consideration of the following matters: the child’s background and medical history; the particular educational needs of the child; the facilities that can be provided by a school; the facilities that could be provided other than in a school; the comparative cost of the possible alternatives to the child’s educational provisions; the child’s reaction to education provisions, either at a school or elsewhere; the parents’ wishes; and any other particular circumstances that apply to a particular child.’ *R (on the application of M) v Hounslow London Borough Council* [2009] EWCA Civ 859, [2010] 2 All ER 467 at [23]–[25], per Aikens LJ

INCAPACITY

Of child

[For 5(3) Halsbury’s Laws of England (4th Edn) (Reissue) para 5 see now 9 Halsbury’s Laws of

England (5th Edn) (2012) para 5.]

INCHMAREE CLAUSE

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 344 see now 60 Halsbury’s Laws of England (5th Edn) (2011) para 335.]

INCIDENT

Australia [Civil Liability Act 1936 (SA), s 3.] ‘[12] ... “Accident” is defined [in the Civil Liability Act 1936 (SA), s 3] as “an incident out of which personal injury arises and includes a motor accident”. A “motor accident” means an incident in which personal injury arises out of the use of a motor vehicle.

... [24] With respect to their Honours, the relevant ordinary English meaning of the word “incident” is “[a] distinct occurrence or event”. [*Shorter Oxford English Dictionary* (5th edn) (2002).] The use of the term “incident” in the definition of “accident” dates back to the enactment of s 35A(1)(c), when it was used to define the class of event constituting a “motor accident” by reference to the use of a motor vehicle.’ *King v Philcox* [2015] HCA 19, (2015) 320 ALR 398 at [12], [24], per French CJ, Kiefel and Gageler JJ

INCIDENTAL TO

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

[Senior Courts Act 1981, s 45(4). On the true construction of s 45(4) of the 1981 Act, matters were “incidental to” the jurisdiction of the Crown Court only when the powers to be exercised related to the proper dispatch of the business before it.]

[23] Section 45 of the [Senior Courts] Act 1981 is headed “General jurisdiction of Crown Court”, and sub-s (4) provides:

“Subject to section 8 of the Criminal Procedure (Attendance of Witnesses) Act 1965 (substitution in criminal cases of procedure in that Act for procedure by way of subpoena) and to any provision contained in or having effect under this Act, the Crown Court shall, in relation to the attendance and examination of witnesses, any contempt of court, the enforcement of its orders and all other matters incidental to

its jurisdiction, have the like powers, rights, privileges and authority as the High Court."

'[24] Mr Nicol submits that the proposed identification of the defendant in the media as the person convicted in the Crown Court is a matter "incidental to its jurisdiction", in that it flows directly from his trial in that court. If, therefore, the proposed identification would infringe the rights of the children under art 8 of the European Convention on Human Rights, s 45(4) confers upon the Crown Court "the like powers ... as the High Court" "in relation to" the proposed identification, in particular the power—indeed presumably by virtue of s 6 of the Human Rights Act 1998, the duty—to restrain it by injunction. Mr Millar, supported by Mr Tomlinson, denies that the proposed identification of the defendant in the media can possibly be described for the purposes of s 45(4) as a matter "incidental to [the] jurisdiction" of the Crown Court.

'[29] There is a dearth of reported authority on the construction of s 45(4) of the [Senior Courts] Act 1981. In *Ex p HTV Cymru (Wales) Ltd* [2002] EMLR 184 Aikens J restrained a television company from interviewing witnesses who had given evidence until all the evidence was complete. He pointed out that one witness would have to be recalled, and others might be recalled, and accordingly held that the proposed interviews would constitute a contempt of court pursuant to ss 1 and 2 of the 1981 Act. He proceeded to hold that s 45(4) of the [Senior Courts] Act 1981 conferred upon the Crown Court the same power to make an injunction as was conferred upon the High Court by s 37 of the same Act. He observed (at [23]):

"Of course the power of the Crown Court to grant injunctions is strictly limited to the specific matters that are set out in section 45(4). There is no general power in the Crown Court to grant injunctions. But I am satisfied that the Crown Court has the power to grant an injunction to restrain a threatened contempt of court in relation to a matter that is before the Crown Court in question."

This decision seems unimpeachable. Mr Nicol points to Aikens J's use of s 45(4) as a source of power to make an injunction such as can be made in the High Court by virtue of s 37. On the other hand Mr Millar relies on its use "to restrain a threatened contempt of court in relation to a matter that is before the Crown

Court". Reasonably enough Mr Nicol responds that the judge's words were not designed to be prescriptive of the ambit of the subsection, but to identify the particular mischief at which his order was aimed. Nevertheless Mr Millar suggests that this decision provides a prime example of the proper use of the subsection, to ensure the proper despatch of the proceedings.

'[30] In our judgment for the purposes of s 45(4), and for the reasons advanced by Mr Millar and Mr Tomlinson, matters are "incidental to" the jurisdiction of the Crown Court only when the powers to be exercised relate to the proper dispatch of the business before it. We agree with Aikens J that the Crown Court has no "general" power to grant injunctions. There is no inherent jurisdiction to do so on the basis that it is seeking to achieve a desirable, or indeed a "just and convenient" objective. Unless the proposed injunction is directly linked to the exercise of the Crown Court's jurisdiction and the exercise of its statutory functions, the appropriate jurisdiction is lacking. The order was not incidental to the defendant's trial, conviction and sentence. Accordingly, the ambit of s 45(4) of the [Senior Courts] Act 1981 did not extend to protect the children from the consequences of the identification of their father in the criminal proceedings before the Crown Court.' *Re Trinity Mirror plc (A and another (minors acting by the Official Solicitor) intervening)* [2008] EWCA Crim 50, [2008] 2 All ER 1159 at [23]–[24], [29]–[30], per Sir Igor Judge P

INCITE

Australia [Anti-Discrimination Act 1977 (NSW), s 49ZT: it is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group.] '[41] In these circumstances, s 49ZT should be construed as follows:

- (a) Incite means to rouse, to stimulate, to urge, to spur on, to stir up or to animate and covers conduct involving commands, requests, proposals, actions or encouragement.
- (b) It is not necessary for a contravention that a person actually be incited.
- (c) It is not sufficient that the speech, conduct, or publication concerned conveys hatred towards, serious contempt for, or serious ridicule of homosexuals; it must be capable

- of inciting such emotions in an ordinary member of the class to whom it is directed.
- (d) It is not necessary to establish an intention to incite.
 - (e) For the public act to be reasonable within the meaning of s 49ZT(2)(c) it must bear a rational relationship to the protected activity and not be disproportionate to what is necessary to carry it out.
 - (f) For the act in question to be done in good faith, it must be engaged in bona fide and for the protected purpose.’

Sunol v Collier (No 2) [2012] NSWCA 44, (2012) 289 ALR 128 at [41], per Bathurst CJ

INCLUDES

Australia [Migration Act 1958 s 48A(2): in s 48A, ‘application for a protection visa “includes” ...’.] [64] The minister contends that the use of the word “includes” in the definition provision is s 48A(2), as opposed to “means”, indicates that the definition should be understood as expansive rather than exhaustive. He cites cases in support of that contention such as *Douglas v Tickner* (1994) 49 FCR 507 at 519; 34 ALD 192 at 203 per Carr J and *Federal Commissioner of Taxation v St Hubert’s Island Pty Ltd (in liq)* (1978) 138 CLR 210 at 216; 19 ALR 1 at 4 (*St Huberts*) per Stephen J. The minister argues that, because the definition in s 48A(2) is expansive and not exhaustive, the appellant’s previous protection visa application is properly identified as an “application for a protection visa” for the purposes of s 48A even if it is not found to come within the terms of s 48A(2)(aa).

...
[66] For the following reasons, we reject those submissions.

[67] First, the question whether a definition provision which uses the word “includes” is exhaustive or merely expansive is frequently determined by a consideration of whether the definition expands upon what otherwise would fall within the ordinary meaning or common usage of the defined term. The point is well illustrated by *St Huberts*, one of the cases cited by the minister. The issue there was whether the following definition of “trading stock” in s 6(1) of the Income Tax Assessment Act 1936 (Cth) was exhaustive or expansive, that section provided:

... “trading stock” includes anything produced, manufactured, acquired or purchased for purposes of manufacture, sale or exchange, and also includes live stock.

At CLR 215–16; ALR 3–4 Stephen J identified the relevant issue as follows:

There is another aspect of this statutory meaning of trading stock which is of present relevance. It is whether it is a true definition, giving to “trading stock” when used in the Act an exclusive meaning, so that anything falling outside it will not be trading stock although answering that description according to common usage; or whether, on the contrary, it operates as merely expansive of what would otherwise be conveyed by the ordinary meaning of “trading stock”.

[68] In resolving that question, Stephen J noted at the outset that the statutory definition of “trading stock” enlarged the ordinary meaning of the term by including things acquired not only for purposes of sale or exchange, but also for purposes of manufacture. His Honour also noted that there was a further enlargement of the ordinary meaning of trading stock, by including live stock. Those considerations, together with the fact that the relevant statutory definition used the word “includes”, as opposed to “means” (which was used in many of the other definitions in s 6(1)), meant that the definition of “trading stock” was expansive and not exhaustive.

[69] The difficulty with the minister’s argument that the definition in s 48A(2) is also expansive and not exhaustive is that, unlike an expression such as “trading stock”, the concept of an “application for a protection visa” has no ordinary meaning independently of the relevant descriptions of that particular class of visa in the Act. In other words, it is the Act itself which provides the meaning of “an application for a protection visa”, not common usage.

[70] Second, and arising from that first consideration, where a concept is entirely the creation of a legislative scheme (such as the concept of “an application for a protection visa”), it is more likely in our view that a definition such as that contained in s 48A(2) is exhaustive. Otherwise, considerable uncertainty and confusion would result in determining whether or not a particular application for a visa is an application for a protection visa.

[71] Third, in the particular statutory context of this Act, which involves the use of terms “includes” and “means” in numerous instances involving definition provisions (particularly in the primary definition provision in s 5 of the Act), in our view the task of construction is not meaningfully advanced by

contrasting the use of the terms “includes” and “means” in such provisions with the use of the term “includes” in s 48A(2).

[72] Even if, textually, “includes” is not seen as exhaustive, the lack of ordinary English meaning to the phrase “application for a protection visa” means that there is no basis to read s 48A(1) by reference to that phrase being defined, rather than by reference to the relevant part of the definition (as we have earlier done). It may be that if another kind of protection visa were to be created under the Act, s 48A(2) would not have to be amended so as to engage the prohibition in s 48A(1). It would depend on the meaning given to the words by reference to which the new kind of visa was created.’ *Szgez v Minister for Immigration and Citizenship* [2013] FCAFC 71, (2013) 299 ALR 246 at [64], [66]–[72], per Allsop CJ, Buchanan and Griffiths JJ

INCOME

[For the Income and Corporation Taxes Act 1988, s 739(1) see now the Income Tax Act 2007, s 721(1).]

Earned income

[Note that the Income and Corporation Taxes Act 1988, s 833(4) has been repealed.]

Income of the bankrupt

[Insolvency Act 1986, s 310: whether a pension entitlement in respect of which a bankrupt had a present right to elect to draw down payment (but which he had not yet exercised) fell to be included in the assessment of his income ‘to which he from time to time becomes entitled’ within the meaning of s 310(7) when the court was considering whether, and if so on what terms, to make an income payments order (‘IPO’) under s 310.] [40] We were not referred to any authority which supported the proposition that a bankrupt could be required by a demand made by the trustee under s 333 to take steps to obtain property excluded from the estate, and convert it into income receivable by him, so that it could be subject to an IPO on the application of the trustee. Indeed, it was common ground, for example, that a trustee could not require a bankrupt to work so as to receive a salary that might be subject to an IPO. Nor did Mr Davies suggest that a trustee could compel a bankrupt, for example, to request a payment from a discretionary trust of which he

was a discretionary beneficiary.

... [42] As a matter of construction of s 310 of the Insolvency Act, there is no basis for concluding that a bankrupt’s contractual rights to draw down or “crystallise” his pension come within the definition of “income of the bankrupt” within s 310(7). The language of that subsection, when construed in the context of the statutory framework and the various changes effected by the pension legislation, simply does not support a construction which characterises a pension holder’s contractual rights under his pension to elect, after reaching a certain age, to draw down, or “crystallise” his pension, in the form of a lump sum or income payments, as “payment in the nature of income” which is “from time to time made to him or to which he from time to time becomes entitled” for the purposes of s 310(7). Such a construction is wholly unrealistic. The contractual right to elect, by service of a notice on the pension provider, to receive a lump sum or income payment, in the pension context is very different in character from an actual payment or the right to receive that actual payment, once the relevant election has been made. Indeed, normally, until well after the relevant election has been made, there will be no legal right as such to receive any specific payment, particularly in the case of a SIPP, where the fund may comprise assets which are not readily marketable. In the context of s 310, payment and payment to which he from time to time becomes entitled mean just that; payment does not mean a chose in action or a bundle of rights which, if and when exercised, and only then, give rise to the making of a payment or the entitlement to a payment. The language of s 310 is addressed to capturing income; there is no suggestion in the language that it is conferring a power on the court to require the bankrupt to exercise a power—in relation to property expressly excluded from the bankruptcy estate—to generate income.

... [54] My conclusion that, in the context of s 310, and as a matter of ordinary language the phrase “payment in the nature of income ... to which he from time to time becomes entitled” refers to a pension in payment is supported by decisions such as that of Neuberger J (as he was then) in *Barclays Bank plc v Holmes* [2001] OPLR 37, [2000] Pens LR 339 and *Re the estate of Borger (decd)* [1912] VLR 310 at 313, albeit those decisions were reached in a different statutory context. However, I would have reached the same conclusion irrespective of those decisions.’ *Re Henry (a bankrupt)*; *Horton*

v Henry [2016] EWCA Civ 989, [2017] 3 All ER 735 at [40], [42], [54], per Gloster LJ

Total income

[For the Income and Corporation Taxes Act 1988, s 835(1) see now the Income Tax Act 2007, s 23.]

INCREASE IN VALUE

[Finance Act 1989, s 83(2)(b): ‘any increase in value (whether realised or not) of long-term business fund assets’, ‘as brought into account for a period of account (and not otherwise)’ has to be taken into account in computing profits.] [17] This subsection directs that there must be taken into account as receipts of the period for the purposes of Case I of Sch D (a) the company’s “investment income” from the assets of its long-term business fund and (b) any increase in value of “those assets”, in so far as these items have been “brought into account” by the company. The question is whether its language permits the company to claim that it in fact sustained an allowable loss during the relevant period when the values “as brought into account” for that period indicate the contrary.

‘[18] It is common ground that the reference to “investment income” in para (a) of the subsection is a reference to actual income from assets actually comprised in the long-term business fund. The company submits that, by parity of reasoning, the reference to “any increase in value” in para (b) must be taken to be a reference to something that can be recognised on a commercial basis as a real increase in real assets. So the word “assets” in both paragraphs meant assets of the long-term business fund which had the capacity to earn income and to grow in value. The fact was that its assets had decreased, not increased, in each of the relevant accounting periods. The amounts included in line 15 of form 40 were there for regulatory purposes only. They were book entries which had no commercial validity. The fact was that the assets of the long-term business fund had decreased, not increased, in each of the relevant accounting periods. The mere fact that an amount, such as interest on unpaid tax, was entered in form 40 did not mean that it was taxable. To arrive at a true and fair view it was necessary to go behind the entries on the forms and look at the facts.

‘[19] In the Court of Session the judges of the First Division were unanimous in accepting this argument and rejecting the argument for

HMRC. The Lord President said that he was unable to accept that the contents of the revenue account that had been prepared for regulatory purposes had the definitional character for which HMRC contended. The fact that the investment income was inevitably an actual receipt suggested that the increase in value should be an actual sum, as opposed to an accounting element (see [2010] STC 2133 at [54]). Lord Reed made the same point at [181], adding that the words “whether realised or not” were a strong indication that s 83(2) was concerned with real gains rather than a change in notional values. Lord Emslie said that, consistent with the long-established distinction between “assets” and “fund”, the reference to an increase in value of assets should be taken as reflecting commercial reality in the form of actual increases in the value of assets (see [204]).

‘[20] As Mr Andrew Young QC for HMRC pointed out, however, s 83(2) is a special rule for the computation of the profits of an insurance company in respect of its life assurance business. The general rules for the computation of profits and gains for the purposes of Case I of Sch D must be taken to have been modified to the extent provided for in this subsection. The company was being taxed on the “I minus E” basis and it is this subsection, not the rules that are generally applicable, that must be construed. An insurance company is entitled to elect, under reg 45(6) of the 1994 Regulations [Insurance Companies Regulations 1994, SI 1994/1516], to assign to any of its assets the value given to the asset in the books or other records of the company. Section 83(2) can be taken to have been drafted in the light of the fact that insurance companies almost always, if not invariably, choose to use book values (in the sense indicated by reg 45(6)) to arrive at the necessary balance in form 40 to demonstrate solvency to the regulatory authority.

‘[21] Once this point is grasped, it seems to me that the meaning to be given to s 83(2)(b) falls fairly easily into place. The wording of the subsection follows that of the forms. While the investment income in para (a) is real income, the increase in value referred to in para (b) may or may not be a real increase. The assets which gave rise to this increase in value may or may not be the same assets as those referred to in para (a). It depends on the content of the amounts shown in lines 13 and 15 of form 40. Amounts taken from its long-term business fund were used by the company to supplement its trading income in each of the three years in

question. It chose to use its own book values, not values computed according to the current value of the assets of its long-term business fund, to arrive at the final values that were brought into account on form 40. In the absence of further directions in the statute as to how the increase in value is to be computed in cases where that option has been chosen—and there are none—I would hold that the increase in value referred to in para (b) must be taken to be the amount which has been brought into account on the form.

[22] The phrase “as brought into account for a period of account” in the opening words of the paragraph lies at the heart of this interpretation. It was suggested by the company that this phrase determined the period for which items were to be treated as taxable receipts but not the items which were taxable. But this interpretation of the phrase does not, I think, give full weight to the word “as”. Linked to the words “the following items” which precede it, the phrase indicates that the computation must proceed on the basis of the way the items have actually been entered on the forms. If values shown in the books or other records of the company have been used, instead of market values, it will be the book values that will determine whether or not there has been any increase in value during the relevant period and, if so, how much that increase is.

[23] The phrase “and not otherwise” was said to support the company’s interpretation of para (b) because it indicated that it was being assumed that the items that were being brought into account when any increase in value was being assessed were items that could be realised, not notional ones. But I think that their purpose is to make it clear that the basis of computation referred to in sub-s (2) is the only basis that is relevant for the purposes referred to in sub-s (1). The words “whether realised or not” are there to indicate a change from the computation indicated by the original wording of s 83. If the company chooses to bring unrealised increases in value into account, those increases in value must be taken into account as receipts for the period in the same way as increases that have been realised.

[24] For these reasons I am unable to agree with the judges of the Court of Session as to the meaning and effect of s 83(2)(b). But in para [205] of his opinion Lord Emslie made some further points which, as they were attractively put, need to be answered too. He said that a factor which favoured the company’s construction of s 83(2) was that it accorded well with the general principles (1) that the

ascertainment of receipts or gains for tax purposes should *prima facie* reflect commercial reality; (2) that income or gains to be taxed should *prima facie* be the taxpayer’s and not those of a third party; and (3) that the ordinary recognition of shareholders’ capital to cover actual trading should not *prima facie* be a chargeable receipt. He described these principles in more detail in [197], [198], and I agree with him that *prima facie* they can be taken to be a reliable guide as to how tax legislation ought to be construed. But his use of the phrase “*prima facie*” indicates, if I may say so quite correctly, that these are not absolute rules that are incapable of being disapplied by the statute. In this case we are dealing with special rules that have been designed to take account of the unique nature of the business carried on by life assurance companies. That in itself suggests that it is the language of the statute, rather than these general rules, that should be the determinative factor in this case.

[25] Taking Lord Emslie’s three points in turn, I would hold, firstly, that the language of s 83(2) shows conclusively that, if the insurance company chooses to use book values to arrive at the final values shown on form 40, it is on those values that the computation referred to in s 83(1) must be based. This can be said to reflect the commercial reality of the life assurance industry, as the company’s taxable receipts were based on its own figures as submitted to the regulatory authorities to justify the surplus of assets that it wished to recognise. Secondly, there is no question, in this case, of taxing the income or gains of a third party. The values brought into account on form 40 are the product of assets that were vested in the company when it established its long-term business fund. Their link with the society was entirely broken when the transfer under the scheme took effect.

[26] As to Lord Emslie’s third point, it must be appreciated that the capital reserve was not, as he said (at [202]), ordinary shareholders’ capital. The words themselves might be taken as suggesting otherwise, but I think that the name that was given to what the scheme described as a memorandum account is a distraction. The reality is that the reserve had no life of its own separate from the long-term business fund. It was an accounting mechanism which the company had established for its own internal accounting purposes as part of its long-term business fund. It did not consist of particular assets but was a financial structure which was subject to all the statutory restrictions and requirements to which that fund was subject. He

said (at [205]) that, as the capital reserve was shareholders' capital, its ordinary recognition to cover actual trading receipts should not prima facie be deemed a chargeable receipt. But, as the capital reserve had no life of its own, amounts that were described as transfers from the reserve fell to be treated in the same way as any other assets comprised within the long-term business fund for regulatory purposes and, in consequence, for the purposes of s 83(2) too.' *Scottish Widows plc v Revenue and Customs Commissioners* [2011] UKSC 32, [2012] 1 All ER 379 at [17]–[26], per Lord Hope DP

INCRIMINATING EVIDENCE

Canada [Canadian Charter of Rights and Freedoms, s 13: 'A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence'.] '8 Thus, a party seeking to invoke s. 13 must first establish that he or she gave "incriminating evidence" under compulsion at the prior proceeding. If the party fails to meet these twin requirements, s. 13 is not engaged and that ends the matter.

'9 What then is "incriminating evidence"? The answer, I believe, should be straightforward. In my view, it can only mean evidence given by the witness at the prior proceeding that the Crown could use at the subsequent proceeding, if it were permitted to do so, to prove guilt, i.e., to prove or assist in proving one or more of the essential elements of the offence for which the witness is being tried.

'10 In *Henry* [*R v Henry* 2005 SCC 76, [2005] 3 SCR 609], at para. 25, Justice Binnie adopted the following definition of "incriminating evidence" from this Court's earlier decision in *R. v. Kuldip*, [1990] 3 S.C.R. 618, at p. 633: "Incriminating evidence means 'something "from which a trier of fact may infer that an accused is guilty of the crime charged" '."

'11 While that definition of "incriminating evidence" is framed somewhat differently than the definition I am proposing, one thing is clear—the *Kuldip* definition did not include evidence from the prior proceeding that the Crown wished to use for the sole purpose of impeaching the witness's testimony at the subsequent proceeding. Indeed, *Kuldip* affirmed, without qualification, that the witness's evidence from the prior proceeding could be used for that purpose. And that is how things

stood for 12 years, until 2002, when this Court in *R. v. Noel*, 2002 SCC 67, [2002] 3 S.C.R. 433, qualified the rule—correctly in my view—in a way that does not read the words "incriminating evidence" out of s. 13. At para. 47 of *Noel*, Arbour J. stated, for the majority:

If the original evidence was not incriminating, the *quid pro quo* was never engaged, and the witness cannot ask of the state that he be prevented from being cross-examined as to his credibility should he assert matters differently in a subsequent proceeding, even if the ultimate effect of that subsequent cross-examination may be adverse to his interest. This is consistent with the language of s. 13 which grants to every witness the right not to have any "incriminating evidence so given used to incriminate that witness in any other proceedings". [Emphasis in original.]

R v Nedelcu 2012 SCC 59, [2012] 3 SCR 311 at paras 8–11, per Moldaver J

INCUMBENT

[For 14 Halsbury's Laws of England (4th Edn) para 541 see now 34 Halsbury's Laws of England (5th Edn) (2011) para 269.]

INDEMNITY

[For 20(1) Halsbury's Laws of England (4th Edn) (Reissue) para 109 see now 49 Halsbury's Laws of England (5th Edn) (2015) para 646.]

[For 25 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 3 see now 60 Halsbury's Laws of England (5th Edn) (2011) para 3.]

INDENTURE

[For 13 Halsbury's Laws of England (4th Edn) (2007 Reissue) para 3 see now 32 Halsbury's Laws of England (5th Edn) (2012) para 203.]

INDEPENDENT

New Zealand [Racing Act 2003, s 11(1)(a): the governing body of the New Zealand Racing Board consists of seven members, acceptable to the Minister, as follows: '(a) an independent chairperson appointed by the Minister after consultation with the racing industry; ...'] '[62] Counsel for both parties refer to how "independent" is used elsewhere. Some of these were

included in the Department's advice to the Minister at the time. One example referred to is the Institute of Directors' description in a recent publication "The Four Pillars of Governance Best Practice", which is as follows:

An independent non-executive director plays an important role, particularly on larger boards. *Independent* in this context means independent of management and free from any business or other relationship or circumstance that could materially interfere with the exercise of a director's independent judgement. For example, a director would not be independent if they had recently been employed by the company or have a contractual relationship with the company (other than as a director) or if they are related to a major shareholder.

[63] Another example referred to is the NZX Listing Rules. Under those rules an independent director is someone who is not an executive of the company and who has no disqualifying relationship. A disqualifying relationship means any direct or indirect interest that could reasonably influence, in a material way, the director's decisions in relation to the company. Those two examples are helpful. They indicate that the requirement for independence in the context of independent directors is about involvement or relationships that could materially influence that director's independent judgement.

[64] Counsel for the Minister refers to the Oxford English Dictionary (online edition) which defines "independent" as:

Not depending upon the authority of another, not in a position of subordination or subjection; not subject to external control or rule; self governing, autonomous free.

Not depending on others for the formulation of opinions or guidance of conduct; *not influenced or biased by the opinions of others; thinking or acting, or disposed to think or act for oneself.* [Emphasis added.]

[65] In the context of s 11(1)(a) the most relevant part of that definition is the words in italics. Applied in the context of s 11(1)(a), an independent chairperson must not be influenced or biased by the views of one code, or thinking or acting, or disposed to think or act for the benefit of one code over another or for the benefit of a code over other industry concerns.

[66] Counsel for both sides referred to references to an "independent chairperson" in other legislation and other definitions of "independent" or "acting independently" in cases. However, as counsel for the Minister submits, in the end these are of limited assistance because they arise in their own contexts. "Independent chairperson" in s 11(1)(a) must also be considered in its context and in light of its purpose.

[67] I conclude that the word "independent" in s 11(1)(a) when read in light of its purpose means a person who is independent of the three codes [the New Zealand Thoroughbred Racing Incorporated (the thoroughbred code), Harness Racing New Zealand Incorporated (the harness code) and the greyhound code]. To be independent the person must not have past or present relationships, associations or interests with any of the three codes that would materially influence their decisions on the governing body in relation to that code. In considering whether a person would likely be materially influenced in their decisions on the governing body, the following (not necessarily exhaustive) considerations are relevant:

- (a) It is not simply a question of whether the person under consideration for appointment is an office holder on one of the codes. A person may be materially influenced in their decision making because of other substantial involvement in one of the codes.
- (b) Past positions as an office holder of a code or as a code nominated appointee on the NZRB are an indicator of an association with that code. Even a past position on the NZRB as a s 11(1)(e) appointee should be considered where that appointment indicates a strong alignment with one of the codes. Resigning from such positions does not necessarily end that association. The longer the period that the positions were held, the greater the likely degree of association with the code. The closer the time period between positions held with a code or as a code nominated appointee on the NZRB with the proposed appointment as independent chairperson of the NZRB governing body, the more likely it is that the relationships formed and the perspectives gained from that position will have an influence on the chairperson's views on matters of concern to that code that are before the NZRB.

- (c) Other interests in the code are also relevant. A person may never have held an office position on that code, but may still have interests and relationships within the code that are likely to influence their view on matters of concern to that code that are before the NZRB. Where a person carries on a business in relation to one of the codes, that may be relevant. Substantial ownership interests in thoroughbreds, for example, are potentially relevant. The issue with any of these interests is whether they are likely to materially influence their exercise of independent judgement on decisions of the governing body on matters relating to the code to which the business relates or in which the interest is held.
- (d) Anything else which indicates that a person has interests, associations or relationships that materially align that person with one of the codes such as to be likely to materially interfere with that person's independent decision making on matters before the NZRB that relate to the code.'

New Zealand Greyhound Racing Association (Inc) v Minister for Racing [2013] NZHC 245, [2013] NZAR 374 at [62]–[67], per Mallon J

INDEPENDENT CONTRACTOR

[For 16(1A) Halsbury's Laws of England (4th Edn) (Reissue) para 1 et seq see now 39 Halsbury's Laws of England (5th Edn) (2009) para 1 et seq.]

INDEPENDENT PROCESSOR

New Zealand [Dairy Industry Restructuring Act 2001, s 5.] '[1] On this appeal Fonterra Co-operative Group Ltd, as appellant, contends that it was not obliged to supply raw milk to the respondents, The Grate Kiwi Cheese Company Ltd and Kaimai Cheese Company Ltd, under reg 4 of the Dairy Industry Restructuring (Raw Milk) Regulations 2001 (SR 2001/326). Fonterra's obligation to supply raw milk under that regulation arises only if those seeking such supply are "independent processors", as defined. The Commerce Commission, the High Court and the Court of Appeal have each ruled against Fonterra on the basis that Grate and Kaimai were independent processors. Fonterra

challenges that conclusion. Its essential proposition is that the meaning which has so far been given to the expression "independent processor" does not properly reflect the context and purpose of the relevant Regulations. For the reasons which follow, we consider that the meaning given to the expression by the Commission and the Courts below represents a natural meaning of its definition. The context and purpose of the regulations support that meaning. Fonterra's appeal must therefore be dismissed.

...
 '[4] ... Independent processor is defined as meaning "a processor of milk or milksolids or dairy products who is not an associated person of new co-op [Fonterra]". The definition also includes New Zealand Dairy Foods Ltd (now Goodman Fielder Ltd) and any associated person of that company other than Fonterra. The issue is whether in order to qualify as an independent processor the party concerned must physically process the raw milk it obtains from Fonterra "in its own facility", as the Commerce Commission put it in its determination;⁸ or whether it is sufficient for the party concerned to do the processing by what has been called "toll processing".

'[5] The expression toll processing describes a situation where the processor does not use its own facilities to process raw milk but makes use of spare capacity within the facilities of another party, pursuant to contractual arrangements entered into for that purpose. This latter and wider meaning of the definition was adopted by the Commission in its determination. The key difference between the rival contentions is that, in Fonterra's submission, an independent processor must personally process the raw milk it acquires from Fonterra. The argument favoured by the Commission and in the Courts below allows a person to be an independent processor when that person does not do the processing of the raw milk personally but arranges for the processing to be done by someone else, pursuant to contractual arrangements made for the purpose.

...
 '[13] Having considered the competing submissions we can state our conclusion quite briefly. The meaning of the definition of independent processor must be derived from the statute's text and in the light of its purpose. The key words of the text define an independent processor as "a processor of milk or milksolids or dairy products". As there is no suggestion of any association between Grate and Kaimai on the one hand and Fonterra on the other no

further reference need be made to the independence aspect of the definition. Any person who processes either milk, milksolids or dairy products satisfies the processor part of the definition.

[14] Although the meaning advanced by Fonterra is a possible one, there is nothing in the text of the definition or in the Act or Regulations to suggest that a processor must make use of its own facilities when undertaking the processing. If that had been intended, express words to that effect could have been expected in view of the frequency with which commercial parties contract out aspects of their operations. Similarly, if this sort of restriction had been intended, one would have expected to see some provision dealing with the situation where the facilities used were not owned by the party concerned but were operated under lease, licence or were used under some other contractual arrangement. Provided the processing is done beneficially on behalf of the person claiming to be an independent processor, the regulations do not envisage any restriction on how the processing is physically or contractually arranged. Hence, on a textual basis, Grate and Kaimai qualified as independent processors both on account of their intention to arrange for the processing of the raw milk acquired from Fonterra to be done on their behalf, and on account of their actually processing other dairy products in their own facilities.

[15] We cannot discern any sufficient basis upon which it would be appropriate to read down the simple language of the definition. Had a more limited meaning such as that suggested by Fonterra been intended, those who framed the regulations could hardly have expressly incorporated the Act's definition of independent processor. A more limited and targeted definition would have been adopted. While the enhancement of farm gate competition was no doubt one of the purposes of the Regulations, that purpose is not necessarily inconsistent with the meaning of the definition adopted by the Courts below. Furthermore, the regulations were designed to address aspects of competition in dairy markets generally rather than simply competition in respect of raw milk. Downstream processors, as well as processors of raw milk, have an interest in obtaining regulated supplies of raw milk.' *Fonterra Co-operative Group Ltd v The Grate Kiwi Cheese Co Ltd* [2012] NZSC 15, [2012] 2 NZLR 184 at [1], [4]–[5], [13]–[15], per Tipping J

INDICTMENT

[For 11(3) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 1202 see now 27 Halsbury's Laws of England (5th Edn) (2015) para 315.]

INDIGENT

See also IMPOVERISHED

INDISSOCIABLE

'... The word "indissociable" is very rarely used in English legal parlance except where it has been used to translate the same French word in judgments of the European Court of Justice and the European Court of Human Rights, and acts of the European institutions. The point frequently arises in the context of value added tax in determining whether the supply of goods and services is one service, or two: see eg *EC Commission v UK* Case 353/85 [1988] 2 All ER 557, [1988] ECR 817, *Beynon and Partners v Customs and Excise Comrs* [2004] UKHL 53, [2004] 4 All ER 1091, [2005] 1 WLR 86. The European Court of Human Rights has emphasised that some of the rights are indissociable from "a danger of arbitrary power" (see *Golder v UK* (1975) 1 EHRR 524 at 535–536 (para 35)) or indissociable "from a democratic society" (see *Kokkinakis v Greece* (1994) 17 EHRR 397 at 418 (para 31): see also *Stewart v New Testament Church of God* [2007] EWCA Civ 1004 at [38], [39], [2007] All ER (D) 285 (Oct) at [38], [39]). So also Council Regulation (EC) 343/2003 (establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national) (OJ 2003 L50 p 1) (Dublin II) provides in art 4(3) that the situation of a minor who is accompanying the asylum seeker and meets the definition of a family member is to be "indissociable" from that of his parent or guardian: see *R (on the application of A) v Secretary of State for the Home Dept* [2006] EWCA Civ 1540, [2006] All ER (D) 178 (Oct).'
Kolden Holdings Ltd v Rodette Commerce Ltd [2008] EWCA Civ 1468, [2008] 3 All ER 612 at [90], per Lawrence Collins LJ

INDORSEMENT

[For 4(1) Halsbury's Laws of England (4th Edn) (2002 Reissue) para 308 see now 49 Halsbury's Laws of England (5th Edn) (2015) para 191.]

INEVITABLE ACCIDENT

[For 45(2) Halsbury's Laws of England (4th Edn) (Reissue) paras 362–363 see now 97 Halsbury's Laws of England (5th Edn) (2015) paras 468–469.]

INFECTION

Of goods

[For 36(2) Halsbury's Laws of England (4th Edn) (Reissue) para 826 see now 85 Halsbury's Laws of England (5th Edn) (2012) para 625.]

INFLICT

Australia [Crimes Act 1900 (NSW): is an act of having sexual intercourse with another person and thereby causing the other person to contract a grievous bodily disease capable of amounting to the infliction of grievous bodily harm within the meaning of s 35(1)(b)?] '[27] Counsel for the appellant contended that the word "inflicts" connotes the production of an immediate consequence with the result that, because the symptoms of the HIV which the appellant transmitted to the complainant were not immediately apparent, it could not be said that there had been any *infliction* of disease or injury. Arguably, that idea derives some support from some of the observations of Stephen J in *Clarence* [R v Clarence (1888) 22 QBD 23 at 41–42]. But it is misplaced. It rests on the kind of discredited logic that was rejected in *Alcan Gove Pty Ltd v Zabic* [(2015) 257 CLR 1; 325 ALR 1; [2015] HCA 33] that until and unless the symptoms of an insidious disease become manifest, no damage has been inflicted. As *Zabic* established, that is not so.

'[28] On the appellant's submission, the ordinary acceptance of the word "inflicts" does not, even now, extend to the communication of disease or infection. That contention must also be rejected. It is commonplace to speak of the infliction of suffering and thus, as counsel seemed to accept, it is now commonplace to speak of the infliction of psychiatric injury. Semasiologically, it is just as commonplace and just as appropriate to speak of the infliction of physical disease.' *Aubrey v R* [2017] HCA 18, (2017) 343 ALR 538 at [27]–[28], per Kiefel CJ, Keane, Nettle and Edelman JJ

INFORMATION

Australia [Migration Act 1958 (Cth), s 424(2).]

'(4) Is a document "information" and therefore "additional information" within s 424(2)?

'[110] The answer to this question is "no".

'[111] The two words mean different things, although a document may convey information.

'[112] In his submissions the minister refers to usages of the words "information" and "document" or "documents" in the Act which differentiate between them. He refers to ss 18, 305C, 308, 311EA, 359A, 375, 375A, 376, 377, 424A, 437, 438, 439 and 440. The minister also refers to sections that protect the confidentiality of "information", such as, ss 336E, 503A.

'[113] Section 424B(1) provides that if a person is invited under, relevantly, s 424, to give additional information, the invitation must specify the way in which it is to be given. This requirement hardly makes sense if attempted to be applied to a document.

'[114] We accept the minister's submission that s 424(2) does not apply to an invitation to a person to supply a document to the tribunal.' *SZLPO v Minister for Immigration and Citizenship* (NSD 1227 of 2008) [2009] FCAFC 51, (2009) 255 ALR 407 at [110]–[114], per Lindgren, Stone and Bennett JJ

Australia [Migration Act 1958 s 424A: Refugee Review Tribunal required to give an applicant 'clear particulars of any information that the tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review'.] '[8] The "information" upon which the tribunal invited comment, was the existence of "contradictions and inconsistencies" between what SZGUR had stated orally and in writing to the tribunal, variously constituted, during the iterations of the review process. The contradictions and inconsistencies, which were elaborated at some length in the letter, related to SZGUR's claimed involvement with the Communist Party of Nepal, whether he and his family had gone into hiding in Nepal, whether he had been helped to leave the country and his claim that two colleagues had been executed by the Nepalese Army.

'[9] Despite the language of the tribunal's letter, the existence of "inconsistencies" and "contradictions" in an applicant's testimony and written submissions to the tribunal is not "information" of the kind to which s 424A is directed. As was explained by the plurality in *SZBYR v Minister for Immigration and Citizenship* [(2007) 235 ALR 609; 81 ALJR 1190; [2007] HCA 26], the term "information" in s 424A does not extend to the tribunal's

“subjective appraisals, thought processes or determinations”. Their Honours said (at [18]):

[18]... However broadly “information” be defined its meaning in this context is related to the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies or the absence of evidence.

The exclusion of this class of information from the obligation imposed by s 424A is consistent with limits on the procedural fairness hearing rule at common law. Procedural fairness requires a decision-maker to identify for the person affected any critical issue not apparent from the nature of the decision or the terms of the statutory power. The decision-maker must also advise of any adverse conclusion which would not obviously be open on the known material. However, a decision-maker is not otherwise required to expose his or her thought processes or provisional views for comment before making the decision. That is not to say that the tribunal cannot or should not, in the exercise of its discretion, invite an applicant for review to make supplementary submissions in relation to apparent inconsistencies, contradictions or weaknesses in his or her case which have been identified by the tribunal. Indeed it may be that such an invitation, once issued, amounts to a binding indication by the tribunal that the review process will not be concluded until the applicant has had an opportunity to respond. But an invitation to comment on perceived inconsistencies and contradictions is not an invitation under s 424A. The tribunal’s letter of 11 April 2008, despite its phrasing, was not sent pursuant to the obligation imposed by that section. ...’ *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1, (2011) 273 ALR 223 at [8]–[9], per French CJ and Kiefel J

INHERENT VICE

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 353 see now 60 Halsbury’s Laws of England (5th Edn) (2011) para 344.]

INHUMAN OR DEGRADING PUNISHMENT

See also CRUEL AND UNUSUAL PUNISHMENT

[Human Rights Act 1998, Sch 1 Pt I art 3; right under art 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the

Human Rights Act 1998) not to be subjected to inhuman or degrading punishment. Extradition sought of drug dealer to Missouri, for offences the prescribed penalties for which were death or imprisonment for life without eligibility for probation or parole or release except by the act of the Governor.] ‘[5] The appeal raises two issues. First, whether a sentence of imprisonment for life without eligibility for parole would, if imposed in the United Kingdom, constitute an inhuman or degrading punishment. Secondly, whether it makes a difference that the sentence will not be imposed by a United Kingdom authority but by the State of Missouri.

‘[6] Before coming to the authorities in the United Kingdom and the European Court of Human Rights (the ECHR), I shall consider the question in principle. In the Divisional Court, Laws LJ put forward a philosophical argument for treating life imprisonment without parole as inhuman or degrading ([2008] 3 All ER 248 at [39](iv)):

“The abolition of the death penalty has been lauded, and justified, in many ways; but it must have been founded at least on the premise that the life of every person, however depraved, has an inalienable value. The destruction of a life may be accepted in some special circumstances, such as self-defence or just war; but retributive punishment is never enough to justify it. Yet a prisoner’s incarceration without hope of release is in many respects in like case to a sentence of death. He can never atone for his offence. However he may use his incarceration as time for amendment of life, his punishment is only exhausted by his last breath. Like the death sentence the whole life tariff is *lex talionis*. But its notional or actual symmetry with the crime for which it is visited on the prisoner (the only virtue of the *lex talionis*) is a poor guarantee of proportionate punishment, for the whole life tariff is arbitrary: it may be measured in days or decades according to how long the prisoner has to live. It is therefore liable to be disproportionate—the very vice which is condemned on art 3 grounds—unless, of course, the death penalty’s logic applies: the crime is so heinous it can never be atoned for. But in that case the supposed inalienable value of the prisoner’s life is reduced, merely, to his survival: to nothing more than his drawing breath and being

kept, no doubt, confined in decent circumstances. That is to pay lip service to the value of life; not to vouchsafe it."

'[7] This passage was quoted with apparent approval by Lord Bingham of Cornhill in *de Boucherville v Mauritius* [2008] UKPC 37, (2008) 25 BHRC 433 but in my respectful opinion the argument breaks down at the very first step. It is not the case that the abolition of the death penalty *must* have been founded upon the premise that the life of every person has such inalienable value that its forfeiture cannot be justified on the ground of retributive punishment. A perfectly respectable case for the abolition of the death penalty can be constructed without subscribing to the view that the lives of Streicher, Eichmann, Saddam Hussein or Myra Hindley had such inalienable value that their executions could not be morally justified. Opposition to the death penalty may be based upon the more pragmatic grounds that it is irreversible when justice has miscarried, that there is little evidence that its deterrent effect is greater than that of other forms of punishment and that the ghastly ceremony of execution is degrading to the participants and the society on whose behalf it is performed. For people who hold such views, who must include many opposed to the death penalty, the parallels between the death penalty and life imprisonment without parole, to which Laws LJ draws attention, are the very reasons why they think that in some cases the latter sentence is appropriate. The preservation of a whole life sentence for the extreme cases which would previously have attracted the death penalty is for such people part of the price of agreeing to its abolition. The member states of the European Union are in principle democracies and the views of such people must be taken into account by the courts which are invited to extend the reach of art 3. As Lord Bingham of Cornhill said of the mandatory life sentence for murder in *R v Lichniak* [2002] UKHL 47 at [14], [2002] 4 All ER 1122 at [14], [2003] 1 AC 903:

"... the House must note that [the mandatory life sentence] represents the settled will of Parliament. Criticism ... has been voiced in many expert and authoritative quarters over the years, and there have been numerous occasions on which Parliament could have amended it had it wished, but there has never been a majority of both Houses in favour of amendment. The fact that [the mandatory life sentence] represents the settled will of a democratic

assembly is not a conclusive reason for upholding it, but a degree of deference is due to the judgment of a democratic assembly on how a particular social problem is best tackled."

'[8] I come then to the law. The leading European authority is now *Kafkaris v Cyprus* (2008) 25 BHRC 591, which concerned a mandatory life sentence for murder imposed in Cyprus. Only the President could order the release of such a prisoner, either by exercising the power of mercy under art 53(4) of the constitution or by ordering release on licence under s 14 of the Prison Law 1996. The prisoner, who had been sentenced in 1989, complained in 2004 that his continued detention was in breach of his rights under, inter alia, art 3.

'[9] The majority judgment noted ((2008) 25 BHRC 591 at para 97) that a life sentence was "not in itself prohibited by or incompatible with art 3" but that the imposition of an *irreducible* life sentence "may raise an issue" under art 3.

...

'[12] The conclusion I draw from the court's guarded statement that an irreducible sentence "may raise an issue" under art 3 and that the existence of a system for release was a "factor to be taken into account" in assessing the compatibility of a life sentence with art 3 is that an irreducible sentence will not necessarily infringe. On the particular facts of the case, an offence may justify an irreducible sentence. Furthermore, provided that the sentence is reducible, its imposition will not even raise an issue under art 3. And the bar for what counts as irreducible is set high. It must be shown that the national law does not afford a real possibility, de jure and de facto, of review with a view to commutation or release.

'[13] This very limited application of art 3 to life sentences is shown by the way the court applied the stated principles to the facts. It concluded that the possibility of Presidential pardon or release was sufficient to prevent the sentence from being irreducible, notwithstanding that the prospect for release was limited. The fact that the possibility of release existed de facto was shown by evidence that some prisoners had been released. It did not matter that Cyprus had no parole board system.

...

'[20] The next question is the application of this construction of art 3 to cases in which the whole life sentence is not imposed in the United Kingdom but is likely to be imposed in a

country to which the prisoner is extradited. The leading authority on this question is the decision of the ECHR in *Soering v UK* [1989] ECHR 14038/88. That case concerned a decision by the Home Secretary to extradite the applicant (a German citizen) to Virginia to face charges of capital murder, for which the penalty was death. The applicant did not submit that the death penalty was in itself a violation of art 3 (as the court noted at para 101, that would have been difficult to reconcile with the language of art 2(1)) but complained that the manner in which it was implemented in Virginia, namely, after long delays, was inhuman or degrading. The court accepted this submission. The Privy Council later reached a similar conclusion in *Pratt v A-G for Jamaica* [1993] 4 All ER 769, [1994] 2 AC 1.

'[21] The United Kingdom nevertheless submitted that the convention required it only to refrain from imposing inhuman or degrading punishments in the United Kingdom. It was not responsible for what happened in Virginia after the applicant's lawful extradition. The court accepted (in para 86) that the engagement undertaken by a contracting state was confined to securing convention rights within its own jurisdiction and that it could not require a contracting state, notwithstanding its extradition obligations, not to surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the convention:

"Indeed, as the United Kingdom Government stressed, the beneficial purpose of extradition in preventing fugitive offenders from evading justice cannot be ignored in determining the scope of application of the Convention and of Article 3 in particular.' (My emphasis.)

'[22] I have emphasised the last few words of this passage because they make it clear that in cases of extradition, art 3 does not apply as if the extraditing state were simply responsible for any punishment likely to be inflicted in the receiving state. It applies only in a modified form which takes into account the desirability of arrangements for extradition. The form in which art 3 does apply must be gathered from the rest of the judgment and subsequent jurisprudence.

'[23] In para 88 the court distinguished between torture and other "inhuman or degrading treatment". Torture attracted such abhorrence that it would not be compatible with the values of the convention for a contracting state knowingly to surrender a fugitive to another

state if there were substantial grounds for believing that he was in danger of being subjected to torture, "however heinous the crime allegedly committed". The position in relation to inhuman or degrading treatment is more complicated. What amounts to such treatment depends upon "all the circumstances of the case" (para 89). The court went on:

"Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases."

'[24] The passage makes it clear that the desirability of extradition is a factor to be taken into account in deciding whether the punishment likely to be imposed in the receiving state attains the "minimum level of severity" which would make it inhuman and degrading. Punishment which counts as inhuman and degrading in the domestic context will not necessarily be so regarded when the extradition factor has been taken into account.

'[25] The relevance of the desirability of extradition in deciding whether art 3 has been infringed is shown by the weight which the court attributed to the fact that Mr Soering, as a German citizen, could be tried in Germany. It said ([1989] ECHR 14038/88 at para 110) that:

"... the Court cannot overlook either the horrible nature of the murders with which Mr Soering is charged or the legitimate and beneficial role of extradition arrangements in combating crime. The purpose for which his removal to the United States was sought, in accordance with the Extradition Treaty between the United Kingdom and the United States, is undoubtedly a legitimate one. However, sending Mr Soering to be tried in his own country would

remove the danger of a fugitive criminal going unpunished as well as the risk of intense and protracted suffering on death row. It is therefore a circumstance of relevance for the overall assessment under Article 3 in that it goes to the search for the requisite fair balance of interests and to the proportionality of the contested extradition decision in the particular case ...”

[26] The inference I would draw from this passage is that if Mr Soering could not have been tried in Germany and the court had been left with the stark choice of extraditing him to Virginia or allowing him to escape justice altogether, it would not necessarily have decided that, in the context of extradition, the method of implementing the death penalty in Virginia made the punishment sufficiently severe to be inhuman or degrading treatment.

[27] A relativist approach to the scope of art 3 seems to me essential if extradition is to continue to function. For example, the Court of Session has decided in *Napier v Scottish Ministers* 2004 SCLR 558, (2004) Times, 13 May that in Scotland the practice of “slopping out” (requiring a prisoner to use a chamber pot in his cell and empty it in the morning) may cause an infringement of art 3. Whether, even in a domestic context, this attains the necessary level of severity is a point on which I would wish to reserve my opinion. If, however, it were applied in the context of extradition, it would prevent anyone being extradited to many countries poorer than Scotland, where people who are not in prison often have to make do without flush lavatories.

[28] Treating art 3 as applicable only in an attenuated form if the question arises in the context of extradition or other forms of removal to a foreign state is consistent with the ECHR’s jurisprudence on the applicability of other convention articles in a foreign context. These authorities were discussed at some length by Lord Bingham of Cornhill in *R (on the application of Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 3 All ER 785, [2004] 2 AC 323 and led to his conclusion (at [24]) that:

“While the Strasbourg jurisprudence does not preclude reliance on articles other than art 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case.”

[30] There is in my opinion nothing in the

subsequent jurisprudence of the ECHR to qualify the principle laid down in *Soering v UK* [1989] ECHR 14038/88 that torture is a contravention of art 3 whether the context is domestic or foreign but that such context may affect whether other punishment or treatment is regarded as sufficiently severe to contravene. In *Chahal v UK* (1996) 1 BHRC 405 the court decided that nothing could justify deporting someone to a country where he faced a serious risk of suffering torture. It rejected the argument of the United Kingdom that even in such a case, deportation could be justified by interests of national security. But the case was not concerned with whether treatment or punishment less than torture, which might be regarded as inhuman or degrading in the United Kingdom, would necessarily engage art 3 on the ground that it was likely to be suffered in another country. It is true that the court said in para 81 that—

“It should not be inferred from the Court’s remarks (para 89) concerning the risk of undermining the foundations of extradition that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a state’s responsibility under art 3 is engaged.”

[31] In the context of *Chahal v UK* (1996) 1 BHRC 405, I read this remark as affirming that there can be no room for a balancing of risk against reasons for expulsion when it comes to subjecting someone to the risk of torture. I do not however think that the court was intending to depart from the relativist approach to what counted as inhuman and degrading treatment which was laid down in *Soering v UK* [1989] ECHR 14038/88 and which is paralleled in the cases on other articles of the convention in a foreign context. If such a radical departure from precedent had been intended, I am sure that the court would have said so.

...

[49] In short, the European Court of Human Rights has not yet said, either in *Kafkaris v Cyprus* (2008) 25 BHRC 591, or in any other case, that all irreducible life sentences are inhuman and degrading treatment within the meaning of art 3. There may come a time when it will do so and we shall then have to have regard to that view. In the meantime, it has simply said that such sentences “may raise an issue” under art 3. Reducible life sentences, on the other hand, do not. In my view, however, even if the sentence faced by the appellant were to be regarded as irreducible, it would not in his

case amount to inhuman or degrading treatment within the meaning of art 3.

[50] I agree, of course, that if there is substantial ground for believing that a person who is to be expelled from this country faces a real risk of being subjected to torture or to inhuman or degrading treatment in the country to which he is to be expelled, then his right not to be subjected to such treatment is absolute. It cannot be balanced against other considerations, including the real risk which he poses to the country from which he is to be expelled: see *Chahal v UK* (1996) 1 BHRC 405 and *Saadi v Italy* (2008) 24 BHRC 123. But the particular context of the case is important in assessing whether the treatment which he faces is indeed to be regarded as inhuman or degrading. It is worth repeating what was said in *Soering v UK* [1989] ECHR 14038/88 at para 89:

“What amounts to ‘inhuman and degrading treatment or punishment’ depends upon all the circumstances of the case... As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.”

[51] There is nothing in either *Chahal v UK* (1996) 1 BHRC 405 or *Saadi v Italy* (2008) 24 BHRC 123 which casts doubt upon the relevance of these considerations in assessing the severity of the treatment or punishment faced by the person to be extradited. The references in *Saadi v Italy* (2008) 24 BHRC 123 at paras 127 and 138, to the irrelevance of the victim's conduct refer to the absolute nature of the prohibition once it has been determined that there is a real risk of treatment contrary to art 3. They do not cast doubt on the oft-repeated statements that the assessment of the minimum level of severity is relative: see *Saadi v Italy* (2008) 24 BHRC 123 at para 134. Thus, for example, in *Soering v UK* [1989] ECHR 14038/88 the court went on, at para 100, to repeat some well known general considerations:

“As is established in the Court's case-law, ill-treatment, including punishment, must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim... In order for a punishment or treatment associated with it to be ‘inhuman’ or ‘degrading’, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment...”

Indeed, if the concept of proportionality in sentencing is relevant to the assessment of severity, then the conduct of which the prospective victim has been found guilty may be central to the assessment of whether the punishment is inhuman or degrading.

[52] As already seen, the court has not stated that even an irreducible life sentence is automatically an illegitimate form of punishment. ... It is not for us to impose our views of the proper tariff for any particular offence upon another country. Our only legitimate concern is that they should not impose the death penalty and that what they do impose does not cross the high threshold of inhuman or degrading punishment for the offence in question. There is nothing to suggest that the conditions in Missouri prisons are inhuman or degrading. Hence I have difficulty in seeing how a punishment which was prescribed by the law of the state where the crime was committed, and which falls within the range of legitimate punishments for that offence, can be considered inhuman or degrading. That view is strengthened if, as in this case, the offence was one which might have attracted the same penalty if committed here.

[53] I do understand the philosophical position, that each human being should be regarded as capable of redemption here on earth as well as hereafter. To those who hold this view, the denial of the possibility of redeeming oneself in this life by repentance and reform may seem inhuman. I myself was brought up in that tradition. But, as Lord Hoffmann has pointed out, this is not the only tenable view of the matter. There are many people, in and outside prison, who would draw a very sharp

distinction between life and death, however restricted that life might be. There are many justifications for subjecting a wrongdoer to a life in prison. It is not for us to impose a particular philosophy of punishment upon other countries.' *R (on the application of Wellington) v Secretary of State for the Home Department* [2008] UKHL 72, [2009] 2 All ER 436 at [5]–[9], [12]–[13], [20]–[28], [30]–[31], per Lord Hoffmann, and at [49]–[53], per Baroness Hale of Richmond

INJUNCTION

[For 24 Halsbury's Laws of England (4th Edn) (Reissue) para 801 see now 12 Halsbury's Laws of England (5th Edn) (2015) para 1098.]

Interlocutory

[Note that an interlocutory injunction is now referred to as an interim injunction. For 24 Halsbury's Laws of England (4th Edn) (Reissue) para 804 see now 12 Halsbury's Laws of England (5th Edn) (2015) para 1101.]

Mandatory

[For 24 Halsbury's Laws of England (4th Edn) (Reissue) para 802 see now 12 Halsbury's Laws of England (5th Edn) (2015) para 1099.]

Mareva

[Note that a Mareva injunction is now known as a freezing injunction. See 12 Halsbury's Laws of England (5th Edn) (2015) para 595 et seq.]

Perpetual

[For 24 Halsbury's Laws of England (4th Edn) (Reissue) para 803 see now 12 Halsbury's Laws of England (5th Edn) (2015) para 1100.]

INJURY

Australia [Safety Compensation and Rehabilitation Act 1988 (Cth) s 14: compensation payable in respect of an injury suffered by an employee if the injury results in death, incapacity for work, or impairment.] '[109] Adjectives such as "sudden" and "identifiable" help emphasise the distinction made in both *Zickar v MGH Plastic Industries Pty Ltd* [1996] 187 CLR 310; 140 ALR 156; [1996] HCA 31] (by the majority) and *Kennedy*

Cleaning [Kennedy Cleaning Services Pty Ltd v Petkoska (2000) 200 CLR 286; 174 ALR 626; [2000] HCA 45] between a disease and some of its consequences or effects; they also reflect the historical fact that injuries often occurred in the workplace in the context of an "accident".

'[110] We do not, however, see in the statutory concept of injury in the SRC Act any necessity for the attribute of "suddenness". The passage from the judgment of Latham CJ in *Hume Steel* [*Hume Steel Ltd v Peart* (1947) 75 CLR 242 at 252; [1947] ALR 477 at 479; [1947] HCA 34] at CLR 252–3; ALR 479 has force, not as a substitute definition, but as an informing guide to the content of meaning of the word, including its relationship to ordinary meaning or common understanding. An injury involves "physiological change or disturbance of the normal physiological state" as an alteration to a person's physical or mental state, and one that can be said to be an alteration from the functioning of a healthy body or mind. It is antithetical to the use of a word like "injury" in this legal context to load it up with qualifications having the effect of narrowing or constraining the circumstances to which it might be applied, unless those qualifications or constraints are drawn from the text or structure of the statute. Any relevant constraints on meaning are to be found expressed by Parliament in the legislation. The degree to which an injury may reflect an identifiable event will depend on the circumstances. The precise identification of the breaking of an arterial wall or lining or a rupture of an aneurism may make suddenness of an identifiable event useful as the discrimen to distinguish an identifiable physiological change from the natural progress of the underlying (and in one sense, closely related) disease.

'[111] Where, however, as here, there is no diagnosed disease whose progression can be assessed as inevitable or not, the general conceptions spoken of by Latham CJ in *Hume Steel* are of particular relevance: the distinction according to ordinary language between getting hurt and becoming sick; something that involves "a harmful effect on the body"; "a disturbance of the normal physiological state which may produce physical incapacity". See also *McIntosh* [*Accident Compensation Commission v McIntosh* [1991] 2 VR 253] at 257, 263 and 264.

'[112] In circumstances where one has physiological change, and the inquiry is whether there is the mere progression of a disease, or an event or identifiable change that can be seen as a separate injury, there will be room for debate

and factual assessment. Suddenness may assist in the demarcation of the injury from the progression of the disease. However, if one has, as here, physiological changes without apparent aetiology or any real diagnostic explanation then “suddenness” may have less relevance. To elevate it to a pre-requisite to the finding of injury may be to introduce an element of fortuity or incident or accident into the concept of injury that was discussed in cases such as *Ockenden* [*Commonwealth v Ockenden* (1958) 99 CLR 215; [1958] ALR 772; [1958] HCA 37] as relevant to “injury by accident”, thus impermissibly taking the construction and application of these provisions back to a time where an additional element was present.

...
[114] As the High Court there [in *Canute v Comcare* (2006) 226 CLR 535; 229 ALR 445; 91 ALD 552; [2006] HCA 47] observed, the presence in the SRC Act of a distinction between mental and physical injuries is significant. There may, or may not, be a “suddenness” attached to mental injury. There may or may not be a clear diagnosis. There must, for it to be an injury within s 4, be an alteration or disturbance to the functioning of a normal and healthy mind. The focus of the statutory concept is on the effects of events, incidents or ailments on the worker’s body and mind.

[183] The respondent submitted that the word “injury” was used in its ordinary English sense in (b) of the definition in s 4(1) of the SRC Act or in a way which renders the tribunal’s decision about its meaning a question of fact.

...
[186] What is and is not an “injury” for the purposes of s 4(1) of the SRC Act involves a statutory concept. It is apparent from the large number of authorities in state and federal jurisdictions, to some of which we have referred, that what can constitute an injury for the purposes of workers’ compensation regimes may require constructional choices. Within the well-established parameters of text, context and purpose, recognising the existence of constructional choices reflects a recognition that language is plastic and nuanced, leading to a level of legal indeterminacy which courts must resolve: see *Momcilovic v R* (2011) 245 CLR 1; 280 ALR 221; [2011] HCA 34 at [50] per French CJ. It is too simplistic to see the word “injury” in s 4(1) of the SRC Act as having merely or only an “ordinary meaning”, whether as an individual word or a statutory concept. It has a statutory meaning, which must be arrived

at in accordance with the principles of statutory construction. That meaning involves, however, everyday and familiar concepts. As Latham CJ said in *Hume Steel* [*Hume Steel Ltd v Peart* (1947) 75 CLR 242 at 252; [1947] ALR 477 at 479; [1947] HCA 34] — there is a difference between getting hurt and becoming sick.

...
[193] Accordingly, we do not accept the respondent’s submission that the word “injury” is used in an ordinary English sense in para (b) of the definition in s 4(1) of the SRC Act or otherwise in a way which renders the tribunal’s decision about its meaning a question of fact. The correct construction of “injury” in s 4(1) of the SRC Act is, as we have said, a question of law.

[194] The subsequent (but inextricably related) question of whether, on the facts as found by the tribunal in the present case, it was open to the tribunal to decide that the appellant had not suffered an “injury” is also a question of law. That is, adopting the correct construction of the statutory concept of injury in s 4(1) of the SRC Act, whether the material before the tribunal reasonably admitted of different conclusions is a question of law. In contrast, assuming a positive answer to this, the next question — which conclusion should be drawn — is a question of fact: *Bell v Commissioner of Taxation* [2013] FCAFC 32 at [18] per Jessup, Jagot and Robertson JJ, referring to *TNT Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation* (1988) 82 ALR 175 at 182; [1988] FCA 119. Thus, where the tribunal’s reasoning discloses no error of construction and the facts as found are capable of “falling within or without the description used in the statute, the decision which side of the line they fall on will be a decision of fact not law”: *Sharp Corp of Australia Pty Ltd v Collector of Customs* (1995) 59 FCR 6 at 16 ; [1995] FCA 1521 (*Sharp Corp*) per Hill J; and see *Haritos* [*Haritos v Commissioner of Taxation* [2015] FCAFC 92] at [194]–[197]. *May v Military Rehabilitation and Compensation Commission* (NSD 485 of 2014) [2015] FCAFC 93, (2015) 322 ALR 330 at [109]–[112], [114], [183], [186], [193]–[194], per Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ

Injury (other than a disease)

Australia [Safety Rehabilitation and Compensation Act 1988 (Cth), ss 4(1), 14.] [2] Mr May applied for compensation under s 14(1) of the Safety, Rehabilitation and Compensation

Act 1988 (Cth) (the Act) "in respect of *an injury* suffered by an employee [where] *the injury* results in death, incapacity for work, or impairment" (emphasis added).

[3] The question on this appeal is whether Mr May's dizziness was an "injury" for the purposes of the Act and therefore compensable under s 14 of the Act. The Full Court said it was. For the reasons that follow, that conclusion cannot be supported and the appeal must be allowed.

[9] Mr May did not contend that he suffered a "disease" within the meaning of par (a) of the definition of "injury" in s 4(1) of the Act. Rather, he claimed he suffered an "injury (other than a disease)" within par (b) of the definition of "injury" in s 4(1) of the Act.

[41] As seen earlier, subject to an exception for disciplinary action and other matters not now relevant, "injury" was defined in s 4(1) of the Act to mean:

- (a) a *disease* suffered by an employee; or
- (b) an *injury* (other than a *disease*) suffered by an employee, being a physical or mental injury *arising out of, or in the course of, the employee's employment*; or
- (c) an aggravation of a physical or mental injury (other than a *disease*) suffered by an employee (whether or not that injury arose out of, or in the course of, the employee's employment), being an aggravation that arose out of, or in the course of, that employment;

..." (emphasis added)

[43] As appears from the definition of "disease", a "disease" for the purposes of the Act must be an ailment or an aggravation of an ailment. That is not sufficient to establish the existence of a disease. The ailment or aggravation thereof has to have been contributed to in a material degree by the employee's employment by the Commonwealth.

[44] An "injury (other than a disease)" covers the other sub-set of "injury". Various aspects of this limb of the definition of "injury" should be observed. First, the phrase "other than a disease" means that if an employee establishes that they have a "disease" within par (a) of the definition of "injury", there is no need to consider par (b). Second, an "injury (other than

a disease)" suffered by an employee must be "a *physical or mental injury* arising out of, or in the course of, the employee's employment" (emphasis added). That is to say, the physical or mental injury has to have a causal or temporal connection with the employee's employment. Third, that need for a causal or temporal connection in respect of a "physical or mental injury" in par (b) directly raises the question — what does "injury" mean in that paragraph?

[45] "Injury" in par (b) is used in its "primary" sense. As Gleeson CJ and Kirby J explained in *Kennedy Cleaning [Kennedy Cleaning Services Pty Ltd v Petkoska]* (2000) 200 CLR 286, 174 ALR 626, [2000] HCA 45 at [39], if "something ... can be described as a *sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state*, it may qualify for characterisation as an 'injury' in the primary sense of that word" (emphasis added).

[46] That physiological change or disturbance of the normal physiological state may be internal or external to the body of the employee. It may be, for example, the breaking of a limb, the breaking of an artery, the detachment of a piece of the lining of an artery, the rupture of an arterial wall or a lesion to the brain. Each would be described as an "injury" in the primary sense.

[47] However, as the Full Court correctly held, "suddenness" is not *necessary* for there to be an "injury" in the primary sense. A physiological change might be "sudden and ascertainable". A physiological change might be "dramatic". The employee's condition might be a "disturbance of the normal physiological state". That an "injury" in the primary sense can arise, and can be described, in a variety of ways does not mean that "suddenness" is irrelevant. As the Full Court said, "suddenness" is often useful where there is a need to distinguish a physiological change from the natural progress of an underlying (and in one sense, closely related) disease (as occurred in *Zickar [Zickar v MGH Plastic Industries Pty Ltd]* (1996) 187 CLR 310, 140 ALR 156] and *Kennedy Cleaning*). But it is the *physiological change* — the nature and incidents of that change — that remains central.

[56] The proper construction of the Act reflects the importance of the distinction drawn by the Act between "disease" and "injury (other than a disease)" in the definition of "injury" in s 4(1) of the Act and recognises that each creates a different basis for liability under the statutory scheme.

[57] The Full Court concluded that the

inquiry demanded by the statutory definition of “injury” was “whether *the person has experienced* a physiological change or disturbance of the normal physiological state (physical or mental) that can be said to be an alteration from the functioning of a healthy body or mind” (emphasis added). To the extent that conclusion suggested that subjectively experienced symptoms, without an accompanying physiological or psychiatric change, are sufficient to provide a positive answer to the first or third questions set out above, that conclusion should be rejected.

‘[58] That is because, first, it overlooks that the Act provided that the appellant was liable to compensate in respect of “an injury” and that the focus of the Act is on “an injury”.

‘[59] Second, it overlooks that the Act draws an important distinction between “disease” and “injury (other than a disease)” and that “disease” and “injury (other than a disease)” are part of different limbs of the definition of “injury” in s 4(1). Each limb deals with a separate basis for something being an “injury”. That is the reason for separate questions.

‘[60] Third, as seen earlier, the word “injury” in “injury (other than a disease)” has a different meaning from the defined term “injury” in s 4(1) — it means “injury” in its primary sense. That necessarily requires consideration of the “precise evidence, on a fact by fact basis, concerning the nature and incidents of the physiological change”.

‘[61] Put another way, the proper construction of the Act recognises that an employee may genuinely complain of being unwell, but, in the context of the “injury (other than a disease)” limb of the definition of “injury”, unless that employee can satisfy the tribunal of fact that he or she has suffered an “injury” (in the primary sense of the word), s 14 of the Act will not be engaged.

‘[62] The “nature and incidents of the physiological [or psychiatric] change” will determine whether there was an “injury (other than a disease)”. The evidence to be adduced, of course, will vary from case to case and, where appropriate, may take into account common-sense inferences drawn from a sequence of events. To take an extreme example, the dismemberment of a limb involves a physiological change as a matter of common sense. But there must be more than an assertion by an employee that he or she feels unwell.’ *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19, (2016) 331 ALR 369 at [2]–[3], [9], [41], [43]–[47], [56]–[62], per French CJ, Kiefel, Nettle and Gordon JJ

INNKEEPER

[For 24 Halsbury’s Laws of England (4th Edn) (Reissue) para 1106 see now 68 Halsbury’s Laws of England (5th Edn) (2016) para 649.]

INLAND WATERS

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

INNUENDO

[For 28 Halsbury’s Laws of England (4th Edn) (Reissue) para 47 see now 32 Halsbury’s Laws of England (5th Edn) (2012) para 547.]

INSIDE INFORMATION

New Zealand [Securities Markets Act 1988.]
 ‘[111] For convenience, we repeat the definition of inside information pertaining at the relevant time:

Inside information in relation to a public issuer, means information which.

- (a) is not publicly available; and
- (b) would, or would be likely to, affect materially the price of the securities of the public issuer if it was publicly available.

‘[112] In simple terms, the Act deals with information which is not publicly available but which would be price-sensitive if it were released. There is no definition of the term “information”. This led us to discuss with counsel during the hearing whether the material relied on as inside information must have some threshold level of credibility or reliability before it could be treated as information for the purposes of the definition. For example, would mere speculation or rumour suffice or must there be some reasonably reliable foundation for the relevant material before it could be regarded as information? And, we asked, would matters of opinion as distinct from matters of fact qualify as information in this context? Would it make a difference if optimistic views by some within a company were not shared by their superiors?

...

‘[122] Our research has not revealed any other authorities in overseas jurisdictions which materially assist in the interpretation of the insider trading legislation at issue here. The Court of Appeal of Western Australia has recently discussed insider trading issues in *R v*

Mansfield [[2011] WASCA 132, (2011) 251 FLR 286], but the legislation in issue differs materially from our Act. Legislation in other jurisdictions also differs from our own and does not assist.

[123] However, we are satisfied that a broad approach to the interpretation of the term “information” is justified having regard to the purposes of the legislation as identified by the Securities Commission in its 1987 report. In particular, information in this context may include matters of opinion as well as matters of fact. Relevantly to the present case, information may include the views or predictions of experts which may not have reached the point where they have been fully substantiated, documented or proven. And, as the Securities Commission suggested, inside knowledge that negotiations are in progress in respect of a takeover or major new contract or that a profit announcement (whether favourable or adverse) is in the wind, may also qualify as information in this context. That may be so even if the matters at issue have not yet been finally documented or completed to the point where a public announcement is appropriate.

[124] Having made these observations, we do not consider that every piece of “tittle tattle” would qualify as information in this context. There must, we think, be some threshold below which material could not properly be regarded as information. If, for example, completely unsubstantiated rumour were to qualify as information, share transactions could be seriously inhibited for no good reason. On the other hand, the bar should not be set so high that the purpose of the legislation is defeated.

[125] The answer to the question of where the bar should be set is found in the definition of “inside information”. In order to qualify as information, the relevant material must not be publicly available and must be of such a nature that it would (or would be likely to) affect the price of the shares to a material extent if it were made publicly available. If, objectively considered, it would be unlikely to materially affect the share price if released to the public, then it is not inside information for the purposes of the legislation.

[126] Material which is in the category of wholly unsubstantiated rumour would generally be unlikely to affect the share price. Even if it might affect the share price, its effect would very likely be short-lived since one would expect the company to move quickly to correct any false rumours circulating in the market place. Similarly, if the material in question was merely an unsupported opinion of a low-level

employee of the company which was not accepted by responsible officers or executives within the company. On the other hand, the more substantial the material and the more reliable its source, the greater the prospect that it could be price-sensitive.’ *Haylock v Patek* [2011] NZCA 674, [2012] 1 NZLR 665 at [111]–[112], [122]–[126], per Randerson J

INSTITUTION

Canada [Federal-Provincial Fiscal Arrangements and Established Programs Financing Act, 1977, SC 1976–77, c. 10, s. 27(8); Federal-Provincial Fiscal Arrangements and Established Programs Financing Regulations 1977, SOR/78–587, s 24(1).] ‘36. To determine whether SSPD [support services provided to persons with disabilities living in residential resources] were eligible for cost sharing under the CAP [Canada Assistance Plan], the only question this Court must answer concerns the meaning of the “adult residential care service” concept referred to in s 27(8) of the *Fiscal Arrangements Act*, 1977. As I mentioned above, the appellant argues that SSPD could not be characterized as adult residential care services because they were provided in the recipient’s “home”. This argument has two aspects, which I will discuss in turn: the first concerns the very nature of residential resources, while the second relates to the range of services offered in such resources.

‘37. Section 24 of the *Fiscal Arrangements Regulations*, 1977 must be considered in analysing the Attorney General of Quebec’s argument. I believe it will be helpful here to reproduce, in part, this provision, which defined the term “institution” for the purposes of the federal program:

24(1) For the purposes of this section,

...

“institution” means

- (a) in the case of a service other than converted mental hospitals, a facility or portion of a facility that qualifies as a home for special care under section 8 of the *Canada Assistance Plan Regulations*...
- (2) ...
 - (b) “adult residential care service” means a service provided in an institution in respect of adults consisting of
 - (i) personal and supervisory

- care according to the individual requirements of residents of the institution,
- (ii) assistance with the activities of daily living and social, recreational and other related services to meet the psycho-social needs of the residents of the institution,
 - (iii) services required in the operation of the institution, and
 - (iv) the provision of room and board ...

'38. The Attorney General of Quebec contends, first, that residential resources were not "institutions" within the meaning of s 8(f) of the *Canada Assistance Plan Regulations*, CRC 1978, c 382 ("*CAP Regulations*"), which read as follows:

8. For the purposes of the definition "home for special care" in section 2 of the Act, the following kinds of residential welfare institutions are prescribed for the purposes of the Act as homes for special care:

- ...
- (f) any residential welfare institution the primary purpose of which is to provide residents thereof with supervisory, personal or nursing care or to rehabilitate them socially,
- the standards of which ... are, in the opinion of the provincial authority, in accordance with the standards generally accepted in the province for residential welfare institutions of that kind.

'39. Relying on the last part of this provision, the Attorney General of Quebec submits that the criteria provided for in a Quebec statute, the *Act respecting health services and social services and amending various legislation*, SQ 1991, c 42 ("*AHSSS*"), had to be applied to determine whether a residential resource could be characterized as an "institution" within the meaning of the *CAP Regulations*. I disagree. In my opinion, the Attorney General of Quebec is wrong in law to state that s 8(f) of the *CAP Regulations* incorporated provincial legislation to establish the criteria for characterizing a residential facility for persons with disabilities as an "institution". I believe that the reference to provincial legislation instead concerned the *quality* of the services provided in such facilities.

'40. The concluding words of s 8 of the *CAP Regulations* must therefore be understood to state a condition that costs were to be shared only if "standards generally accepted in the province" were met. Thus, the obligation assumed by the federal government under the *CAP* was to share in the costs of services provided in "homes for special care" only if the services met quality standards set out in the provincial legislation applicable to that type of institution. It is reasonable to conclude that the federal government was simply ensuring that it would not share in the costs of services that did not meet provincial quality standards. From this perspective, the concluding words of s 8 represented neither more nor less than a guarantee for the federal government that the *CAP* would not be a blank cheque given to the provinces without regard for the quality of the services provided. I agree with the respondent that setting out in Schedule A to the agreement entered into with Quebec under s 4 of the *CAP* a list of the "homes for special care" approved in accordance with provincial standards was the best way to secure that guarantee (RF, at para 169).

'41. Moreover, it must not be forgotten that the *CAP* was established by a spending statute whose purpose was to remedy an imbalance that had been observed between the federal government's tax revenues and the expenses incurred by the provinces. The Attorney General of Quebec's argument would therefore mean that the Parliament of Canada left it up to the provinces to determine the scope of a federal spending statute. I cannot believe that this was Parliament's intention at the time the *CAP* was drafted.

'42. If this were the interpretation to be given to s. 8(f) of the *CAP Regulations*, it would have to be concluded that, before the *CAP* was repealed, it would have been open to each province to amend its legislation to change the criteria for what it considered to be "institutions" in order to avoid the application of the residual exception of s. 5(2)(c) of the *CAP*. As the respondent states in her factum, the effect of the interpretation suggested by the Attorney General of Quebec would have been [TRANSLATION] "to deprive the Government of Canada of any power to assess the provinces' claims under the legislation it was responsible for administering" (para. 168). For these reasons, the argument [page 388] that the *AHSSS* had to be applied in interpreting the meaning of the term "institution" in the federal statute and regulations must be rejected.

'43. The Attorney General of Quebec also

insists that the range of services offered in residential resources did not meet the cumulative conditions set out in s. 24(2)(b) of the *Fiscal Arrangements Regulations, 1977*, which defined “adult residential care service”. He argues that residential resources could not be considered “institutions” within the meaning of that provision because they did not provide recipients with room and board. The essence of the Attorney General of Quebec’s interpretation is that residential resources did not “provide” services relating to room and board, because the recipients paid for those services themselves.

‘44. This argument must also be rejected. The fact that most recipients of SSPD paid the costs of their own room and board—using social security benefits—does not mean that residential resources did not provide them with those services. The evidence at trial showed that the recipients did not do their own grocery shopping or cook their own meals (para 405) and that, although some recipients signed leases, reception and rehabilitation centres (“CAR”) or rehabilitation centres for mentally impaired persons (“CRDI”) always co-ordinated and supervised, from an administrative standpoint, the activities of residential resources, which were responsible for placing and moving recipients (para 395). The recipients had no choice in this respect.

‘45. Accordingly, even assuming that the amount of social assistance benefits covered all costs of the recipients’ room and board—although this seems doubtful—it is impossible to conclude that those services were not provided by an institution for adults within the meaning of s 24(2)(b) of the *Fiscal Arrangements Regulations, 1977*. In fact, without the support of CAR or of CRDI, recipients of SSPD who required continuous assistance would have been unable to feed themselves and would not have been lodged in this type of residential resource. In the final analysis, I cannot conclude, as the Attorney General of Quebec suggests, that residential resources provided home care rather than an “adult residential care service”. Deinstitutionalization was a valid social objective, but it did not change the legal framework established under the relevant federal legislation for cost sharing under the *CAP*.

‘46. I agree with the trial judge that the intensiveness of the services provided by residential resources was a key factor in characterizing such resources as “homes for special care” that provided “adult residential care services”. Although intensiveness was not, *per se*, a classification criterion under s 24(2)(b)

of the *Fiscal Arrangements Regulations, 1977*, it seems obvious to me that it was implicit in all the cumulative factors set out in that section. It was even explicit in s 24(2)(b)(ii), which referred to services provided to recipients to assist with the activities of daily living as well as social and recreational services.

‘47. Therefore, a residential resource that did not provide all these services would not have had the “intensiveness” needed to qualify under s 24(2)(b)(ii). Conversely, a residential resource that provided all the services referred to in s 24(2)(b) of the *Fiscal Arrangements Regulations, 1977* would legitimately have been considered to be providing an “adult residential care service”. It could be concluded that such a resource was an institution “the primary purpose of which is to provide residents thereof with supervisory, personal or nursing care or to rehabilitate them socially” within the meaning of s 8(f) of the *CAP Regulations*.’ *Quebec (Attorney General) v Canada* 2011 SCC 11, [2011] 1 SCR 368 at paras 36–47, per Lebel J

INSTRUMENT

[For 13 Halsbury’s Laws of England (4th Edn) (2007 Reissue) para 140 see now 32 Halsbury’s Laws of England (5th Edn) (2012) para 340.]

Under hand

[For 13 Halsbury’s Laws of England (4th Edn) (2007 Reissue) para 139 see now 32 Halsbury’s Laws of England (5th Edn) (2012) para 339.]

INSTRUMENT OF CRIME

Australia ‘[1] This appeal concerns the construction and application of a provision of Pt 10.2 of the Criminal Code (Cth) (the Code) which creates one of a number of offences under the general designation “money laundering”. That provision, s 400.3(1), makes it an offence for a person to deal with money or other property of a value of or exceeding \$1,000,000 if the person intends that the money or property will become an “instrument of crime”. Property is an “instrument of crime” if it is used in the commission of, or used to facilitate the commission of, an indictable offence.

‘[2] In February 2005 the appellant effected a disposition of shares the beneficial interest in which was held by a company under his control, Barat Advisory Pty Ltd (Barat Advisory). The shares were in a publicly listed company,

Admerex Ltd (Admerex). They were swapped, at the appellant's direction, for shares in a Swiss software development company, Temenos Group AG (Temenos). The appellant intended that Barat Advisory would not declare, in its income tax return for 2005, the capital gain derived from that transaction. An intentional failure by Barat Advisory to declare the capital gain would be an offence against the Code. The question in this appeal is whether, in those circumstances, the Admerex shares upon which the capital gain was made could have been intended to be or become "an instrument of crime" within the meaning of s 400.3(1). The answer to that question must be in the negative. Upon the disposal of the shares, which was the relevant dealing for the purposes of s 400.3(1), they were not intended to be "used" in the commission of, or to facilitate the commission of, an indictable offence. The proposition that they were intended to be so used involves giving to the term "use" a meaning which the text of the Code will not bear and which its purpose does not require.

...
 '[14] It was not in dispute that the Admerex shares the subject of the indictment were "property" and that their transfer, effected by the appellant, was a disposal for the purposes of s 400.2(1)(a)(i). What was in contest, relevant to the physical element in s 400.3(1)(a) and the element of intention in s 400.3(1)(b)(ii), was whether, on the Crown case, the shares could be said to have been intended to become "an instrument of crime" within the meaning of s 400.2(1)(b). The relevant crime attributable to Barat Advisory was that created by s 134.2 of the Code, namely obtaining a financial advantage by deception. Section 134.2 relevantly provided:

- (1) A person is guilty of an offence if:
- (a) the person, by a deception, dishonestly obtains a financial advantage from another person; and
 - (b) the other person is a Commonwealth entity.

That offence was said to arise out of the deliberate failure by Barat Advisory to declare the net capital gain for the sale of the Admerex shares in its income tax return for the year ending 30 June 2005.

...
 '[33] For property to become an instrument of crime within the meaning of s 400.3(1) it must be "used". An ordinary meaning of the verb "use" is "[t]o make use of (some immaterial thing) as a means or instrument; to employ for a certain end or purpose". That is the

relevant ordinary meaning for the definition of "become an instrument of crime" which involves the "use" of property to serve a purpose, namely the "commission of an offence" or "to facilitate the commission of an offence". The relevant ordinary meaning of "facilitate" in this case is "[t]o render easier the performance of (an action), the attainment of (a result); to afford facilities for, promote, help forward (an action or process)".

...
 '[40] Properly construed, s 400.3(1) of the Code could not apply to the conduct of the appellant said to constitute an offence against that provision according to the Crown case at trial. The disposal of the Admerex shares, which was the relevant dealing, did not involve their intended "use" within the meaning of that term in the definition of "instrument of crime".' *Milne v R* [2014] HCA 4, (2014) 305 ALR 477 at [1]–[2], [14], [33], [40], per French CJ, Hayne, Bell, Gageler and Keane JJ

INSULT

Canada [Criminal Code, RSC 1985, c C-46, s 232.] '7. Specifically, there was no "insult" within the meaning of s 232 of the *Criminal Code*, RSC 1985, c C-46. As rightly concluded by the Court of Appeal, the appellant's view of his estranged wife's sexual involvement with another man after the couple had separated—found at trial to be the "insult"—cannot in law be sufficient to excuse "a loss of control in the form of a homicidal rage" and constitute "an excuse for the ordinary person of whatever personal circumstances or background" (Watson JA, at para 64). In addition, the uncontradicted evidence about the appellant's knowledge that his wife was involved with another man and his own conduct in entering her home and bedroom, unexpected and uninvited, belied any notion that this supposed "insult" would have struck "upon a mind unprepared for it" as required by law (Hunt JA, at para 18). Finally, there was no air of reality to the appellant "acting on the sudden at the time of the killing" (Watson JA, at para 77).

...
 '23. In my view, the requirements of s 232 are most usefully described as comprising two elements, one objective and the other subjective. As Cory J for the majority of the Court put it in *Thibert*:

First, there must be a wrongful act or insult of such a nature that it is sufficient to

deprive an ordinary person of the power of self-control as the objective element. Second, the subjective element requires that the accused act upon that insult on the sudden and before there was time for his passion to cool. [Emphasis in original deleted; para 4.]

...
'25. For the purpose of discussion, the objective element may be viewed as two-fold: (1) there must be a wrongful act or insult; and (2) the wrongful act or insult must be sufficient to deprive an ordinary person of the power of self-control.

'26. While the concepts "wrongful act" and "insult" are not defined, the following limitation is set out in s 232(3):

232...

(3) For the purposes of this section, the questions

(a) whether a particular wrongful act or insult amounted to provocation, and

(b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,

are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

...
'27. It is well established that the phrase "legal right" does not include all conduct not specifically prohibited by law. For example, the fact that a person may not be subject to legal liability for an insult directed at the accused does not mean that he or she has the "legal right" to make the insult within the meaning of s 232(3) and that provocation is not open to the accused. To require that an insult be specifically prohibited by law would effectively render the word "insult" under s 232(2) redundant, as any such "insult" would necessarily be a "wrongful act". The phrase "legal right" has been defined, rather, as meaning a right which is sanctioned by law, such as a sheriff proceeding to execute a legal warrant, or a person acting in justified self-defence (*Thibert* [R v *Thibert*, [1996] 1 SCR 37], at para 29, citing *R v Haight* (1976),

30 CCC (2d) 168 (Ont CA), at p 175, and *R v Galgay*, [1972] 2 OR 630 (CA), at p 649). Interpreted in this manner, the notion of legal right serves to carve out from the ambit of s 232 legally sanctioned conduct which otherwise could amount, in fact, to an "insult".

'28. There has been academic criticism of this approach. Professor Roach argues, for example, that the concept of legal right could be rethought in the context of domestic violence. He writes: "It could be argued that people have a legal right to leave relationships and even to make disparaging comments about ex-partners. The Court's continued refusal to recognize this broader interpretation of a legal right could deny women the equal protection and benefit of the law" ([Roach, Kent, *Criminal Law*, 4th edn, Toronto: Irwin Law, 2009] p 359).

'29. In my view, these concerns, while legitimate, are better addressed at the stage when the gravity of the "insult" is objectively measured as against the ordinary person standard. In other words, while one spouse undoubtedly has a legal right to leave his or her partner, in some circumstances the means by which that spouse communicates this decision may amount *in fact* to an "insult", within the ordinary meaning of the word. However, to be recognized *at law*, the insult must be of sufficient gravity to cause a loss of self-control, as objectively determined. The fact that the victim has the "legal right", in the broad sense of the term, to leave the relationship is an important consideration in the assessment of this objective standard.

...
'42. As stated at the outset, I agree with the Court of Appeal that there was no air of reality to the defence of provocation in this case. The conduct in question does not amount to an "insult"; nor does it meet the requirement of suddenness.

'43. As for the objective element of the defence, the appellant does not suggest that he was provoked by a "wrongful act". Rather, his contention is that, in the context of his relationship with Ms. Duong, his discovery of her sexual involvement with Mr An Tran amounted to an insult at law. The facts do not support this contention.

'44. First, it is difficult to see how the conduct of Ms Duong and Mr An Tran could constitute an insult on any ordinary meaning of the word. The general meaning of the noun "insult" as defined in the *Shorter Oxford English Dictionary on Historical Principles* (6th edn 2007), vol 1, at p 1400, is "[a]n act or the action of attacking; (an) attack, (an) assault."

Likewise, the action of insulting means to “[s]how arrogance or scorn; boast, exult, esp. insolently or contemptuously Treat with scornful abuse; subject to indignity; . . . offend the modesty or self-respect of.” Here, Ms Duong and Mr An Tran were alone in the privacy of her bedroom, neither wanting nor expecting the appellant to show up. In these circumstances, I agree with Hunt JA that “[n]othing done by the complainant or the victim comes close to meeting the definition of insult. Their behaviour was not only lawful, it was discreet and private and entirely passive vis-à-vis the [appellant]. They took pains to keep their relationship hidden Their behaviour came to his attention only because he gained access to the building by falsely saying he was there to pick up his mail” (para 17).” *R v Tran* 2010 SCC 50, [2011] 3 SCR 350 at paras 7, 23–29, 42–44, per Charron J

INSURABLE INTEREST

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 366 see now 60 Halsbury’s Laws of England (5th Edn) (2011) para 357.]

INSURANCE

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 2 see now 60 Halsbury’s Laws of England (5th Edn) (2011) para 2.]

Contingency insurance

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 780 see now 60 Halsbury’s Laws of England (5th Edn) (2011) para 746.]

Double insurance

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 495 see now 60 Halsbury’s Laws of England (5th Edn) (2011) para 229.]

Industrial insurance

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 528 see now 60 Halsbury’s Laws of England (5th Edn) (2011) para 479.]

[Note that the Income and Corporation Taxes Act 1988, s 832(1) has been repealed.]

INSURANCE COMPANY

[Note that the Income and Corporation Taxes Act 1988, s 431(2) has been repealed by the Finance Act 2012.]

For the purposes of the Finance Act 2012, Part 2, a person who carries on the activity of effecting or carrying out contracts of insurance is an ‘insurance company’ if: (1) the person has permission under the Financial Services and Markets Act 2000, Part IV (ss 40–55) to carry on that activity; (2) the person is of the kind mentioned in Sch 3 para 5(d) or (da) (EEA passport rights) and carries on that activity in the United Kingdom through a permanent establishment there; or (3) the person qualifies for authorisation under Sch 4 (Treaty rights) and carries on that activity in the United Kingdom through a permanent establishment there. (Finance Act 2012, s 65(1), (2); applied by s 141 to other provisions of the Corporation Tax Acts)

INSURED BY THE TERMS AND CONDITIONS OF THIS POLICY

[Professional indemnity insurance policy. Extension 3 stated: ‘3. Grant Thornton International [GTI] is included as an Assured Firm but solely in respect of claims made against [GTI] arising from claims made against a member firm of [GTI] insured by the terms and conditions of this policy.’] ‘[11] GTI’s case is that extension 3 includes GTI as an assured within the insuring clauses—more particularly the second clause found in the third paragraph of part I—and that the wording of extension 3 is to be seen as a shorthand reference to that second insuring clause. “[S]olely” emphasises that GTI’s cover is only in respect of that second clause. The words “arising from claims made against a member firm of [GTI]” reflect the limitation of cover under the second clause to legal liability incurred by reason of membership in GTI for any negligent act, etc, on the part of another member firm of GTI. The phrase “insured by the terms and conditions of this policy” limits the member firms of GTI whose negligent act, etc is relevant for this purpose to those insured by the policy, in a manner which, although not express in the reference to “another member firm of [GTI]” in the second clause, applies nonetheless under the second clause as a result of the definition of “Professional Services”. The phrase is descriptive, rather than introductory of a positive requirement that either the claim or the member firm should be validly covered.

...
[14] The rival arguments are finely balanced. This is a claims made policy, as its opening language in capitals emphasises; and the double use of the phrase in extension 3 may be said to point in favour of insurers' construction, particularly when followed by the final words "insured by the terms and conditions of this policy". The phrase "claims made against a member firm of [GTI]" may be said to suggest a claim made under the policy; and to have no parallel in the second insuring clause, which does not (strictly) require a claim to have been made against the other Grant Thornton member firm, for whose negligent act, etc, the assured firm claiming indemnity is said to be liable "by reason of its membership in [GTI]". The phrase "claims made arising from" can also be read as going wider than the words "by reason of its membership in [GTI] ... held liable" in the second insuring clause. The detail of the reference to being "insured by the terms and conditions of this policy" may be said to be surprising if the only intention was descriptive. Mr Colin Edelman QC in his thoughtful argument for insurers relied upon all these factors to differentiate the cover afforded by extension 3 and by the second main insuring clause. If the intention in extension 3 was in effect to add GTI as an additional assured firm under the second main insuring clause, this could, he points out, easily have been done by expanding the wording of that clause. All these are on their face points of some persuasive force.

[15] Mr Edelman's further argument that the cover intended by extension 3 is essentially parasitic does not appear to me so persuasive. The cover under extension 1, in respect of partners and employees, etc, can be described as parasitic, and it must be limited to claims of a kind in respect of which the relevant assured firm would be insured under one of the main insuring clauses. Such partners and employees would have, or be expected to have, cover for other claims under the local policies taken out by member firms such as GT Italy. The effect of extensions 2, 4, 5 and 6 and indeed 8 and 9 is, on the other hand, to define who counts as an assured firm and who can therefore take advantage of the cover afforded by the insuring clauses in respect of claims made directly against them. That it seems to me is also the natural meaning of the opening phrase of extension 3, whereby "[GTI] is included as an Assured Firm".

[16] While it is true that GTI could have been specifically added into the second insuring

clause, extension 3 does not seem to me a surprising place for a provision with similar effect, bearing in mind that GTI is, on any view, only intended to be covered for some and not all policy purposes. Further, on insurers' primary construction, extension 3 does not include GTI as an assured firm under the main insuring clauses, as the opening phrase of extension 3 would lead one to expect; rather it includes GTI at a higher level which requires GTI, before it has any cover, to show that some other GTI member firm has received a claim and is covered under those insuring clauses. (The only alternative proffered by Mr Edelman involved the proposition that the purpose of extension 3 might be to insure GTI as an assured firm under the first main insuring clause, against claims made in respect of international work done by other member firms, who might for this purpose be regarded as persons or entities for whose negligent act, etc, GTI "is legally responsible". Not only is this approach to extension 3 quite inconsistent with insurers' primary approach, it also applies the phrase "is legally responsible" to the relationship between GTI and member firms in an artificial manner which they would certainly not accept as correct, however much a third party might try to allege that it was so.)

[17] The most cogent consideration on this appeal is, in my opinion, the general nature of the cover that would result from insurers' construction. The Court of Appeal took the view that the second insuring clause was likely only to be relevant in relation to international work as defined in the policy. I am not persuaded by this. Question 18 in the proposal addresses the risk of liability arising from mere association in or with the GTI family. Allegations of vicarious or partnership liability of this nature, however tenuous they might appear to an English lawyer, are a foreseeable risk of such association. (Indeed, in the present New York litigation, GTI is said to be liable "as an entity ... in control of [GT Italy]", ie simply because of the association between them within the Grant Thornton family or organisation. There is also a claim against GTI for violating United States securities laws, but GTI does not suggest that that this can be covered by the second insuring clause, read with extension 3.)

[18] The scheme of the policy appears to be to cover by the first insuring clause claims against an assured firm by reason of its own negligence in respect of international work performed by it, and by the second insuring clause claims by virtue of association in the Grant Thornton family. For the purpose of the first insuring clause, international work is

defined quite narrowly, as work performed (a) after being referred by another member firm, or (b) for a client of another member firm, or (c) for a subsidiary or related company of an accounting firm after that firm becomes a member firm, or (d) at the request of another member firm, or, finally, (e) consisting in cross border floatation work for the client of another member firm. The second insuring clause provides indemnity only where an assured firm is held liable "by reasons of its membership in [GTI]", in other words where some form of partnership or vicarious liability is held to exist as between the two firms, so that one can be held liable for the other without itself being negligent or indeed having had any involvement at all in the work alleged to have been negligently performed by the latter.

'[19] All that question 18 of the proposal form asks regarding the risk of claims "by virtue of... association with [GTI] or any other member firm" is whether the local policy excludes cover for such claims. On that very limited basis, the second insuring clause then gives, on its face, full cover for all and any such claims, whatever their nature or origin. I do not think that the risk can be said to be confined to international work, still less to international work in the limited policy sense.

'[20] If individual member firms are as between themselves given full cover in respect of liability for such claims incurred by reason of their membership in GTI, it would seem very odd that GTI itself should not enjoy similarly full cover in respect of claims holding it responsible on a vicarious or partnership for or with one of the insured member firms in its international family. The submission that this would not fit, because GTI is not, as the umbrella entity, itself a member of GTI, and that it cannot therefore incur liability "by reason of its membership in [GTI]", is formalistic in the extreme; and anyway ignores the different potential shades of meaning attaching to "[GTI]".

'[21] If insurers are right, then GTI, in respect of the acknowledged risk of claims (however tenuous) made against it, only achieved cover under this policy in two particular situations: one where a member firm received a claim relating to international work as defined, the other where a member firm was itself the recipient of a claim that it was liable for another member firm on some vicarious or partnership basis by reason of its membership in GTI. GTI would then have cover if, "arising from" the claim made against a member firm, GTI itself also received a claim. This limited

patchwork cover would mean, on insurers' case, that GTI needed another policy insuring it for vicarious or partnership type claims arising in other circumstances, such as (it appears) the present. In the vacuum surrounding the present policy, all that can be said is that there is no indication of any relevant gap-filling insurance, and that insurers' construction appears on any view to postulate an unlikely allocation and splitting of insurance risks.

'[22] In these circumstances, I have come to a different conclusion to the Court of Appeal. I consider that GTI's construction of extension 3 is to be preferred. It gives to GTI as an assured firm the protection of the second insuring clause, without any need to show that the claim against GT Italy is itself one which is insured under either of the two insuring clauses. This means that the phrase "insured by the terms and conditions of this policy" do[es] not relate to the earlier words "claims made", but rather to the words "a member firm of [GTI]".' *Brit Syndicates Ltd v Italaudit SpA* [2008] UKHL 18, [2008] 2 All ER 1140 at [11], [14]–[22], per Lord Mance

INTEGRITY OF THE TAX SYSTEM

New Zealand '[16] Section 6 of the TAA [Tax Administration Act 1994] provides:

6 Responsibility on Ministers and officials to protect integrity of tax system

- (1) Every Minister and every officer of any government agency having responsibilities under this Act or any other Act in relation to the collection of taxes and other functions under the Inland Revenue Acts are at all times to *use their best endeavours to protect the integrity of the tax system*.
- (2) Without limiting its meaning, **the integrity of the tax system** includes—
 - (a) taxpayer perceptions of that integrity; and
 - (b) *the rights of taxpayers to have their liability determined fairly, impartially, and according to law*; and
 - (c) the rights of taxpayers to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other taxpayers; and
 - (d) the responsibilities of taxpayers to comply with the law; and

- (e) the responsibilities of those administering the law to maintain the confidentiality of the affairs of taxpayers; and
- (f) *the responsibilities of those administering the law to do so fairly, impartially, and according to law.* [Emphasis added.]

... [26] In our judgment Toogood J's conclusion [in *Russell v Taxation Review Authority* (2003) 21 NZTC 18,255, CA] exposes the conceptual obstacle faced by Michael Hill. Its claim presupposes that the Commissioner's s 6(1) obligation to protect the integrity of the tax system imports a duty to act consistently as between taxpayers. Ms Fitzgerald's submission before us that the Commissioner's duty is to act fairly, impartially and consistently was to the same effect. But that is not what the TAA says.

[27] Without limiting the meaning of "the integrity of the tax system", s 6(2) specifies two discrete rights vested in the taxpayer and three discrete responsibilities imposed on the taxpayer and the Commissioner. A taxpayer's only right on an assessment is to have its liability "determined fairly, impartially and according to law" (s 6(2)(b)); the Commissioner's correlative duty must be limited to the same three elements when determining liability to tax. The first two duties of fairness and impartiality affirm administrative law principles of natural justice; the third duty refers to legal or substantive correctness.

[28] Michael Hill's correctness challenge alleges that the Commissioner has failed to assess its liability on the transaction according to law. Ms Fitzgerald confirmed that the company does not otherwise challenge the Commissioner's determination for breach of either of her other two statutory duties of fairness or impartiality towards Michael Hill. Ms Fitzgerald also accepted that the English authorities do not identify inconsistency as a ground of challenge in itself but as symptomatic of another recognised ground.

[29] To the extent that the English authorities have spoken of inconsistency, it has fallen within the conceptual characterisation of unfair treatment, which Michael Hill does not assert, and then only when applied to the Commissioner's treatment of a particular taxpayer. On a principled analysis the existence of an inconsistency may be relevant in alerting the Commissioner to a possible error in the correctness of her assessment of a particular taxpayer's liability. It is otherwise telling that

s 6(2) omits any reference to a fourth standalone duty of consistency and we cannot see any warrant for reading that requirement separately into the meaning of the "integrity of the tax system". To the contrary, we are satisfied that the Commissioner is using her best endeavours to protect the integrity of the tax system when she determines liability on a transaction according to law.' *Commissioner of Inland Revenue v Michael Hill Finance (NZ) Ltd* [2016] NZCA 276, [2016] 3 NZLR 303 at [16], [26]–[29], per Harrison J

INTELLECTUAL PROPERTY

[Senior Courts Act 1981, s 72(5): 'intellectual property' means 'any patent, trade mark, copyright, design right, registered design, technical or commercial information or other intellectual property'.] [20] Here there is no particular potency about the expression "intellectual property" because there is a general consensus as to its core content (patents for inventions, literary, dramatic, musical and artistic copyright, copyright in recordings, films and broadcasts, registered and unregistered design rights and trademarks, all now governed by national statutes and international treaties), but no general consensus as to its limits. The sweeping-up words at the end of the definition ("or other intellectual property") no doubt include new and specialised statutory rights akin to those in the core content, such as plant breeders' rights under the Plant Varieties Act 1997 and database rights under the Copyright and Rights in Databases Regulations 1997, SI 1997/3032. But for present purposes the essential point is that the definition in s 72(5) contains the words "technical or commercial information". Parliament has made plain that information within that description is, for the purposes of s 72, to be regarded as intellectual property, whether or not it would otherwise be so regarded. Such limited potency as there is in the expression "intellectual property" (and more generally, the legislative purpose of s 72 in enhancing protection against unlawful trade competition) may be of assistance in determining the meaning of "technical or commercial information". It must be something in which a civil claimant has rights capable of being infringed, since infringement of rights pertaining to intellectual property is what s 72(2)(a) is concerned with. The fact that technical and commercial information ought not, strictly speaking, to be described as property (the majority view of the House of

Lords in *Boardman v Phipps* [1966] 3 All ER 721 at 734–735, 743, 759; cf 745 and 751, [1967] 2 AC 46 at 89–90, 103 and 127–128; cf 107 and 115) cannot prevail over the clear statutory language. Whether or not confidential information can only loosely, or metaphorically, be described as property is simply irrelevant. *Phillips v News Group Newspapers Ltd* [2012] UKSC 28, [2012] 4 All ER 207 at [20], per Lord Walker SCJ

INTER-BANK PAYMENT SYSTEM

- (1) In this Part [Part 5 (ss 181–206)] ‘inter-bank payment system’ means arrangements designed to facilitate or control the transfer of money between financial institutions who participate in the arrangements.
- (2) The fact that persons other than financial institutions can participate does not prevent arrangements from being an inter-bank payment system.
- (3) In subsection (1) ‘financial institutions’ means—
 - (a) banks, and
 - (b) building societies.
- (4) In subsection (1) ‘money’ includes credit.
- (5) A system is an inter-bank payment system for the purposes of this Part whether or not it operates wholly or partly in relation to persons or places outside the United Kingdom.

Banking Act 2009, s 182

INTERCEPT A PRIVATE COMMUNICATION

Canada [Criminal Code, RSC 1985, c C-46, ss 183, 487.01.] ‘2 The service provider in this case is TELUS Communications Company. It urges this Court to find that the prospective, daily acquisition of text messages from their computer database constitutes an interception of private communications and therefore requires authorization under Part VI of the *Code*, a comprehensive scheme for “wiretap authorizations” for the interception of private communications. The Crown, on the other hand, contends that the retrieval of messages from a computer maintained by a service provider does not fall within the scope of Part VI because the production of messages in computer storage does not amount to an “interception”, and that the police are therefore permitted to use the general warrant power in s. 487.01 of the *Code* to get copies of the text messages.

‘3 Part VI of the *Code* provides a scheme to protect private communications. Telus employs a unique process for transmitting text messages that results in the messages being stored on their computer database for a brief period of time. The question in this appeal is whether the technical differences inherent in Telus’ transmission of text messages should deprive Telus subscribers of the protection of the *Code* that every other Canadian is entitled to.

‘4 The focus of this appeal therefore turns on the interpretation of “intercept” within Part VI. “Intercept” is used throughout Part VI with reference to the intercept of *private communications*. This means that in interpreting “intercept a private communication”, we must consider the broad scope of Part VI and its application across a number of technological platforms, as well as its objective of protecting individual privacy interests in communications by imposing particularly rigorous safeguards. The interpretation should not be dictated by the technology used to transmit such communications, like the computer used in this case, but by what was intended to be protected under Part VI.

‘33 The issue then is how to define “intercept” in Part VI. The interpretation should be informed not only by the purposes of Part VI, but also by the rights enshrined in s. 8 of the *Charter*, which in turn must remain aligned with technological developments. In *R. v Wong*, [1990] 3 S.C.R. 36, this Court found that “the broad and general right to be secure from unreasonable search and seizure guaranteed by s. 8 [of the *Charter*] is meant to keep pace with technological development, and, accordingly, to ensure that we are ever protected against unauthorized intrusions upon our privacy by the agents of the state, whatever technical form the means of invasion may take” (p. 44). A technical approach to “intercept” would essentially render Part VI irrelevant to the protection of the right to privacy in new, electronic and text-based communications technologies, which generate and store copies of private communications as part of the transmission process.

‘34 It is true that unlike traditional voice communication, a text message may or may not be delivered to its intended recipient at the time it is created. Receipt of the text message depends on whether the phone is turned on, whether it is in range of a cell tower, and whether the user has accessed the message. If Telus is unable to deliver the message, it remains in the transmission infrastructure for five days, at which point Telus stops trying to complete delivery. Furthermore, unlike voice

communications, text communications, by their nature, generate a record of the communication which may easily be copied and stored. A narrow or technical definition of “intercept” that requires the act of interception to occur simultaneously with the making of the communication itself is therefore unhelpful in addressing new, text-based electronic communications.

³⁵ A narrow definition is also inconsistent with the broad language and purpose of Part VI. The statutory definition of “intercept” in s. 183 includes three distinct parts—“listen to”, “record” or “acquire”. In French, the definition includes “*de prendre ... connaissance*”. Rather than limit the definition of “intercept” to its narrow, technical definition, the statutory definition broadens the concept of interception. There is no requirement in the *Code* definition of “intercept” that the interception of a private communication be simultaneous or contemporaneous with the making of the communication itself. If Parliament intended to include such a requirement, it would have included it in the definition of “intercept”. Instead, it chose to adopt a wider definition, consistent with Part VI’s purpose to offer broad protection for private communications from unauthorized interference by the state.

³⁶ The interpretation of “intercept a private communication” must, therefore, focus on the acquisition of informational content and the individual’s expectation of privacy at the time the communication was made. In my view, to the extent that there may be any temporal element inherent in the technical meaning of intercept, it should not trump Parliament’s intention in Part VI to protect an individual’s right to privacy in his or her communications.

³⁷ The use of the word “intercept” implies that the private communication is acquired in the course of the communication process. In my view, the process encompasses all activities of the service provider which are required for, or incidental to, the provision of the communications service. Acquiring the substance of a private communication from a computer maintained by a telecommunications service provider would, as a result, be included in that process.

³⁸ Focusing on the fact that the *Code* draws a distinction between the interception of private communications and the disclosure of those communications, fails to provide the intended protection under Part VI. On the contrary, it allows technological differences in Telus’ transmission process to defeat Parliament’s intended protection of private communications from state interference.

³⁹ The reality of modern communication

technologies is that electronic private communications, such as text messages, are often simultaneously in transit *and* in some form of computer storage by the service provider. As a result, the same private communication exists in more than one place and may therefore be acquired by the state from the transmission stream and from computer storage. In other words, the same private communication may be “intercepted” by police more than once from different sources.

...

⁴² Part VI recognizes the dangers inherent in permitting access to the future private communications of a potentially unlimited number of people over a lengthy period of time. Those are the very risks inherent in the investigative technique in this case. An authorization that permits police to obtain the *prospective* production of *future* text messages over a two-week period directly from the communications process used by the service provider is precisely what Part VI was intended to protect. In my view, the investigative technique in this case therefore qualifies as “intercepting private communications” under Part VI.

⁴³ An interpretation of “intercept a private communication” that includes the investigative technique used by police in this case finds support in the statutory definition of “intercept” in s. 183. The definition includes the simple acquisition of a communication. It does not require the acquisition of the communication itself; rather, the acquisition of the “substance, meaning or purport” of the communication is sufficient. Moreover, this interpretation is harmonious with the scheme and objectives of Part VI, which is drafted broadly in order to regulate and control a wide variety of technological invasions of privacy. Finally, it strikes the appropriate balance between the serious invasion of privacy that results from the surreptitious acquisition of private communications and the evolving needs of effective law enforcement.’ *R v TELUS Communications Co* 2013 SCC 16, [2013] SCJ No 16 at paras 2–4, 33–39, 42–43, per Abella J

INTEREST

Interest reversionary

[Perpetuities and Accumulations Act 1964, s 9(1).] [27] It is common ground between the parties that the option is void for perpetuity unless s 9(1) of the 1964 Act is applicable. For

that subsection to apply, the option must relate to “an interest reversionary (whether directly or indirectly)” on the term of a relevant lease. Mrs Marilyn Kennedy-McGregor, who appeared for the claimant, argued that it does. The defendants, however, dispute this. Mr David Holland QC, who appeared for the defendants, contended that, to come within s 9(1), an interest has to be either the freehold of the premises comprised in the lease or an existing leasehold interest superior to the lease.

‘[28] Where the parties differ is essentially as to whether an interest carved out of a superior leasehold or freehold interest can constitute an “an interest reversionary (whether directly or indirectly)” on the term of a lease for the purpose of s 9(1). Mrs Kennedy-McGregor maintained that it can. Mr Holland, on the other hand, suggested that both Parliament and, previously, the Law Reform Committee had been concerned with the acquisition of existing interests.

‘[29] On balance, I prefer the view for which Mrs Kennedy-McGregor contended. I can summarise my reasons as follows: (i) Section 9(1) does not in terms limit the reversionary interests to which an option can relate to existing interests; (ii) While the Law Reform Committee doubtless had in mind options to acquire either existing intermediate leases or freeholds, its reasoning suggests that options such as the option should also be exempt from the rule against perpetuities. The committee considered that “leasehold options” should be immune from the rule on the basis that they “encourage the only person who is normally in a position to develop leasehold land (namely, the lessee) to preserve and develop it to its full capacity” (para 36). If a freeholder grants a sub-lessee an option to call for a new lease at the expiry of his sub-lease, that will encourage the sub-lessee to develop the land; (iii) I can think of no good reason for options such as the option to be subject to the rule against perpetuities when the rule does not apply to either (a) options for renewal contained in leases or (b) options for lessees to acquire existing superior or freehold interests. Moreover, Mr Holland did not identify any circumstances in which Mrs Kennedy-McGregor’s construction of s 9(1) could be expected to produce unsatisfactory outcomes; (iv) It is apparent from the terms of s 9(1) that a relevant reversionary interest need not be immediately expectant on the lease held by the grantee of the option. Were the position otherwise, then s 9(1) would not apply to the grant to a sub-lessee of an option to purchase

the freehold. Both sides accepted, however, that s 9(1) is applicable in such a case. That conclusion is borne out by s 9(1)’s use of the words “directly or indirectly”. It is also consistent with the Law Reform Committee’s report; (v) Mrs Kennedy-McGregor sought support for her submissions in the fact that s 9(1) speaks of “an” interest rather than “the” interest. I am not persuaded by this point: I agree with Mr Holland that the “an” would also be consistent with Parliament having in mind the possibility that there might be more than one superior interest already in existence (say, a head lease and the freehold). While, however, the “an” may not actively help Mrs Kennedy-McGregor, neither is it of any assistance to Mr Holland. Both parties’ submissions can accommodate it; (vi) Mr Holland suggested that s 9(1) does not apply to options to renew contained in leases. Were that correct, it would tend to indicate that s 9(1) does not extend to interests carved out of superior interests; after all, a renewed lease could be said to be carved out of the immediate lessor’s interest in the same way as the extension lease the claimant seeks would be carved out of the freehold of 53 Ennismore Gardens. However, s 9(1) nowhere states that it is not, and I do not think it matters whether it does. An option to renew contained in a lease will still be unaffected by the rule against perpetuities (a) because (as Mrs Kennedy-McGregor submitted) it will inevitably satisfy the requirements of s 9(1) and/or (b) because s 9(1) adds an extra basis on which a disposition can be exempted (so that an option granted to a lessee will be outside the rule against perpetuities if it either falls within s 9(1) or is an option for renewal contained in the lease).

‘[30] It follows that I consider that the option fell within s 9(1) of the 1964 Act and so was exempt from the rule against perpetuities. In my view, therefore, the option is not void for perpetuity.’ *Souglides v Tweedie* [2012] EWHC 561 (Ch), [2012] 3 All ER 189 at [27]–[30], per Newey J

INTEREST (RETURN ON CAPITAL)

[For 32 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 127 see now 49 Halsbury’s Laws of England (5th Edn) (2015) para 90.]

INTERLOCUTORY

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

INTERNATIONAL EXHIBITION

Australia [30] The final issue is whether the fair was “international”. The ordinary and natural meaning of “international” is “of or relating to different nations or their citizens.” Mr McGowan submitted, based on this definition, that an exhibition could be characterised as international either by virtue of the nationality of the goods and exhibitors or by virtue of the nationality of the visitors to the exhibition. Mr Samargis, on the other hand, put the argument that the international character of an exhibition can be determined only by reference to the goods and exhibitors.

[31] Mr Samargis has the better argument. First, his approach is supported by what little authority there is: see *Bodenhausen* at 151. Second, his argument has the great virtue of certainty and clarity — any prospective design registrant or exhibitor would be able to ascertain with a glance at an exhibition guide or list of exhibitors the nationality of the goods and exhibitors. By contrast, lists of visitors and their nationalities are not so easily or publicly found, if at all. And one must not lose sight of the fact that the exhibitions which were the backdrop to the Paris Convention were international because of their exhibitors.

[32] In my view an exhibition is international if there are foreign exhibitors exhibiting foreign goods (with foreign being defined as a nationality other than that in which the exhibition is hosted).

[33] Mr Samargis also submitted that for an exhibition to be truly international it requires exhibitors from at least three nations (that is, the host country and two others). This is a departure from the ordinary dictionary definition of international. But it is an approach that sits comfortably with Professor Bodenhausen’s views that for an exhibition to be international “it must include the exhibition of goods coming from foreign countries”: *Bodenhausen* at 151.

[34] ... Whatever be the characteristics of an “international exhibition” they are not met by an exhibition which is essentially an Australian exhibition. In my view, for an exhibition to be international in character there must at least be a significant foreign presence.

[35] I should explain what I mean by “significant foreign presence.” First, the quantitative presence of foreign exhibitors, both in relative and absolute terms (here 7 exhibitors out of 257), is a factor. The greater the foreign presence, the more likely it is that an exhibition will be an “international exhibition.” Second, the quality of the foreign exhibitors is a factor;

and by “quality” I mean both the geographic location and the importance of the foreign state(s) in the relevant industry. For example, if an exhibition is held in Canada and the only foreign exhibitors or goods are from the United States (or if, as in this case, the exhibition is held in Australia and the only foreign exhibitors are from New Zealand), the exhibition is more likely to be a “regional exhibition” rather than an “international exhibition.” On the other hand, if a fashion exhibition is held in Australia and the only foreign exhibitors are from Italy or France (or, for example, if a computer software exhibition is held in the US and the only foreign exhibitors are from India or China), the exhibition is likely to be an “international exhibition” due to the importance of those countries in the fashion design field (or computer industry) and the geographic separation between the states involved. This, of course, cannot be, and is not intended to be, an exhaustive list of the factors, or the way they might be applied in combination, to determine whether an exhibition had a “significant foreign presence” so as to make it an international exhibition.’ *Chiropedic Bedding Pty Ltd v Radburg Pty Ltd* [2007] FCA 1869, (2007) 243 ALR 334, (2007) 74 IPR 398, BC200710390 at [30]–[35], per Finkelstein J

INTERNET

New Zealand [Criminal Justice Act 1985, s 138(5); order that judgment was not to be published on the internet.] [52] Mr Siemer contends publication on his websites is not publication on the internet. The term “internet”, when used correctly, refers to the mechanism by which the world wide web is accessed. It is not actually possible to publish on the internet as such. Rather, one publishes on the web. It is submitted that the terms of suppression orders should be construed strictly.

[53] In our view there is no doubt that the term internet has come to be used, arguably inaccurately, to describe both the means by which the web is accessed, and as a synonym for the world wide web. As an example, the *New Oxford Companion to Law*, when discussing regulation of the “internet”, describes three levels of regulation: regulation of the communications infrastructure, regulation of internet intermediaries such as internal service providers, and thirdly, regulation of the content of the internet. The latter concept of “content of the internet”, an idea which we consider is in ordinary usage, plainly refers to the collected

information available on the world wide web. It is an example of the two terms being used interchangeably. We are satisfied the order should be read as prohibiting anyone from adding the judgment to the collection of information commonly called the internet, or more accurately described as the world wide web. We also consider that this is how it would be understood.’ *Solicitor-General v Siemer* [2011] 3 NZLR 101 at [52]–[53], per MacKenzie and Simon France JJ

INTERPLEADER

[Note that interpleader has been replaced by the procedure for stakeholder applications. For 37 Halsbury’s Laws of England (4th Edn) (Reissue) para 1417 see now 12A Halsbury’s Laws of England (5th Edn) (2015) para 1404.]

INTERROGATORIES

[Note that interrogatories have been replaced by orders to provide further information. For 37 Halsbury’s Laws of England (4th Edn) (Reissue) para 678 see now 11 Halsbury’s Laws of England (5th Edn) (2015) para 361.]

INTERVIEW

Australia [Criminal Code (WA) s 579(1).] ‘[47] Beyond the clarification that “interview” means an “interview with a suspect by ... a member of the Police Force”, the Criminal Code does not otherwise define the word “interview”. The court was taken to a number of dictionary definitions, none of which provided a clear resolution to the present case. The appellant contended that “interview” connoted a “formal, unhurried interrogation procedure directed to the investigation of crime”, as opposed to a chat, informal banter, or talk carried out in an atmosphere of informality. In part, this proffered definition was derived from dicta in the judgment of Wright J in *R v McKenzie* [[1999] TASSC 36 at [14]]. In that case certain admissions were ruled inadmissible because they were not recorded by videotape, not for the absence of an “interview”.

‘[48] The appellant submitted that a mere conversation would not suffice to constitute an “interview”. To this end, the appellant pointed to the absence of any definition such as that found in s 74C of the Summary Offences Act 1953 (SA), in which “interview” is defined to include:

- (a) a conversation; or
- (b) part of a conversation; or
- (c) a series of conversations ...

This comparison of the South Australian and Western Australian provisions is of doubtful utility. The South Australian provisions were inserted in 1995 by s 5 of the Statutes Amendment (Recording of Interviews) Act 1995 (SA), well after the enactment in 1992 of the relevant Western Australian provisions. The most that could be said is that the South Australian provision might tend to highlight an ambiguity in the Western Australian one, but it does nothing to resolve that ambiguity one way or the other. The inclusion of conversations in the South Australian definition says nothing about whether they are to be excluded from the Western Australian provision, which is silent on the matter.

‘[49] The appellant also contended that the “formality” of an interview required a “meeting of minds” about the nature, context and purpose of the discussion. However, that phrase is more likely to mislead than assist. The absence of a “meeting of minds” might indicate that the appellant’s admissions were involuntary, or that they were elicited by unfair deception. Such cases can and should be dealt with under the common law exclusionary rules. They are not matters which touch upon the definition of “interview”.

‘[50] Even if it be accepted that the term “interview” connotes a degree of formality, it is not apparent where that line is to be drawn. The conversation between the appellant and the police officers in the present case was no mere informal chit-chat: the police officers fell in with the appellant’s style of speech, but they structured the relevant part of the conversation as a patient and deliberate sequence of questions and answers designed to elicit admissions. However, there is much force in the observation of Ormiston J in *R v Raso* [(1993) 115 FLR 319 at 348] that:

... it would be difficult to identify that form of questioning which constitutes an “interview” and that which constitutes some less formal kind of questioning in circumstances where the questions are being administered by the police ...

Raso concerned the meaning of s 23V(1) of the Crimes Act 1914 (Cth), which at that time included the phrase “interviewed as a suspect”. That legislation concerned the tape recording of such interviews, and Ormiston J considered it [(1993) 115 FLR 319 at 348]:

... artificial, and possibly conducive to the abuses which the legislation is trying to avert, to draw distinctions between questioning which takes place on a relatively casual basis and questioning which results from some formal or organised interview.

[51] The same is true of the present case. Contrary to the appellant's submissions, neither logic nor the text of Ch LXA justifies the conclusion that "formality" requires that the suspect appreciate that the conversation was being recorded and that its contents could be used as evidence against him. Rather, in an appropriate case these matters may attract the common law exclusionary rules relating to involuntariness, unfairness or public policy.

[52] In the absence of textual indicia, the appellant turned to argument based on what was said to be the purpose of Ch LXA. This was said to be "to facilitate formality and propriety throughout the interview ... process" and hence to "serve" the "protection and preservation of the integrity of the interview process generally". The appellant submitted that the "evident policy of the statutory regime" was that evidence of the appellant's admissions be inadmissible, as part of the "broader imperative" of the statute, namely to ensure the "formality" of the interview process and hence its "integrity". The appellant did not otherwise indicate, however, what this formality would require, nor did he indicate how it was to be manifested beyond the suggested requirements that a suspect be cautioned and consent before any interview is videotaped.

[53] It is difficult to see how any such policy of "formality" is evident either in the statute itself or in the extrinsic legislative materials. The term "interview" is largely undefined and on its face Ch LXA is unconcerned with the conduct of interviews beyond the requirement that they be videotaped if admissions made during them are to be admissible. Contrary to the appellant's contentions, nothing in the text or structure of the Chapter evinces any broader purpose of regulating the conduct of interviews. The textual indicia of Ch LXA all relate to the regulation of *videotapes* — their use, distribution and so forth — but not the regulation of interviews.

[54] Moreover, a consideration of the relevant extrinsic materials confirms this textual conclusion. In his second reading speech, the Attorney-General stated that the Bill that inserted Ch LXA:

... makes provision with respect to the increasing use of video recordings of police interviews for indictable offences ... [and] will ensure that in serious cases an accused's confession will be inadmissible unless it has been videotaped. Exceptions to this rule will be permitted, subject to the court's discretion, to receive evidence of admissions which have not been videotaped, if this is in the interests of justice.

[55] Further, the appellant did not point to any passage in any of the reports which led to the enactment of legislation similar to s 570D supportive of his submission that their goal was to ensure the "formality" and "integrity" of the interview process.

[56] Even if the appellant were correct about the policy underlying Ch LXA of the Criminal Code, his construction of the term "interview" is inconsistent with his submission as to that underlying statutory purpose. If indeed Ch LXA is aimed at preserving the integrity of police procedure more generally, it seems odd that the requirement of videotaping should apply only to a vaguely defined subset of interactions between police and suspects, namely "formal" interviews. To the contrary, the text of the statute and its legislative history point towards its purpose as being the encouragement of video recording, and the expansion — and not restriction — of the circumstances in which video recording was appropriate.

[57] One textual indicium in Ch LXA of this policy is the very choice of the word "interview", rather than merely "admission", in the definition of "videotape". The statutory definition would not be satisfied, for example, by a videotape that recorded only a string of admissions without the surrounding context of the interview during which they were made. In the present case, however, the jury was presented by the playing of Ex 17 with the near entirety of the appellant's interactions with police.

[60] The consequence of acceptance of the appellant's submissions on the meaning of "interview" would not be that *no* evidence of an admission is admissible unless it be on "videotape". Rather, the consequence would be that the admission might be proved by evidence inferior to and less accurate than a videotape, as long as the prosecution can satisfy the court of the existence of a "reasonable excuse". This result would be to turn the "best evidence rule" on its head.

‘[61] The vice to which the appellant’s construction leads is that police officers could attempt to evade the statute by informal off-camera discussions with suspects during which unrecorded admissions were made, in the belief that the requirement of videotaping did not apply to “informal” discussions and that the circumstances would provide a “reasonable excuse” within the meaning of para (b) of s 570D(2).

‘[62] The appellant’s challenge based on the definition of “interview” fails. The Court of Appeal was correct in determining that the meaning of “interview” encompassed any conversation between a member of the police force and a suspect, and included an informal conversation initiated by the suspect.’ *Carr v Western Australia* [2007] HCA 47, (2007) 239 ALR 415, BC200708991 at [47]–[56], [59]–[62], per Gummow, Heydon and Crennan JJ

INTIMIDATE

[Criminal Justice and Public Order Act 1994, s 51.] ‘[13] The ingredients of the offence of witness intimidation are set out in s 51(1). The first is that the defendant “does an act which intimidates ... another person”. Although, as s 51(4) makes clear, the other person does not have to be put in fear of physical violence, it is difficult to see, on the ordinary and natural language of the section, why the Crown is not required to prove that the other person be actually intimidated.

‘[14] In *R v Patrascu* [[2004] EWCA Crim 2417, [2004] 4 All ER 1066] the issue before the court was whether it was necessary to establish intimidation to put the victim in fear, as opposed to some lesser effect on the victim. The court decided it was not necessary that the victim be put in fear; it was sufficient that he was deterred from some relevant action by an element of threat of violence. That was all that was necessary for the decision, as there was evidence that the conduct of the defendant in threatening the victim had had that relevant material effect on him.

‘[15] When the court went on to say that the section did not require the victim actually to be deterred or put in fear, the court went beyond what was necessary to the decision in that case.

‘[16] In a comment in the Criminal Law Review [2005] Crim LR 593 Professor David Ormerod noted that the part of the decision in *R v Patrascu* where the court stated that a defendant could intimidate the victim without the victim actually being intimidated was “not a

natural interpretation of the section”. He added it was not a necessary construction of the section, as the defendant could be charged with an attempt to intimidate.

‘[17] We agree. On its ordinary and natural meaning s 51(1) requires that the Crown prove that the other person whom the defendant intends to intimidate is in fact intimidated. That is because the statute makes clear that the act of intimidation is part of the actus reus of the offence; it must therefore be proved. The observation in *R v Patrascu* that the offence could be committed without the victim being intimidated is not correct, as the language of the 1994 Act makes clear that one ingredient of the offence is that the victim is in fact intimidated.

‘[18] If that other person is not in fact intimidated, but the other ingredients are proved, then the defendant may well be guilty of an attempt. That is the position in the present appeal. ...’ *R v ZN* [2013] EWCA Crim 989, [2013] 4 All ER 331 at [13]–[18], per Sir John Thomas P

INTOXICATED

New Zealand [Sale of Liquor Act 1989, s 166(1): offence of selling alcohol to a driver who was already intoxicated.] ‘[16] A key issue is the meaning of the word intoxicated in s 166(1). A number of cases establish that intoxicated means something more than under the influence of alcohol. In *Brown v Bowden (Police)* [(1900) 19 NZLR 98, (1900) 2 GLR 374 (SC) at 102], Stout CJ said that a state of intoxication meant:

... that state in which, through intoxicating liquors, a person has lost the normal control of his bodily and mental faculties.

‘[17] In *Abraham v Norwich Union Fire Insurance Society Ltd* [[1970] NZLR 968 (SC) at 978], Beattie J said:

I consider it [intoxication] has a different meaning from “under the influence”; the word “intoxication” carries with it to my mind a reasonably advanced degree of drunkenness. The word has a stigma of more finality about it, and a greater definiteness and certainty than the other expression. It is therefore, in my view, a more difficult test for an insurer to fulfil.

‘[18] The comments of Beattie J were cited with approval by the Court of Appeal in *Parsons v Farmers Mutual Insurance Association* [[1972] NZLR 966 (CA) at 972]. Richmond P said:

To what extent then need a person be affected by liquor before he would, in the ordinary use of language, be described as “intoxicated”? Dealing with the ordinary case of a person who is active and awake, I believe that such a person would not be described as intoxicated unless he had at least reached the stage where, either in his movements or speech or behaviour, he demonstrated an obvious disturbance of his mental or bodily faculties. A person may be materially affected by alcohol for certain purposes, such as driving a car, and yet may not have reached the stage where the ordinary person would describe him as intoxicated.

[19] The approach taken in the above cases has been adopted by the Alcohol Regulatory and Licensing Authority and its predecessor, the Liquor Licensing Authority. In *Hepburn v Clary 2002 Ltd* [LLA PH825/2004, 30 November 2004], the Authority referred to the above cases and accepted that a person may be driving impaired without being intoxicated. In other words, it accepted that a person under the influence of alcohol was in a lesser state of drunkenness than a person who was intoxicated. The Authority went on to say, however, that a person who exceeded a breath/alcohol limit of 1,000 micrograms of alcohol per litre of breath was probably intoxicated. It said [at [56]]:

For the purposes of this case, we would be prepared to accept that a patron who exceeded a breath/alcohol limit of 1,000 micrograms per litre of breath, or a blood/alcohol limit of 200 milligrams of alcohol per 100 millilitres of blood, was probably intoxicated. Furthermore, that such a person probably displayed signs of being in that state.

[20] It should be noted that in the present case Mr McBride had a breath/alcohol reading of 1,441 micrograms of alcohol per litre of breath, which is three and a half times the legal limit for driving and well over the limit of 1,000 micrograms of alcohol per litre of breath, which the Authority was prepared to accept that a person was probably intoxicated and that such person probably displayed signs of intoxication.

[21] Although not defined by statute, the meaning of intoxicated is therefore reasonably well established by case law. The Health Promotion Agency, in conjunction with Hospitality New Zealand and the New Zealand Police has also produced an “Intoxication Assessment Tool”, which defines intoxication and sets out

some key indicators of intoxication. It defines intoxication as:

Intoxicated means observably affected by alcohol, other drugs, or other substances (or a combination of two or all of those things) to such a degree that two or more of the following are evident, (a) appearance is affected; (b) behaviour is impaired; (c) coordination is impaired; (d) speech is impaired.

[22] The Intoxication Assessment Tool lists the key indicators of intoxication as including, but not limited to:

- (a) Speech — slurring, difficulty forming words, loud, repetitive, loses train of thought, nonsensical, unintelligible.
- (b) Coordination — spills drinks, stumbles, trips, weaves, walks into objects, unable to stand unaided or sit straight.
- (c) Appearance — bloodshot eyes, eyes glazed, inability to focus, tired, asleep, dishevelled.
- (d) Behaviour — seriously inappropriate actions or language, aggressive, rude, belligerent, obnoxious behaviour affecting customers.

[33] Here I agree with counsel for the respondents that there are sound jurisprudential and policy reasons for concluding that s 166(1) creates a public welfare offence of strict liability, given that it is in a statute whose object is “to establish a reasonable system of control of the sale and supply of liquor to the public, with the aim of contributing to the reduction of liquor abuse”.

[34] Because s 166(1) creates a public welfare offence of strict liability, the subjective assessment of whether Mr McBride was intoxicated made by the checkout operator, Ms K, is not of any more significance than any other evidence in the case. It is certainly not determinative. That is because Ms K does not need to know or have appreciated that Mr McBride was intoxicated for an offence to have been committed under s 166(1). Ms K’s assessment goes into the pool of evidence from which the Authority makes an objective factual assessment or determination whether Mr McBride was already intoxicated in terms of s 166(1) when Ms K sold him the beer, and whether there is a defence of total absence of fault available. In making its determination, the Authority is able to give the weight it thinks proper to individual pieces of evidence, such as Ms K’s evidence, the CCTV footage, the

breath/alcohol reading and Constable Colbert's evidence.

'[35] The Authority's reference to the assessment of intoxication as being a subjective test is therefore misleading. First, it is unclear who the Authority is referring to when it talks of a subjective assessment of intoxication ...

'[37] Secondly, the assessment that counts is the one undertaken by the Authority and it is objective in nature. ...' *General Distributors Ltd v De'Ath* [2014] NZHC 2278, [2015] NZAR 171 at [16]–[22], [33]–[35], [37], per Woolford J

INVENTION

Australia

'[6] ... As appears from s 6 of the Statute of Monopolies, an invention is something which involves "making". It must reside in something. It may be a product. It may be a process. It may be an outcome which can be characterised, in the language of *NRDC [National Research Development Corporation v Commissioner of Patents]* (1959) 102 CLR 252, [1960] ALR 114, (1959) 1A IPR 63, [1959] HCA 67, as an "artificially created state of affairs". Whatever it is, it must be something brought about by human action. ...' *D'Arcy v Myriad Genetics Inc* [2015] HCA 35, (2015) 325 ALR 100 at [6], per French CJ, Kiefel, Bell and Keane JJ

INVENTIVE CONCEPT

[Patent Act 1977 ss 1, 14(5)(d).] '[14] The appellants' case, reduced to its simplest form, is that the Court of Appeal's decision is an unwarranted departure from the *Biogen* case [*Biogen Inc v Medeva plc* (1996) 38 BMLR 149, [1997] RPC 1, HL], and infringes the general legal principle (stated by the Technical Board of Appeal in para 3.3 of its decision in *Exxon/Fuel Oils* Decision T 0409/91 [1994] OJ EPO 653, by way of explanation of "support" in art 84 of the EPC [European Patent Convention])—

"that the extent of the patent monopoly, as defined by the claims, should correspond to the *technical contribution* to the art in order for it to be supported, or justified."

Lord Hoffmann cited this passage in the *Biogen* case ((1996) 38 BMLR 149 at 169, [1997] RPC 1 at 49) and again in his judgment in the Court of Appeal in this case ((2008) 101 BMLR 52 at [35]). The respondent's case, again in its

simplest form, is that the relevant claims are claims to a product, not a process, and that (as Lord Hoffmann put it at [36] of his judgment in the Court of Appeal):

"When a product claim satisfies the requirements of s 1 of the 1977 Act, the technical contribution to the art is the *product* and not the process by which it was made, even if that process was the only inventive step."

'[29] During the oral argument before your Lordships there was some discussion of whether "inventive concept" means the same as "technical contribution to the art". Neither expression is a statutory term of art. Lord Hoffmann used both expressions several times in his opinion in the *Biogen* case, the former mostly in section 10 (headed 'Inventive step') and the latter mostly in section 12 ('Support for the claims'). Mr Thorley QC submitted in his reply that the two expressions (as used in Lord Hoffmann's opinion) are synonymous.

'[30] I do not think that this is quite right. The expressions are certainly connected, but I do not think it is helpful (either in considering Lord Hoffmann's opinion, or generally) to treat them as having precisely the same meaning. "Inventive concept" is concerned with the *identification* of the core (or kernel, or essence) of the invention—the idea or principle, of more or less general application (see the *Kirin-Amgen* case [2005] 1 All ER 667 at [112]–[113]) which entitles the inventor's achievement to be called inventive. The invention's technical contribution to the art is concerned with the *evaluation* of its inventive concept—how far forward has it carried the state of the art? The inventive concept and the technical contribution may command equal respect but that will not always be the case.

'[31] The *Biogen* case itself is, I think, a good illustration of this. Before your Lordships Lord Hoffmann's opinion in the *Biogen* case has been subjected to closer and more searching scrutiny by the House than any that I can recall, with the possible exception of the House's scrutiny in *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49, [2007] 1 All ER 449, [2007] 1 AC 558 of the speech of Lord Goff of Chieveley in *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513, [1999] 2 AC 349. If I may respectfully say so, Lord Hoffmann's opinion in the *Biogen* case is a tour de force. I have frequently commended it to bar students as an example of how a great

judge can suffuse even the most technical subject with intellectual excitement. But its vivid and powerful language must be read in the context of the facts and issues in that case.’ *Generics (UK) Ltd v H Lundbeck A/S* [2009] UKHL 12, [2009] 3 All ER 955 at [14], [29]–[31], per Lord Walker of Gestingthorpe

INVESTMENT TRUST

[For 23(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 1444 see now 59 Halsbury’s Laws of England (5th Edn) (2014) para 1951.]

INVITES SUPPORT

[Terrorism Act 2000, s 12(1)(a): a person commits an offence if he invites support for a proscribed organisation.] [41] The words “invite” and “support” are not defined in the 2000 Act, and we do not find that surprising. Subject to the point we deal with at para [54] below, those words, as used in s 12(1)(a) of the 2000 Act, require no elaboration. On the face of it, they are ordinary English words with a clear meaning, and would be easily understood by a jury.

[42] Mr Summers describes the use of the word “invite” in a penal statute as curious. We do not consider that it is. The use of that word means the offence in s 12(1)(a) is one where “the words descriptive of the prohibited act ... themselves connote the presence of a particular mental element” per Lord Diplock in *Sweet v Parsley* [1969] 1 All ER 347 at 361, [1970] AC 132 at 162. As the judge said, it is difficult to see how an invitation could be inadvertent.

[43] The appellants submit that the Crown is required to prove an invitation by a defendant to one or more persons to join the defendant in providing support to a proscribed organisation, as part of the actus reus of an offence under s 12(1). This submission is based on the suggestion that “invite”, in its normal meaning, connotes or implies that the maker of the invitation is already engaged in something, or intends to do that “something” himself.

[44] We accept such an implication may arise in ordinary conversation, depending on the context (an invitation to a party for example). However it is possible to invite someone to do something which the person issuing the invitation is not doing and does not intend to do (an invitation to counsel to lodge written submissions, to take a different example). If resort needs to be had to dictionaries to make

the point, the first definition provided for the word “invite” in the *Oxford English Dictionary* is “to make a polite, formal or friendly request to (someone) to go somewhere or do something”.

[45] Whilst common sense might suggest that a defendant charged under s 12(1)(a) may provide support for the proscribed organisation himself, or intend to do so, and may want others to join him in such activities, in our judgment, there is nothing in the language of the section to support the proposition that the prosecution must prove this as part of the actus reus of the offence. The criminality in short, lies in inviting support (from third parties) for the proscribed organisation, not in inviting those third parties to join with the defendant in providing it.

[46] The ‘support’ in question may be practical or tangible, but it need not be, and we agree with the judge’s analysis:

“The *Oxford English Dictionary*’s definition of the noun ‘support’ includes the provision of assistance, of backing or of services to keep something operational: examples of the sort of practical or tangible assistance which defence counsel submit is the true subject of the section 12(1) offence. But the dictionary definition also includes encouragement, emotional help, mental comfort, and the action of writing or speaking in favour of something or advocacy. In everyday language, support can be given in a variety of ways, and it seems to me that it is for a jury to decide whether the words used by a particular defendant do or do not amount to inviting support. In its ordinary meaning, ‘support’ can encompass both practical or tangible assistance, and what has been referred to in submissions as intellectual support: that is to say, agreement with and approval, approbation or endorsement of, that which is supported.

From the point of view of the proscribed organisation, both types of support are valuable. An organisation which has the support of many will be stronger and more determined than an organisation which has the support of few, even if not every supporter expresses his support in a tangible or practical way. The more persons support an organisation, the more it will have what is referred to as the oxygen of publicity. The organisation as a body, and the individual members or adherents of it, will derive encouragement from the fact that they have the support of

others, even if it may not in every instance be active or tangible support. Hence in my judgment, it is a perfectly understandable that Parliament, in legislating to give effect to the proscription of a terrorist organisation, prohibits the invitation of support for that prohibited organisation without placing any restriction upon the meaning of the word 'support', other than to exclude conduct caught in any event by a separate provision of the Act."

'[47] The criminalisation of such conduct, with the requisite intent, seems to us to fall squarely within the legislative intent and purpose of the section, and of the 2000 Act as a whole. ...

'[48] It is of course important, as we have said, that someone can only be convicted of an offence under s 12(1)(a) if they *knowingly* invite support for an organisation that is proscribed. The prosecution must therefore make the jury sure: (i) that the organisation was a proscribed organisation within the meaning of the 2000 Act; (ii) that the defendant used words which in fact invited support for that proscribed organisation; and (iii) that the defendant knew at the time he did so that he was inviting support for that organisation.

'[49] As the judge was also careful to emphasise, there must be proof of an invitation of support *for the proscribed organisation*. This is to be distinguished from the (mere) expression of personal beliefs, or an invitation to someone else to share an opinion or belief, conduct that does not fall within the ambit of the s 12(1)(a) offence.' *R v Choudary* [2016] EWCA Crim 61, [2017] 3 All ER 459 at [41]–[49], per Sharp LJ

IRREGULARITIES ... THAT AFFECTED THE RESULT OF THE ELECTION

Canada [Canada Elections Act, SC 2000, c 9, ss 524(1)(b), 531(2). A court may annul an election under s 531(2) if the applicant establishes that there were 'irregularities ... that affected the result of the election' within the meaning of s 524(1)(b).] '24 This case involves interpreting the phrase "irregularities ... that affected the result of the election". The phrase is composed of two elements: "irregularities" and "affected the result". As we shall explain, "irregularities" are serious administrative errors that are capable of undermining the electoral process—the type of mistakes that are tied to and have a direct bearing on a person's right to vote.

'25 "Affected the result" asks whether someone not entitled to vote, voted. Manifestly, if a vote is found to be invalid, it must be discounted, thereby altering the vote count, and in that sense, affecting the election's result. "Affected the result" could also include a situation where a person entitled to vote was improperly prevented from doing so, due to an irregularity on the part of an election official. ...

'51 Having regard to the centrality of the constitutional right to vote, the enfranchising purpose of the Act, the language of s. 524, and the numerous democratic values engaged, we conclude that an "irregularit[y] ... that affected the result" of an election is a breach of statutory procedure that has resulted in an individual voting who was not entitled to vote. Such breaches are serious because they are capable of undermining the integrity of the electoral process.

'147 In the ordinary sense of the word, something is "irregular" when it is "[n]ot in conformity with rule or principle" (*The Oxford English Dictionary* (2nd ed. 1989), vol. VIII, at p. 93). This suggests that under the Act, an election may be set aside as a result of non-compliance with the provisions of the Act, even in the absence of fraud or corrupt or illegal practices.

'149 Only irregularities that "affected the result of the election" permit the annulment of the election under s. 531(2). Irregularities must be of a type that *could* affect the result of the election, and impact a *sufficient number* of votes to have done so. An irregularity resulting in a vote being cast that should not have been is of a type that *could* affect the result of the election. To have actually affected the result of the election, the number of such votes must be equal to or exceed the winning candidate's plurality. If the irregularities are of this type and impact this number of votes, then a court can and should annul the election under s. 531(2). This is known as the "magic number" rule. (See *Beamish* [*Beamish v Miltenberger*] [1997] NWTR 160], at para. 18; *O'Brien v Hamel* (1990), 73 O.R. (2d) 87 (H.C.J.), at para. 34; *Blanchard v. Cole*, [1950] 4 D.L.R. 316 (N.S.S.C.), at p. 320; *Wright* [*Wright v Koziak*] [1981] 1 WWR 449, at pp. 458 and 465–66; *Morgan* [*Morgan v Simpson*] [1974] 3 All ER 722], at p. 727.)' *Opitz v Wrzesnewskyj* 2012 SCC 55, [2012] 3 SCR 76 at paras 24–25, 51, per Rothstein and Moldaver JJ and at paras 147, 149, per McLachlin CJ (dissenting)

IRREPARABLE INJURY

[For 24 Halsbury's Laws of England (4th Edn) (Reissue) para 826 see now 12 Halsbury's Laws of England (5th Edn) (2015) para 583.]

ISSUE (VERB)

- (1) For the purposes of this Part [Part 6 (ss 207–227)] a banknote is issued when it passes—
 - (a) from a person who holds it not as bearer but as a person carrying on the business of banking ('the issuing bank'), and
 - (b) to a person taking as bearer ('the bearer').
- (2) In subsection (1)(a) the reference to a banknote passing from the issuing bank includes a reference to it passing—
 - (a) from the issuing bank's agent, or
 - (b) from a person printing or preparing the banknote for, or taking it to, the issuing bank or its agent.
- (3) For the purposes of subsection (1)(b) it does not matter whether the bearer also holds the banknote for use in the business of banking.

Banking Act 2009, s 209

ISSUE ESTOPPEL

Canada '[2] ... In my view, the difficulties associated with the application of issue estoppel in criminal law arise from the fact that it has been extended to circumstances where justice does not support its application. Properly confined, in accordance with a proper reading of the majority reasons in *Grdic* [*Grdic v The Queen* [1985] 1 SCR 810], issue estoppel plays an indispensable role in ensuring fairness to the accused, avoiding inconsistent verdicts and maintaining the principle of finality. Other concepts, such as abuse of process, character evidence rules, and the rules governing the admissibility of similar fact evidence, do not completely or effectively guarantee these goals. Though it shares many features with its civil law equivalent, criminal law issue estoppel is a stand-alone doctrine responsive to the unique characteristics of criminal trials. I would therefore decline to throw out issue estoppel in its entirety. Rather, I would modify the current Canadian approach to issue estoppel in criminal law, confining it to the focused compass of precluding the Crown from leading evidence which is inconsistent with findings made in the accused's favour in a previous proceeding.

'[3] Applying this principle to the facts in this case, I conclude that issue estoppel does not operate against the Crown. The accused argues that issue estoppel means that evidence admitted on his first trial, the verdict under appeal, must now be deemed to have been improperly admitted on the ground that he was acquitted on a second charge where the subject matter of the second charge was the same as the impugned evidence led at the first trial. In my view, this argument invokes the doctrine of issue estoppel in a manner that is overbroad. I agree with Blair JA, dissenting in the Court of Appeal, that properly understood, issue estoppel does not operate retrospectively to require the ordering of a new trial. However, as a new trial is required on other grounds, I would dismiss the appeal.

... '[14] The common law developed two doctrines to deal with problems of unfair relitigation, consistency of result and finality. Both come out of the broad concept known as *res judicata*.

'[15] The first branch of *res judicata* is sometimes called cause of action estoppel in the civil context, or double jeopardy in the criminal context. An argument on this basis asserts that the cause of action in a current proceeding is the same as the cause of action in a proceeding previously litigated, with the result that the current action should not proceed. In criminal law, the double jeopardy principle finds expression in the pleas of *autrefois acquit* and *autrefois convict*.

'[16] The second branch of *res judicata* is issue estoppel. Issue estoppel is concerned not with whether the cause of action in two proceedings is the same, but with whether an issue to be decided in proving the current action is the same as an issue decided in a previous proceeding. The causes of action may be (and typically are) different. Issue estoppel in Canada has historically applied to both civil and criminal law.

'[17] While double jeopardy is concerned with the total cause of action and the ultimate result of the litigation, issue estoppel is concerned with particular issues arising in two different pieces of litigation. As will be discussed more fully below, much of the difficulty associated with issue estoppel in the criminal context is the result of conflating the focus of double jeopardy on the ultimate verdict with the proper and narrower concern of issue estoppel, which is particular determinations on the issues supporting the verdict. If issue estoppel is confined to prior determinations of

issues, the difficulties largely vanish.

[18] The conflation of the result-based double jeopardy principle and issue estoppel can be traced to this Court's decision in *Grdic*. Two views of issue estoppel were expressed in *Grdic*. A majority of five, *per* Lamer J (as he then was), took the view that "any issue, the resolution of which had to be in favour of the accused as a prerequisite to the acquittal, is irrevocably deemed to have been found conclusively in favour of the accused" (p 825). Lamer J went on to state: "This is so even though the judgment might well be the result of a reasonable doubt on that issue ..." (p 825). Accordingly, Lamer J held that since identity was the central issue in the first trial in *Grdic*, and since the trial judge had a reasonable doubt about identity, the Crown was estopped from re-litigating that issue (pp 825–26). In short, if an issue supporting an acquittal is resolved in favour of the accused on one offence, on whatever basis, evidence to contradict the finding on that issue cannot subsequently be re-led on different charges.

[19] By contrast, Wilson J, dissenting, held that because the trial judge's reasons in *Grdic* were based on a reasonable doubt about identity, rather than an affirmative factual finding of lack of identity, the Crown was not estopped from calling evidence going to the issue of identity (pp 817–18).

[20] In sum, both Lamer J and Wilson J confirmed the applicability of the principle of issue estoppel in criminal law. Both saw it as a principle that prevented relitigation of an issue decided in the accused's favour in a prior trial. They differed only on whether the principle extended to issues resolved in the accused's favour on the basis of a reasonable doubt. The majority of the Court, *per* Lamer J, held that it did; the dissenting justices, *per* Wilson J, held that it did not. (Lamer J and Wilson J also differed on the limits of the fraud exception to issue estoppel; however, that issue does not arise in this appeal.)

[21] Some of the difficulty with the application of issue estoppel appears to find its genesis in a misreading of the majority in *Grdic* that the fact of an acquittal estops the Crown from re-litigating *any* fact that was in issue in the first trial, whether or not it can be shown that the particular issue was decided in the accused's favour in the first case. The basis for this extension of the principle may lie in Lamer J's comment in *Grdic* that "[t]here are not different kinds of acquittals" (p 825) — a comment made at the outset of his analysis in response to concerns about the trial judge's

comments that one of the witnesses on identity must have committed perjury. Lamer J's concern appears to have been to rebut any suggestion that the acquittal was somehow tainted or not genuine, as a result of the finding of perjury. It was in this context that he stated that all acquittals are equal and that one cannot go behind them. Lamer J then turned to *res judicata* and issue estoppel. The balance of the analysis focuses, not on the acquittal, but on whether the issue of identity had been decided in the first trial. Lamer J expressly affirmed that a prior acquittal on a different charge "does not mean that, for the purpose of the application of the doctrine of *res judicata*, the Crown is estopped from re-litigating all or any of the issues raised in the first trial" (p 825), limiting the scope of issue estoppel to "any issue, the resolution of which had to be in favour of the accused as a prerequisite to the acquittal" (p 825). Whether the Crown was estopped was discussed as dependent, not on the fact of an acquittal in a previous proceeding, but on whether the issue in question has been decided in the accused's favour in a previous proceeding. On the facts of *Grdic*, Lamer J found that the issue of identity had been decided in favour of the accused in the first trial, based on a review of the record of the first trial, including the defence led, and the nature of the case (*Grdic*, at p 826).

[22] To the extent that *Grdic* has been read as preventing the Crown from leading evidence on *any* issue raised in a previous trial that resulted in an acquittal, this is a misreading of the majority's holding. Only issues which were decided in the accused's favour, whether on the basis of a positive factual finding or a reasonable doubt, are the subject of issue estoppel.

[23] It is thus not every factual issue in the trial resulting in an acquittal which results in an estoppel at a subsequent trial, but only those issues which were expressly resolved or, given how the case was argued, had to be resolved for there to be an acquittal. If a particular issue was decided in favour of the accused at a previous trial, even if the issue was decided on the basis of reasonable doubt, issue estoppel applies. The determination of whether an issue was decided at a first trial, either expressly or necessarily as a prerequisite to an acquittal, must be based on a review of the relevant portions of the transcript of the first trial, in particular, the allegations, the nature of the Crown's case, and the defence's case: *Grdic*, at p 826. The accused claiming issue estoppel bears the burden of showing that a particular issue was decided in his or her

favour in a previous proceeding.

‘[24] In a one-issue trial, like *Grdic*, the effect of issue estoppel is that the Crown will normally be estopped from calling evidence about the central issue in the trial on a subsequent trial (subject to *Ollis*-exception situations [*R v Ollis* [1900] 2 QB 758] ..., where the Crown is not seeking to contradict the factual finding from the first trial). But in a more complex multi-issue trial, depending on the facts, the Crown may not be estopped on all issues. This is because the acquittal must have been based on only one factual issue, or because it may not be possible to discern which issue the acquittal is based on.

‘[25] In such a case, it may not be clear that the relevant issue was resolved in the accused’s favour on the first trial. An example of a situation where issue estoppel did not apply, because it was not clear an issue was decided in the accused’s favour in the first trial, can be seen in this Court’s decision in *Gushue v The Queen* [1980] 1 SCR 798. In *Gushue*, the Court considered whether issue estoppel applied where the accused had been acquitted of murder in the course of a robbery involving a co-accused, and was subsequently charged with the robbery. This Court held that issue estoppel did not apply to prevent the robbery charge from proceeding, because different theories of liability were left to the jury at the murder trial, with the effect that the acquittal on the murder charge did not necessarily require a finding of fact that the accused had not participated in a robbery (pp 806–7).

‘[26] In summary, the majority reasons in *Grdic* stand for the following proposition. The Crown is estopped from leading evidence which is inconsistent with findings made in a previous trial, whether those findings were expressly made in the accused’s favour or resolved on the basis of a reasonable doubt. Issue estoppel applies only to findings on a prior trial (as held by Blair JA in this case). Further, the determination of whether an issue was decided at the first trial will be a factual issue at the second trial in each case. In my view, these propositions should be affirmed as correct statements of the law. Moreover, it should follow from these propositions that the Crown is permitted (absent the operation of the other rules of evidence) to lead evidence relating to issues litigated in an earlier proceeding: (1) if the issue was not decided in the accused’s favour in the earlier proceeding; and (2) if the issue was decided in the earlier proceeding, but the Crown is not seeking to use the evidence to

contradict the factual finding on that issue at the previous trial.

‘[27] On the issue of whether issue estoppel should operate retrospectively, I note that *Grdic* was clearly concerned with the relitigation of an issue that had, in a *previous* proceeding, been resolved in the accused’s favour. This accords with the principle of issue estoppel, which has always been concerned with the relitigation of previously concluded issues. Neither Lamer J nor Wilson J suggested issue estoppel should operate retrospectively to result in evidence being redacted from the record on a prior trial. The concern for finality, one of the principles which underlies the doctrine of issue estoppel, is inconsistent with retroactive application of issue estoppel.

‘[28] On the issue of whether issue estoppel should extend to matters resolved on the basis of reasonable doubt, the majority reasons of Lamer J in *Grdic* are sound and should be retained.

‘[29] First, to exclude issues resolved on the basis of reasonable doubt from the scope of issue estoppel gives insufficient weight to the principle that an accused should not be required to answer twice to the same allegations. Once a trial judge has concluded that the Crown has failed to prove a factual issue, the matter is decided against the Crown, and the Crown should be estopped from re-litigating it. It should not matter whether the Crown failed to prove the fact because the trial judge had a reasonable doubt, or because the trial judge expressly found against the fact the Crown is trying to prove. The burden on the Crown to prove its case beyond a reasonable doubt is a fundamental aspect of our criminal justice system. The Crown should not be able to look to the standard of proof as an excuse to relitigate matters.

‘[30] Second, to exclude issues resolved on the basis of a reasonable doubt from the scope of issue estoppel gives insufficient weight to the value of finality in litigation. Trial judges, charged with the duty of determining whether the Crown has proved its case beyond a reasonable doubt, frequently state their findings in terms of having a reasonable doubt about an issue. If having a reasonable doubt on a particular issue is not held to be a conclusive finding of fact, then very few issues will fall within issue estoppel’s ambit, and the ends of finality will be poorly served.

‘[31] I conclude that, properly understood, issue estoppel in Canadian criminal law operates to prevent the Crown from re-litigating an issue that has been determined in the

accused's favour in a prior criminal proceeding, whether on the basis of a positive finding or reasonable doubt.

'[32] Subsequent cases, however, have read the principle of issue estoppel more broadly. This overbroad reading is the primary source of the difficulties that currently attend the rule.

'[33] The most significant extensions of the traditional rule of issue estoppel are first, the view that it operates to bar the Crown from leading evidence on *any* issue raised in a prior trial which resulted in an acquittal; and second, the view that it can operate retrospectively to bar or require the redaction of evidence from a first trial, where there is an acquittal on a subsequent charge involving evidence led at the first trial, as is argued in this appeal: *R v G (KR)* (1991) 68 CCC (3d) 268 (Ont CA); *R v Rulli* (1999) 134 CCC (3d) 465 (Ont CA), [1999] SCCA No 284, leave to appeal refused [2000] 1 SCR xviii; *R v Verney* (1993) 87 CCC (3d) 363 (Ont CA). As to the first issue, as is discussed above at paras 18–26, issue estoppel does *not* mean that every piece of evidence led in a first trial which leads to an acquittal is inadmissible in a subsequent trial on another

matter. Only issues that were either necessarily resolved in favour of the accused as part of the acquittal, or on which findings were made (even if on the basis of reasonable doubt) are estopped. This would usually include the central issue in the case if it is a one-issue case, or particular issues in a multi-issue case, *if* the court at the second trial can discern from reviewing the transcript that a finding was made on a particular issue, even if on the basis of reasonable doubt.

'[34] As to the second issue, issue estoppel should not be understood to operate retrospectively. Nowhere in *Grdic* does Lamer J suggest that acquittal in a subsequent trial would require a retrospective review of previous trials to determine if evidence led by the Crown in the second trial which resulted in an acquittal had been led in the first trial. Nor does he suggest that if such evidence had been led, it would be deemed retrospectively to have been improperly received, requiring a new trial.' *R v Mahalingan* [2008] 3 SCR 316, [2008] SCJ No 64, 300 DLR (4th) 1, 2008 SCC 63 at [2]–[3], [14]–[34], per McLachlin CJ

J

JETSAM

[For 1(1) Halsbury's Laws of England (4th Edn) (2001 Reissue) para 350n see now 93 Halsbury's Laws of England (5th Edn) (2008) para 139n.]

JETTISON

[For 25 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 341 see now 60 Halsbury's Laws of England (5th Edn) (2011) para 332.]

JOURNALISM

See also HELD FOR PURPOSES ... OF JOURNALISM

[Freedom of Information Act 2000 ('FOIA'), Sch 1.] '[31] The tribunal then express their own view as to the meaning of "journalism" in the following way:

"105. [A] more useful distinction may be between functional journalism and the direction of policy, strategy and resources that provide the framework within which the operations of a [public service broadcaster] take place.

106. In relation to functional journalism we find that it covers collecting or gathering, writing, editing and presenting material for publication, and reviewing that material. In order to further understand functional journalism the tribunal considers the following three elements constitute functional journalism.

107. The first is the collecting or gathering, writing and verifying of materials for publication.

108. The second is editorial. This involves the exercise of judgment on issues such as:

- the selection, prioritisation and timing of matters for broadcast or publication,
- the analysis of, and review of individual programmes,
- the provision of context and background to such programmes.

109. The third is the maintenance and enhancement of the standards and quality of journalism (particularly with respect to accuracy, balance and completeness). This may involve the training and development of individual journalists, the mentoring of less experienced journalists by more experienced colleagues, professional supervision and guidance, and reviews of the standards and quality of particular areas of programme making."

... '[53] I have briefly canvassed, and rejected, the possibility of attributing to the word "journalism" in Pt VI of Sch 1 to the FOIA an unnaturally wide meaning. It seems to me that the word should be given its natural meaning, and, in that connection, the tribunal's analysis in that part of its decision which is quoted in para [31], above, is not one which I could improve on, at least in the present context. However, having decided on the meaning of the word "journalism", it seems to me that one should not approach the question of whether the FOIA applies by being too generous on the question of whether information is "held for purposes ... of journalism", and, in particular, one should bear in mind that today's journalism is tomorrow's archive.' *British Broadcasting Corporation v Sugar (No 2)* [2010] EWCA Civ 715, [2011] 1 All ER 101 at [31], [53], per Lord Neuberger MR; affd [2012] UKSC 4, [2012] 2 All ER 509

JUDGMENT

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

Declaratory

[For 1(1) Halsbury's Laws of England (4th Edn) (2001 Reissue) para 120 see now 61 Halsbury's Laws of England (5th Edn) (2010) para 690.]

In personam

[For 16(2) Halsbury's Laws of England (4th Edn) (Reissue) para 975 see now 12A Halsbury's Laws of England (5th Edn) (2015) para 1600.]

In rem

[For 16(2) Halsbury's Laws of England (4th Edn) (Reissue) para 972 see now 12A

Halsbury's Laws of England (5th Edn) (2015) para 1597.]

JUDICIAL AUTHORITY

[Extradition Act 2003, s 2(2).] '[1]... Section 2(2) in Pt 1 of the Extradition Act 2003 requires an EAW [European arrest warrant] to be issued by a "judicial authority". Mr Assange contends that the prosecutor does not fall within the meaning of that phrase and that, accordingly, the EAW is invalid. This point of law is of general importance, for in the case of quite a number of member states EAWs are issued by public prosecutors. ...

... '[13]... For the reasons that I have given I approach the interpretation of the words "judicial authority" in Pt 1 of the 2003 Act on the basis that they must, if possible, be given the same meaning as they bear in the Framework Decision [Council Framework Decision (on the European arrest warrant and the surrender procedures between member states) ((JHA) 2002/584) (OJ 2002 L190, p 1)]. I turn to consider that meaning.

... '[16] As we are here concerned with the meaning of only two words, I propose at the outset to consider the natural meaning of those words. It is necessary to do this in respect of both the English words "judicial authority" and the equivalent words in the French text. Those words are "autorité judiciaire". In the final version of the Framework Decision the same weight has to be applied to the English and the French versions. It is, however, a fact that the French draft was prepared before the English and that, in draft, in the event of conflict, the meaning of the English version had to give way to the meaning of the French. The critical phrase does not bear the same range of meanings in the English language as in the French and, as I shall show, the different contexts in which the phrase is used more happily accommodate the French rather than the English meanings.

'[17] The first series of meanings of "judicial" given in the Oxford English Dictionary is: "Of or belonging to judgment in a court of law, or to a judge in relation to this function; pertaining to the administration of justice; proper to a court of law or a legal tribunal; resulting from or fixed by a judgment in court." In the context of "a judicial authority" the more appropriate meanings are: "having the function of judgment; invested with authority to judge causes"; a public prosecutor would not happily

fall within this meaning.

'[18] "Judiciaire" is capable of bearing a wide or a narrow meaning. *Vocabulaire Juridique* (6th edn, 1996) states that it can be used "(dans un sens vague). Qui appartient à la justice, par opp à législative et administrative", or "(dans un sens précis). Qui concerne la justice rendue par les tribunaux judiciaires". A computer dictionary search discloses a number of examples of its use in the "sens vague", for instance "affaire judiciaire/legal case; aide judiciaire/legal aid; annonce judiciaire/legal notice; poursuite judiciaire/legal proceedings" and last but not least, "autorité judiciaire/legal authority".

... '[20] These definitions demonstrate the width of meaning that "autorité judiciaire" is capable of bearing and the fact that the ambit of the phrase can vary according to its context.

... '[76] The purpose of the Framework Decision, its general scheme, the previous European extradition arrangements, the existing procedures of the member states at the time that the Framework Decision was negotiated, the preparatory documents and the variety of meanings that the French version of the phrase in issue naturally bears, the manner in which the Framework Decision has been implemented and the attitude of the Commission and the Council to its implementation all lead to the conclusion that the "issuing judicial authority" bears the wide meaning for which Miss Montgomery contends and embraces the prosecutor in the present case. All that weighs the other way is the narrower meaning that the English phrase naturally bears. That does not begin to tilt the scales in favour of Miss Rose's submission. For this reason I conclude that the prosecutor in this case fell within the meaning of "issuing judicial authority" in the Framework Decision.

... '[80]... I can see no impediment to according to "judicial authority" in Pt 1 of the 2003 Act the same meaning as it bears in the Framework Decision. On the contrary there is good reason to accord it such meaning. I have concluded that the prosecutor who issued the EAW in this case was a "judicial authority" within the meaning of that phrase in s 2 of the 2003 Act and that Mr Assange's challenge to the validity of the EAW fails.' *Assange v Swedish Prosecution Authority* [2012] UKSC 22, [2012] 4 All ER 1249 at [1], [13], [16]–[18], [76], [80], per Lord Phillips P

JUDICIAL POWER

Australia [Corporations Act 2001 (Cth), s 657A(2)(b).] '[53] The focus of this appeal is the provision, in s 657A(2)(b), that the panel [the Takeovers Panel] may declare circumstances to be unacceptable circumstances, if it appears to the panel that the circumstances are unacceptable because they constitute a contravention of a provision of Chs 6, 6A, 6B or 6C. The Full Court of the Federal Court of Australia (Gyles and Lander JJ, Finkelstein J dissenting) held that s 657A(2)(b) is invalid because it purports to confer on the panel the judicial power of the Commonwealth. These reasons will show that the impugned provision does not purport to confer on the panel the judicial power of the Commonwealth. ...

'[93] As *Brandy* [*Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 127 ALR 1, 37 ALD 340, [1995] HCA 10] demonstrated, and has been recognised since the very earliest decisions of this court about Ch III,¹¹¹ no single combination of necessary or sufficient factors identifies what is judicial power. So much is made plain by the so-called chameleon doctrine [*R v Quinn; Ex p Consolidated Foods Corp* (1977) 138 CLR 1 at 8, 16 ALR 569 at 572, 1A IPR 537 at 547] and the cases in which that doctrine has been engaged.

'[94] In *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* [(1970) 123 CLR 361 at 374, [1970] ALR 449 at 452] in a passage often since applied in this court, Kitto J said:

[A] judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist.

'[95] In *Tasmanian Breweries*, the legislation in

issue (the Trade Practices Act 1965 (Cth)) did not require the relevant tribunal to adjudicate upon any claim of right but did render unenforceable the restriction or practice found to be contrary to the public interest. But as Kitto J went on to say [at CLR 378, ALR 454-455]:

The determination [by the tribunal] itself has no operative effect: it constitutes the factum by reference to which the Act operates to alter the law in relation to the particular case. And an order under s 52 (or an interim restraining order under s 54) is in like case. It presents a direct contrast with an injunction granted by a court as a means of enforcing obligations that have been established by adjudication. The order restrains future conduct, not as being in breach of ascertained obligations, but as being in conformity with ascertained obligations or practices – not in order to ensure observance of them but to prevent observance of them, because it is considered that their observance would be against the public interest. The Act, particularly s 52(7), operates upon the order to give its provisions the force of law, and thus to alter the law for the future in relation to the particular case.

'[96] The features of the legislation in issue in *Tasmanian Breweries* which were identified in that case are also to be observed in the relevant provisions of the Corporations Act. The panel is required to conclude whether a declaration of unacceptable circumstances should be made. If s 657A(2)(b) is engaged, the panel must decide, along the way, whether there has been a contravention of a relevant provision of the Corporations Act. But if it does decide that there has been a contravention, the conclusion to which the panel must ultimately come is whether identified circumstances should be declared unacceptable. In making a declaration, or orders consequent upon a declaration, the panel does not create a charter for the observance of the rights and obligations that attach to the contravention. The panel's powers to make orders expressly exclude the power to make "an order directing a person to comply with a requirement of Ch 6, 6A, 6B or 6C" [s 657D(2)]. The charter that is established by the panel's order is for the observance of the rights and obligations that are created in consequence of a declaration being made. For, if a declaration is made, an order is framed to prevent the consequences of what have been found to be unacceptable circumstances. The

order is framed to prevent those consequences by “protect[ing] the rights or interests of any person affected by the circumstances” [s 657D(2)(a)] or by “ensur[ing] that a takeover bid or proposed takeover bid ... proceeds (as far as possible) in a way that it would have proceeded if the circumstances had not occurred” [s 657D(2)(b)]. The order constitutes the new charter of rights and obligations of the parties. And the Corporations Act “operates upon the order to give its provisions the force of law, and thus to alter the law for the future in relation to the particular case” [*R v Trade Practices Tribunal; Ex p Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 378, [1970] ALR 449 at 454–455].

‘[97] It is then for the courts in the exercise of judicial power to enforce the law as it has been framed by the panel’s orders. There is what was identified in *Brandy* [at CLR 261, ALR 11, ALD 348–349] as “an independent exercise of judicial power” to give effect to the panel’s orders.’[98] The orders of the panel stand in sharp contrast with the determinations of the Human Rights and Equal Opportunity Commission considered in *Brandy*. By the provisions of the Racial Discrimination Act 1975 (Cth) in issue in *Brandy*, the commission’s determination, when registered as it had to be, was binding upon the parties and enforceable as an order of the Federal Court. But the determination remained the determination of the commission and in no sense became the determination of the Federal Court. Under the relevant provisions of the Corporations Act, the binding effect of the orders of the panel is determined by the court which is called upon to decide whether orders should be made under s 657G to secure compliance with them or to decide whether there has been an offence committed under s 657F by a person contravening a valid order of the panel.

‘[99] This analysis of the effect of the relevant provisions requires the conclusion that the panel does not exercise the judicial power of the Commonwealth.

‘[100] It is important, however, to notice one further consideration which strengthens the case for validity of the impugned provisions. Although the Corporations Act gives an order of the panel the force of law and makes contravention of the panel’s order an offence, an order of the panel is open to challenge. It is open to direct challenge by proceedings under s 75(v) of the Constitution or proceedings seeking relief under s 39B of the Judiciary Act. No less importantly, an order of the panel is open to collateral challenge in other judicial

proceedings in which its valid making is an element in issue. That an order of the panel may be challenged in these ways points away from a conclusion that the panel exercises judicial power.

‘[101] For these reasons, the Full Court erred in holding that s 657A(2)(b) was invalid as purporting to confer the judicial power of the Commonwealth on the panel.’ *A-G (Cth) v Alinta Ltd* [2008] HCA 2, (2008) 242 ALR 1, (2008) 64 ACSR 507, BC200800208 at [53], [93]–[101], per Hayne J

JURISDICTION

[For 10 Halsbury’s Laws of England (4th Edn) (Reissue) para 314 see now 24 Halsbury’s Laws of England (5th Edn) (2010) para 623.]

New Zealand [High Court Rules, r 5.49: a defendant who objects to the jurisdiction of the court to hear and determine the proceeding may, within the time allowed for filing a statement of defence and instead of so doing, file and serve an appearance stating the defendant’s objection and the grounds for it.] ‘[25] We also conclude that the Court of Appeal’s view of the scope of what can be addressed in an objection to “jurisdiction” under r 5.49 is too restricted. The Court has held that r 5.49 can be invoked in only three situations: 24 first, when the matter is extraterritorial; secondly, when by law the case can only be determined by a different New Zealand court or authority; and thirdly, where the operation of a contractual term or failure to comply with statutory requirements precludes the High Court having jurisdiction. The third of these categories is obviously directed primarily at arbitration. Although each of these situations is clearly covered by r 5.49, it is not easy to read the rule as limited to them as it expresses an unqualified right to challenge a court’s jurisdiction to hear and determine a proceeding. The better approach is to give r 5.49 its ordinary meaning. In that respect, the Court of Appeal’s limitation on the application of the rule appears to cut across Diplock LJ’s classic expression of the meaning of jurisdiction set out in *Garthwaite v Garthwaite* [[1964] P 356 at 387, CA]:

In its narrow and strict sense, the “jurisdiction” of a validly constituted court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference (1) to the subject-matter of the issue or (2) to

the persons between whom the issue is joined or (3) to the kind of relief sought, or to any combination of these factors.

‘[26] Also material to the meaning of jurisdiction in the context of r 5.49 are the remarks of Lord Scott in *Tehrani v Secretary of State for the Home Department* [[2006] UKHL 47, [2007] 1 AC 521 at [66]]:

When issues are raised as to whether or not a court of law has jurisdiction to deal with a particular matter brought before it, it is necessary to be clear about what is meant by “jurisdiction”. In its strict sense the “jurisdiction” of a court refers to the matters that the court is competent to deal with. Courts created by statute are competent to deal with matters that the statute creating them empowered them to deal with. The jurisdiction of these courts may be expressly or impliedly limited by the statute creating them or by rules of court made under statutory authority. Courts whose jurisdiction is not statutory but inherent, too, may have jurisdictional limits imposed on them by rules of court. But whether or not a court has jurisdictional limits (in the strict sense) there are often rules of practice, some produced by long-standing judicial authority, which place limits on the sort of cases that it would be proper for the court to deal with or on the relief that it would be proper for the court to grant.

‘[27] The principal instance of a reason

established by judicial authority for why a court should not exercise jurisdiction which, strictly it possesses, is the doctrine of *forum non conveniens*.’ *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804 at [25]–[27], per McGrath J

JURY

[For 26 Halsbury’s Laws of England (4th Edn) (2004 Reissue) paras 501–503 see now 61 Halsbury’s Laws of England (5th Edn) (2010) paras 801–803.]

JUSTIFICATION

[For 28 Halsbury’s Laws of England (4th Edn) (Reissue) para 82 see now 32 Halsbury’s Laws of England (5th Edn) (2012) para 582.]

JUSTIFIED

Canada ‘[40] Subsection 6(2) of the NOC Regulations [Patented Medicines (Notice of Compliance) Regulations, SOR/93–133] require a determination by the Court as to whether the applicant has demonstrated that “none of those allegations is justified.”

‘[41] The meaning of the word “justified” or in the French language “fondée”, was considered by the Federal Court of Appeal in *Procter & Gamble Pharmaceuticals Canada Inc v Canada (Minister of Health)* [2005] 2 FCR 269. It means the ordinary civil burden on a balance of probabilities.’ *G D Searle & Co v Novopharm Ltd* [2008] 1 FCR 477, [2007] FCJ No 120, 56 CPR (4th) 1 at [40]–[41], per Hughes J

K

KIND

Of that kind

Australia [Whether the goods and services referred to in the Trade Practices Act 1974 (Cth) s 65A(1)(a)(vi) as 'goods or services of that kind' mean goods or services of the kind the subject of the publication referred to in s 65A(1)(a)(i) and (ii), or whether they mean only goods or services of the same kind as the 'relevant goods or services' mentioned in s 65A(1)(a)(v). Section 65(A1) provides that nothing in section 52, 53, 53A, 55, 55A or 59 applies to a prescribed publication of matter by a prescribed information provider, other than:

- (a) a publication of matter in connection with:
 - (i) the supply or possible supply of goods or services;
 - (ii) the sale or grant, or possible sale or grant, of interests in land;
 - (iii) the promotion by any means of the supply or use of goods or services; or
 - (iv) the promotion by any means of the sale or grant of interests in land;

where:

- (v) the goods or services were relevant goods or services, or the interests in land were relevant interests in land, as the case may be, in relation to the prescribed information provider; or
- (vi) the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with:

- (A) a person who supplies goods or services of that kind, or who sells or grants interests in land, being interests of that kind; or
- (B) a body corporate that is related to a body corporate that supplies goods or services of that kind, or that sells or grants interests in land, being interests of that kind; or

- (b) a publication of an advertisement.]

'[1] Section 52(1) of the Trade Practices Act 1974 (Cth) (the TPA) provides:

A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Actions brought under the section alleging misleading or deceptive news media stories in the late 1970s and early 1980s led to the creation, in 1984, of a statutory exemption for "prescribed information providers". The exemption was created by the enactment of s 65A. An identical provision limiting the scope of the prohibition on misleading or deceptive conduct in relation to financial services is to be found in the Australian Securities and Investments Commission Act 2001 (Cth). Similar provisions appear in the Fair Trading Acts of the various states and territories.

'[2] The present appeal concerns an exception to the exemption. The exception relates to the publication of matter pursuant to a contract, arrangement or understanding between the party publishing the matter and a supplier of goods or services. The proceedings which have led to this appeal arise out of two episodes of the *Today Tonight* program broadcast by the respondents in October 2003 and January 2004. Each respondent is a licensed broadcaster, a member of the Channel Seven network, and a subsidiary of Seven Network Ltd.

...

'[9] For the reasons that follow, the appeal should be allowed. The exemption conferred by s 65A does not apply to situations in which a media outlet, pursuant to an arrangement with a supplier of goods or services, publishes and, by adoption or otherwise, makes representations of a misleading or deceptive character in relation to goods or services of that kind. That is the present case.

...

'[28] The next two questions are the primary constructional questions upon which this appeal turns:

- (iv) Do the goods or services referred to in s 65A(1)(a)(vi) as "goods or services of that kind" mean goods or services of the kind the subject of the publication referred to in s 65A(1)(a)(i) and (iii)? or
- (v) Do they mean only goods or services of the same kind as the "relevant goods or services" mentioned in s 65A(1)(a)(v)?

The first construction, proposed in question (iv), yields a wider exception to the exemption than the second, proposed in question (v). The first was that adopted by the primary judge. The

second was that adopted by the Full Court.

‘[29] If the first construction be correct, then a prescribed information provider is not protected by s 65A when publishing matter in connection with the supply of goods or services of any kind where the publication is made on behalf of, or pursuant to a contract, arrangement or understanding with, a person who supplies goods or services of that kind.

‘[30] If the second construction be correct, the prescribed information provider will be protected in such a case unless the goods or services are “relevant goods or services”, that is to say goods or services of a kind supplied by that prescribed information provider or a related body corporate.

...
‘[77] Section 65A(1) begins by providing that nothing in certain specified sections of the Act “applies to a prescribed publication of matter by a prescribed information provider, other than” the several kinds of publication identified in paras (a) and (b) of the subsection. The immediate question in the case was whether the publication in issue was one of those excepted kinds of publication. In particular, was there “a publication of matter in connection with ... the supply or possible supply ... [or] the promotion ... of the supply ... of ... services” where “the publication was made on behalf of, or pursuant to a contract, arrangement or understanding with ... a person who supplies ... services of that kind”?

‘[78] When the question for consideration is identified in that way, there is no ambiguity in the applicable provisions of s 65A(1). The contract arrangement or understanding must be with a person who supplies services of the kind that are the subject of the publication. The expression “services of that kind” points back to the services which are the subject of the publication.

‘[79] Section 65A(1) is drafted as a single sentence of nearly 200 words. But that sentence is divided and subdivided into paragraphs and subparagraphs which, for the most part, are to operate disjunctively. When account is taken of those disjunctions, s 65A(1) can have more than a dozen distinct operations, even if no distinction is drawn between the supply or possible supply of goods and the supply or possible supply of services.

‘[80] When construing s 65A(1) account must be taken of these disjunctive operations of the provision. Ordinarily, the attribution intended by the demonstrative adjective “that” is determined by proximity. But where, as here, there are distinct operations of the provision, the

relevant proximity is identified by consideration of so much of the subsection as is relevant to the case at hand. It is not identified by treating the sub-section as a single sentence in which “goods or services of that kind” always refers back to the goods or services which were identified in the immediately preceding paragraph of the subsection

‘[81] In this case, the words “of that kind”, where they appear in s 65A(1)(a)(vi)(A) (a person who supplies goods or services of *that kind*) fell to be applied in a case in which it was alleged that there was a publication of matter in connection with “the supply or possible supply [or the promotion of the supply] of goods or services”. Read in that way there is no ambiguity or difficulty in understanding the “goods or services of that kind” as referring back to the goods or services in connection with the supply, possible supply, or promotion of which there was a publication of matter.’
Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Ltd [2009] HCA 19, (2009) 255 ALR 1 at [1]–[2], [9], [28]–[30], per French CJ and Kiefel J, and at [77]–[81], per Hayne J

KNIGHT

[For 35 Halsbury’s Laws of England (4th Edn) (Reissue) para 967 see now 79 Halsbury’s Laws of England (5th Edn) (2014) para 865.]

Orders of knighthood

[For 35 Halsbury’s Laws of England (4th Edn) (Reissue) paras 968–969 see now 79 Halsbury’s Laws of England (5th Edn) (2014) paras 866–867.]

KNOCK-FOR-KNOCK

[Note that the passage from 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 726 is not reproduced in 60 Halsbury’s Laws of England (5th Edn) (2011).]

KNOW-HOW

[For the Income and Corporation Taxes Act 1988, s 533(7) see now the Income Tax (Trading and Other Income) Act 2005 s 583(4).]

KNOWING

New Zealand [Local Electoral Act 2001, s 134(1): offence of transmitting a return of electoral expenses, knowing it to be false in one or more material particulars.] '[37] Section 134(1) used the word "knowing". In order to have committed an offence under the section, it was necessary that, when the candidate transmitted the return of electoral expenses, he or she knew that it was false in a material particular.

'[38] In the criminal law generally, it is commonly accepted that there is more than one way in which a person can be said to "know" something.

'[39] First, knowledge can consist of actual knowledge or correct belief. ...

'[40] Secondly, knowledge can be attributed to a defendant where he or she is "wilfully blind". While a precise definition of wilful blindness remains elusive, it seems that in New Zealand, a defendant is wilfully blind if he or she deliberately chooses not to inquire whether something is true because he or she has no real doubt what the answer is going to be, or because he or she wants not to know. In such cases, the law can, in appropriate cases, presume knowledge on the part of the defendant.

...
'[44] Perhaps not surprisingly, there are no cases which have dealt with the meaning of the words "knowing [the return of electoral expenses] to be false" contained in s 134(1) of the Local Electoral Act.

'[45] Mr Jones submitted that the state of knowledge required by s 134(1) is actual knowledge. He referred to s 134(2) of the Act. As I have already noted, it provided that every candidate committed an offence who transmitted a return of electoral expenses that was false in any material particular, unless the candidate proved that he or she had no intention to

misstate or conceal the facts, and that he or she took all reasonable steps to ensure that the information was accurate. Mr Jones argued that this provision created an offence of strict liability, because no element of knowledge was required. He contrasted this provision with subs (1), which required knowledge of the falsity. He argued that it followed that actual knowledge of falsity was required under subs (1). He also relied on a judgment of Heath J in *Mortimer v Commissioner of Inland Revenue* [(2002) 20 NZTC 17-797].

'[46] I do not accept Mr Jones' submission ...

...
'[47] Underpinning the doctrine of wilful blindness is the principle that a defendant should not be able to shield himself or herself from criminal liability by deliberately remaining in ignorance. As Cooke P, for himself and for Richardson J, put it in *Millar v Ministry of Transport* [[1986] 1 NZLR 660, CA, at 669] the doctrine of wilful blindness carefully applied, should be "a major safeguard against spurious claims of lack of knowledge".

'[48] In my judgment, the knowledge required by use of the phrase "knowing [the return of electoral expenses] to be false" in s 134(1) of the Act embraced not only actual knowledge, but also wilful blindness in the sense I have discussed. It follows that the Crown had to prove beyond reasonable doubt either that Mr Banks actually knew or correctly believed the return of electoral expenses to be false, or that, having formed the view that the return was likely to be false, he deliberately refrained from making further inquiries because he knew what the answer was going to be, or because he wanted not to know.' *R v Banks* [Reasons for verdict] [2014] NZHC 1244, [2014] 3 NZLR 256 at [37]–[40], [44]–[48], per Wylie J

L

LACHES

[For 16(2) Halsbury's Laws of England (4th Edn) (Reissue) paras 910–911 see now 47 Halsbury's Laws of England (5th Edn) (2014) paras 253–254.]

LAMMAS LANDS

[For 6 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 417 see now 13 Halsbury's Laws of England (5th Edn) (2017) para 314.]

LAND

[For 39(2) Halsbury's Laws of England (4th Edn) (Reissue) paras 76–77 see now 87 Halsbury's Laws of England (5th Edn) (2017) paras 6–7.]

[Offences of aggravated trespass and failure to leave land after being directed to do so by a police officer under the Criminal Justice and Public Order Act 1994, ss 68, 69 (as amended by the Anti-social Behaviour Act 2003): whether 'land' includes buildings. Before amendment, s 68 referred to 'land in the open air'. '[11]... Sch[edule] 1 to the Interpretation Act 1978 defines "and" in any Act as including buildings and other structures unless the contrary intention appears (see s 5 of the 1978 Act).

'[14]... In my judgment, it is clear that "land" in s 68 of the 1994 Act (as amended) and therefore also in s 69 includes buildings. Considering s 68 in its amended version and without reference for the moment to its form before amendment, it is true that various adjoining sections in Pt V of the 1994 Act had references to what land does not include. These are self-contained definitions without a reference point to what land would comprise if the relevant element were not excluded. You start therefore with the definition in the 1978 Act which includes buildings. Section 68(5) excludes highways and roads, with reference to the exclusion in s 61(9)(b), but significantly this exclusion does not extend to s 61(9)(a), so that buildings are not excluded and this is a positive

indication that buildings are included, otherwise the reference would have dealt one way or another with s 61(9)(a). That, in my view, is the plain construction of s 68 in its amended form and the district judge was wrong if she somehow thought, as she may have done, that the reference to s 61(9)(b), somehow carried with it s 61(9)(a). The relevant words in s 61(9) are introduced by the words "in this section" and plainly therefore without more do not extend to other sections.

'[15] In its unamended form s 68 did not include buildings within the definition of "land" because of the inclusion of the phrase "in the open air". The purpose and effect of the amendment was, in my view, quite plainly to negative the exclusion of buildings. This is so, both because of the amendment itself and its plain purpose and because of the proper construction of the section in its amended form. It is, in my view, quite artificial to suggest that land had a limited meaning in the unamended section which somehow would carry through to the amended section unless some express further qualification were also introduced. That was unnecessary. All that was necessary was to construe the section in its amended form. The obvious intention of the amendment provides an additional reason for the construction which I have indicated. ...' *Director of Public Prosecutions v Chivers* [2010] EWHC 1814 (Admin), [2011] 1 All ER 367 at [11], [14]–[15], per Sir Anthony May P

In lease

[For 27(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 161 see now 62 Halsbury's Laws of England (5th Edn) (2016) para 154.]

In mining law

[For 31 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 19 see now 76 Halsbury's Laws of England (5th Edn) (2013) para 17.]

LANDED

[Fisheries Act 1981, s 4(3).] '[56] The issue of interpretation turns on the meaning to be attached to "landed in the United Kingdom" in s 4(3)(a) of the Fisheries Act 1981. Does this mean brought ashore for the first time in the United Kingdom (the narrow meaning), or does its meaning extend to embrace bringing onto the territory of the United Kingdom, whether

directly from the sea or indirectly after having been brought ashore in another country (the broad meaning)?

‘[57] The unusual feature is that for nearly 30 years everyone concerned has proceeded on the basis that the phrase should be given the broad meaning. Thus the levy has been imposed and paid not only on fish and fish products brought ashore for the first time in the United Kingdom, but fish and fish products imported into the United Kingdom from other countries. The funds raised by the levy have been disbursed in payment for schemes intended to benefit the sea fish industry, which includes those whose business involves importing sea fish or sea fish products from other countries. By the time that these proceedings were commenced some 75% of the levy income was derived from imports. If the decision of the Court of Appeal is correct, the activities of the authority must be drastically curtailed. Indeed, I would expect that the impact of potential claims for reimbursement of moneys wrongfully levied would render the authority insolvent.

‘[58] In circumstances such as these there must be, at the very least, a powerful presumption that the meaning that has customarily been given to the phrase in issue is the correct one. Carnwath LJ expressed one reason for this in *Isle of Anglesey CC v Welsh Ministers* [2009] EWCA Civ 94 at [43], [2009] 3 All ER 1110 at [43], [2010] QB 163:

“Where an Act has been interpreted in a particular way without dissent over a long period, those interested should be able to continue to order their affairs on that basis without risk of it being upset by a novel approach.”

‘[59] This has the air of pragmatism rather than principle, but courts are understandably reluctant to disturb a settled construction and the practice that has been based on that construction—see *Bennion on Statutory Interpretation* (5th edn, 2008) section 288, p 913 and the authorities there cited.

‘[60] A more principled justification for the principle is that of contemporaneous exposition. Thus in *Clyde Navigation Trustees v Laird & Sons* (1883) 8 App Cas 658 the issue was whether the Clyde Navigation Consolidation Act 1858 required dues to be paid on logs which were chained together and floated down the River Clyde. The evidence was that these dues had been levied and paid without protest for a quarter of a century. Lord Blackburn commented, at 670, that this raised a strong prima

facie ground for thinking that there must exist some legal ground for exacting the dues. Lord Watson, at 673, did not, however, agree with this approach.

‘[61] An important element in the construction of a provision in a statute is the context in which that provision was enacted. It is plain that those affected by the statute when it comes into force are better placed to appreciate that context than those subject to it 30 years later. The 1981 Act was introduced as a successor to legislation of similar character dating back to 1935. I would not readily have been persuaded that those who, when the 1981 Act came into force, charged and paid levies on imports of fish and fish products had misunderstood the effect of the Act.

‘[62] The Court of Appeal reached this conclusion, however, on the basis of a narrow textual analysis that was, in my view, flawed and which produced a number of anomalies.

‘[63] The textual analysis was flawed because it was dictated by the concept of landing a fish, which does indeed naturally suggest the bringing of the fish ashore for the first time. It did not, however, give proper weight to the fact that the landing referred to was not just of sea fish but of sea fish products. While these included “parts of sea fish” it was not suggested, nor sensibly could it have been, that sea fish products were confined to parts of sea fish. As soon as one applies the meaning of “landed in the United Kingdom” to “products” the natural conclusion is that these must include products produced from fish brought ashore in countries other than the United Kingdom, so that landed must bear the broader meaning.’ *Bloomsbury International Ltd v Sea Fish Industry Authority* [2011] UKSC 25, [2011] 4 All ER 721 at [56]–[63], per Lord Phillips P

LANDLORD

[Housing Act 2004, s 214(4): whether for the purposes of an order under a tenancy deposit scheme requiring the landlord to pay to the applicant a sum of money equal to three times the amount of the deposit, ‘landlord’ could include a letting agent. By s 212(9), in Ch 4 of the Act, ‘references to a landlord or landlords in relation to any shorthold tenancy or tenancies include references to a person or persons acting on his or their behalf in relation to the tenancy or tenancies ...’.] ‘[31] The argument for the defendant is that the definition in s 212(9) does not apply to s 214(4). The judge rejected that, saying that s 212(9) was clear in its terms and

applied to s 214(4). He noted that on the facts of this case it was agreed that it was the defendant, the letting agent, which received the payment of the deposit, and it was the defendant that failed to comply with the requirement of s 213(3). He also observed that if the argument of the defendant were correct, the result would be that the tenant would sue the actual landlord, who would then have to join the letting agent in the proceedings. The effect of s 219(9) is that the tenant can claim directly against the person responsible.

[32] For the defendant it is submitted that that cannot be the true construction of s 214(4). Mr Browne submits that in s 214(3)(a) the 2004 Act provides that the court may order “the person who appears to the court to be holding the deposit to repay it to the applicant”. He submits that that makes clear that the order may be made against a person other than the actual landlord. But that provision would be otiose, he submits, if the word landlord in s 214 included the letting agent, since the person holding the deposit would be “a person or persons acting on ... behalf [of the actual landlord] in relation to the tenancy”.

[33] Further, Mr Browne submits that if it were the intention of the legislature that an order under s 214(4) could be made against a letting agent as well as against an actual landlord, it is to be expected that there would appear in that subsection also the words “the person who appears to the court to be holding the deposit”.

[34] Further, Mr Browne submits that if the interpretation accepted by the judge is correct, then an order under s 214(4) may be made against an agent even if his only role was to advertise the property and to introduce the tenant, and the deposit was received by the actual landlord and not by the tenant. This would be manifestly unjust.

[35] Mr Browne submits that his suggested interpretation of s 214 is consistent with the general principle of statutory interpretation that the economic interests of a person should not be taken away except under clear authority of law (the presumption against doubtful penalisation). Mr Browne also refers to material in *Hansard* as an aid to construction.

[36] For the defendant Mr McNamara submits that s 212(9) is clear and unambiguous, as the judge held. In the present case the court is concerned with an agent who did in fact receive payment of the deposit.

[37] In my judgment the judge was clearly correct on this issue. The words of s 212(9) are clear and unambiguous, and there can be no

occasion to look at *Hansard* or to any other extraneous material to interpret s 214.

[38] In my view the words in s 214(3)(a) “the person who appears to the court to be holding the deposit” are not otiose. Rather, those words limit the scope of any possible order under s 214(3)(a) to the person holding the deposit, and prevent such an order being made against any other person who would come within the statutory definition of the landlord—or example a letting agent who, at the time of the making of the court order, was not holding the deposit.

[39] No such limitation would be appropriate in s 214(4). Unlike s 214(3), which is an order for restitution made against the holder of the deposit, s 214(4) is penal, as Mr Browne points out. There is no reason why the penalty should be imposed on the person who, at the time the court order is made, happens to be holding the deposit. The penalty should be imposed on a person who is responsible for the failure to comply with s 213. In the present case that is the defendant, and not the actual landlord (assuming, at this stage, that there has been a non-compliance which attracts an order under s 214(4)).

[40] I am not concerned with how the court would approach a case where the deposit was received by the actual landlord, and any non-compliance with s 213 was by the actual landlord, but proceedings were brought against the agent. It may well be that the court would then not make an order against the agent, possibly having regard either to the principle referred to by Mr Browne, or to art 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). But I make no decision about that.’ *Draycott v Hannells Letting Ltd (t/a Hannells Letting Agents)* [2010] EWHC 217 (QB), [2010] 3 All ER 411 at [31]–[40], per Tugendhat J

LAPSE

Of testamentary gift

[For 50 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 450 see now 102 Halsbury’s Laws of England (5th Edn) (2010) para 160.]

LAW APPLICABLE

[Proper law of tort. Parliament and Council Regulation (EC) 864/2007 on the law applicable

to non-contractual obligations (OJ 2007 L199, p 40) (Rome II), art 15.] '[32] The relevant provision. Article 15 of Rome II provides: "The law applicable to non-contractual obligations under this Regulation shall govern in particular: ... (c) ... the assessment of damage or the remedy claimed ..."' The parties disagree about what "law applicable" means in this context.

'[33] The rival contentions. The rival contentions are as follows.

(i) The claimant contends that in the phrase "law applicable" the word "law" should be construed narrowly. It means legal rules which dictate a result. Thus, in the context of art 15(c) of Rome II, the claimant contends that "law" has the following meaning: "fixed legal rules which dictate expressly the amount to be recovered".

(ii) The defendant contends that in the phrase "law applicable" the word "law" should be construed broadly. It includes practices, conventions and guidelines. Thus, in the context of art 15(c) of Rome II, the defendant contends that "law" includes "practices, conventions and guidelines regularly used by judges in assessing damages under their law".

'[34] My view. In my view the defendant's contention is correct. As Professor Dworkin has eloquently demonstrated, the law comprises both rules and principles. Principles do not dictate results, but they exert influence. The judge arrives at the result in any given case by applying the appropriate rules and taking into account those principles which bear upon the problem. See Ronald Dworkin *Taking Rights Seriously* (1977) (passim) and *Law's Empire* (1986) (Ch 7, 'Integrity in Law'). Whether one is talking about civil law or common law, it is unduly restrictive to confine the notion of "law" to black letter rules.' *Wall v Mutuelle de Poitiers Assurances* [2014] EWCA Civ 13,8 [2014] 3 All ER 340 at [32]–[34], per Jackson LJ

LAW MERCHANT

[For 12(1) Halsbury's Laws of England (4th Edn) (Reissue) para 662 see now 32 Halsbury's Laws of England (5th Edn) (2012) para 62.]

LAWFUL

Lawful activity

[Criminal Justice and Public Order Act 1994, s 68: offence of aggravated trespass committed

if a person trespasses on land and, in relation to any lawful activity which persons are there engaging in, does anything which is intended to have the effect of intimidating those persons so as to deter them from engaging in that activity, of obstructing that activity, or of disrupting that activity.] '[8] ... The live issue relates to the meaning of the expression "lawful activity" and in particular to when the commission of a criminal offence by the occupant whose activity is targeted by the trespasser has the effect of making unlawful the occupant's activity. The question certified by the Divisional Court was:

"Should the words, 'lawful activity', in s. 68 Criminal Justice and Public Order Act 1994 be limited to acts or events that are 'integral' to the activities at the premises in question?"

'[9] The meaning of the expression "lawful activity" in s 68(2) has received some previous attention from the courts. Three propositions were not in dispute in argument in the present case. (i) Section 68 is concerned only with a criminal offence against the law of England and Wales. The House of Lords so held in *R v Jones, Ayliffe v DPP, Swain v DPP* [2006] UKHL 16, [2006] 2 All ER 741, [2007] 1 AC 136. Thus a defendant trespassing at a military base was not entitled to assert that the ordinary activities of the base were unlawful because the United Kingdom government was, or might be, committing an act of international aggression in preparing to despatch military hardware to Iraq. (ii) In a prosecution under s 68 the Crown is not required to disprove the commission of every criminal offence which could conceivably be committed by the occupant(s) of the land. A specific offence or offences must be identified by the defendant and properly raised on the evidence. The Divisional Court so held in *Ayliffe v DPP, Swain v DPP, Percy v DPP* [2005] EWHC 684 (Admin), [2005] 3 All ER 330, [2006] QB 227: see particularly [50]. Thus a bare assertion by trespassers at military bases that the government may have aided and abetted a war crime did not raise the issue. (iii) Where, however, the issue of a relevant specific criminal offence by the occupant(s) of the land is fairly raised by evidence, the onus lies upon the Crown to disprove it to the criminal standard of proof, in order for it to prove, to that standard, that the defendant trespasser has committed the offence contrary to s 68. This follows from *Ayliffe v DPP* and from the language of the statute.

...

[13] The intention of the section is plainly to add the sanction of the criminal law to a trespass where, in addition to the defendant invading the property of someone else where he is not entitled to be, he there disrupts an activity which the occupant is entitled to pursue. Section 68(2) therefore must mean that the additional criminal sanction is removed when the activity which is disrupted is, in itself, unlawful, which may be either because the occupant is himself trespassing, or because his activity is criminal. Mr Southey's realistic concession is correct, for not every incidental or collateral criminal offence can properly be said to affect the lawfulness of the activity, nor to render it criminal. It will do so only when the criminal offence is integral to the core activity carried on. It will not do so when there is some incidental or collateral offence, which is remote from the activity. The decisions in *Hibberd v DPP* and *Nelder v DPP* are both consistent with this approach. The certified question ought thus to be answered, Yes.

[14] This was the general approach of the Divisional Court in this case, as the terms of the certified question show. However, as may occur in an *ex tempore* judgment, some of its language ranged more widely than required. To the extent that it spoke in para [29] of the defence being confined to the case where the activity is "patently unlawful", that latter expression needs to be understood to mean that the criminal offence must be integral to the core activity of the occupant and not collateral to or remote from it. It does not mean that the illegality must be so obvious as not to call for more than the barest inquiry. The Divisional Court was also concerned at the potential breadth of inquiry which might be required of the court of trial, usually the magistrates' court, especially where, as here, the defence raises potentially far-reaching questions concerning international political events. That found expression in para [27] as follows:

"... As Waller LJ said in *Ayliffe* ... it is enough for the prosecution to show that the activity in question is apparently lawful. If then the defendant seeks to raise an issue to the contrary within the s 68 proceedings he must ... do so by reference to facts or events inherent in the activity itself. He cannot rely on the assertion of extraneous facts whose effective investigation would travel into contexts and controversies which are markedly remote from what is actually being done by way of the activities in question."

[15] It is correct that s 68(2) does not arise in the case of an apparently lawful activity unless and until it is raised on the evidence (*Ayliffe v DPP*). It is also correct that a criminal offence, if raised on the evidence, will be relevant to s 68(2) only if it is integral to the core activity in question. But if it is, it may yet involve investigation of extraneous events. The Divisional Court expressly, and correctly, accepted at [30] that guilt of a war crime might in theory at least qualify. Other less grave alleged offending may also involve investigation of the assertion that it has occurred. It does sometimes fall to magistrates to examine matters of complexity and occasionally of international import; so long as the issue is not a non-justiciable one such as the nation's foreign policy as in *R v Jones*, there is no inhibition on their doing so and they will no doubt constitute themselves appropriately if necessary. Nor should the court of trial be inhibited from doing so, if the case requires it, by consideration of the fact that a finding may be made against the occupant of the land, such as the shopkeeper here, who is not a party to the trial. The only finding that might be made is that the Crown has not made out its case because there appears to have been an activity on the land which is not proved to have been lawful. That is not a conviction of the absent shopkeeper, nor in any sense a finding binding upon him. Decisions may sometimes have to be made in all manner of criminal proceedings which involve consideration of the actions of non-parties—an obvious case is where the defendant blames a third party for the offence.

[24] It follows that of the postulated offences all were either not demonstrated to have been committed by the occupants of the shop at the time of the defendants' trespass or were at most collateral to the core activity of selling rather than integral to that activity. The occupants of the shop were, accordingly, engaged in the lawful activity of retail selling at the time and s 68(2) provided no defence to the defendants. The certified question was as follows:

"Should the words, 'lawful activity', in s. 68 Criminal Justice and Public Order Act 1994 be limited to acts or events that are 'integral' to the activities at the premises in question?"

It should be answered, Yes. The appeal must in consequence be dismissed.' *Richardson v DPP* [2014] UKSC 8, [2014] 2 All ER 20 at [8]–[9],

[13]–[15], [24], per Lord Hughes SCJ

Lawful killing

‘[72] We conclude that the long held understanding, reflected in *R (on the application of Sharman) v Inner North London Coroner* [2005] 1 Inquest LR 77 and *R (on the application of Bennett) v Inner South London Coroner* [2007] EWCA Civ 617] and by the editor of *Jervis on Coroners*, that a conclusion of lawful killing is one which would amount to the crime of murder, manslaughter or infanticide but for the presence of an additional factor which justifies it, is correct. It signifies the jury’s conclusion not only that they are not sure that a homicide was committed but also a conclusion that it probably was not. It says nothing about civil liability.

‘[73] The argument advanced by Mr Straw on behalf of the claimant based upon art 2 of the ECHR is beguilingly simple. The presence of the words “for good reasons” in the definition of justifiable killing articulated by the Strasbourg Court in para 200 of *McCann v UK* (1996) 21 EHRR 97], is to be taken to have stated authoritatively that the first limb of its test contains an objective element identical to that in the civil law test in England and Wales. Therefore, for an inquest positively to assert that a killing was lawful it must apply that formulation to its reasoning in order to satisfy the art 2 procedural obligation.

‘[74] Mr Straw draws support for that approach from the report of the Joint Committee on Human Rights, *Legislative Scrutiny* (15th Report, Session 2007–2008) which advances this interpretation of art 2.

‘[75] With respect to the Strasbourg Court, we do not find it easy to state with certainty what precisely was meant by the term “based on an honest belief which is perceived, for good reasons, to be valid at the time”. We note that the formulation is repeated in some of the cases without a comma either side of the words “for good reasons” which would provide additional fertile ground for debate. In *McCann* it appears that the test articulated for art 2 was thought to be consistent with the English criminal law of self-defence albeit that it followed a summary of English law which was not entirely accurate. We have noted that the decision of the Court of Appeal in *R v Williams* [(1983) [1987] 3 All ER 411, CA] was cited along with the decision of the Court of Appeal in Northern Ireland in *R v Thain* [1985] NI 457, NI CA] where both made clear that the reasonableness of the belief went to the question whether it was held at all. In a

short dissenting opinion, but not concerning the appropriate test, Judge Rysdøl and others agreed with the conclusion in para 200 but spoke only of the soldiers’ honest belief. We have further noted the absence of any ruling on this matter from Strasbourg and also the reality that, in discussing potential breaches of art 2, the focus has been on whether the state actor responsible for a death honestly believed that he faced a threat which called for the use of lethal force.

‘[76] Discussion of this issue has tended to focus on the dichotomy familiar to lawyers between objective and subjective standards. Academics tend to dislike the dichotomy because many think it is false and that it fails to reflect the subtlety of decision making. The reality, as Lord Lane’s observations illuminate, is that even when the test is subjective, elements of objectivity are bound to intrude in the mind of anyone evaluating the evidence. That would be on the basis that if, objectively, a state of mind is unreasonable, the fact finder is less likely to find, subjectively, that it existed: this does not, however, alter the fact that ultimately the test is subjective and relies only on honest belief.

‘[77] Looking at *McCann* alone, which followed verdicts of lawful killing at an inquest, there is some ambiguity in the language used by the Strasbourg Court which is amplified by the inaccurate statement of the law in England and Wales. However, it is significant that in *Bennett v UK* (2011) 52 EHRR SE7], also involving a conclusion of lawful killing, the Strasbourg Court accurately set out the criminal law of self-defence without any sign of a suggestion that it was an inappropriate test to be applied in art 2 cases, whether in the context of unlawful or lawful killing.

‘[78] Resting first on the language used in the cases, we are not persuaded that the Strasbourg Court would hold that the test for art 2 purposes is, for practical purposes, the same as the English civil law test. However, even if it were there are three further reasons why we reject this part of the claimant’s submissions.

‘[79] First, as the Strasbourg Court made plain in *McCann*, the Convention does not oblige states to incorporate its provisions into national law. Neither is it appropriate to examine provisions of national law in abstract for compatibility (para 153). Even were there to be a difference, in practical terms we do not believe that the Strasbourg Court would conclude that difference was sufficient to give rise to a violation of the substantive obligation

in art 2(1). The two tests bear many similarities and only in relatively rare circumstances would the distinction lead to different outcomes.

‘[80] Secondly, one of the central purposes of the procedural obligation under art 2 is to explore the circumstances with a view to identifying and enabling the punishment of those criminally responsible. The claimant does not suggest any failure in that central purpose of this art 2 inquest. No point is taken about the way in which unlawful killing was left to the jury, or their entitlement to reject it as a conclusion. Indeed, on behalf of the claimant it has repeatedly been emphasised that this case is about lawful killing, and not unlawful killing. Had the jury concluded that Mr Duggan’s death was the result of unlawful killing, in accordance with well-established rules of domestic law, the DPP would have been required to consider the question of prosecution. The feature which led the Strasbourg Court to find a violation of the procedural obligation in *Jordan v UK* (2001) 11 BHRC 1, ECt HR] is absent.

‘[81] Thirdly, in addition to the formal conclusion reached by the jury, they answered questions. The questions relating to background knowledge, intelligence and choice of location for stopping the minicab were directed to a discrete feature of the jurisprudence on art 2, namely the quality of planning and information underpinning an operation by the police or military. It was in respect of planning that a violation of art 2 was found in *McCann*. The procedural obligation requires an exploration of these matters. The inquest and the jury’s conclusions on these matters satisfied that aspect of the procedural obligation. The principal issues in dispute at the inquest were whether Mr Duggan had a gun in the minicab; if he did how it came to be on the grass nearby; and whether he had it in his hand when he was shot by V53. The jury provided answers on all those issues.

‘[82] In considering a complaint that there has been a violation of the procedural obligation under art 2 (as indeed any violation of the ECHR), the Strasbourg Court is concerned with the overall circumstances of a case and does not proceed in a technical or mechanistic way. The overarching question would be whether the investigation was Convention compliant. Our conclusion is that there is nothing in the complaint relating to the definition of lawful killing which could lead to the conclusion that the procedural obligation under art 2 was violated. We would add that even were there a deficit in this regard it could be cured without interfering with the well-established meaning of

a conclusion of lawful killing. The gap could be filled by asking an additional question directed towards the reasonableness of the honest belief which, on this hypothesis, the officer held.’ *R (on the application of Duggan) v HM Assistant Deputy Coroner for the Northern District of Greater London* [2014] EWHC 3343 (Admin), [2015] 3 All ER 237, DC, at [72]–[82], per Sir Brian Leveson P

Lawful residence

‘[63] The second issue relates to the ability of a failed asylum seeker to bring himself within [the National Health Service (Charges to Overseas Visitors) Regulations 1989, SI 1989/306,] reg 4(1)(b) as someone who has *lawfully resided* in the United Kingdom for a period of not less than one year immediately preceding the time when the health services are provided for him. What constitutes lawful residence?

‘[64] We are bound by *Szoma*’s case [*Szoma v Secretary of State for the Dept of Work and Pensions* [2005] UKHL 64, [2006] 1 All ER 1, [2006] 1 AC 5641] to accept that a person temporarily admitted under the written authority of an immigration officer pursuant to para 21 [of Sch 2 to the Immigration Act 1971] is lawfully present in the United Kingdom, at least for the purposes of enjoying the benefits provided by the European Convention on Social and Medical Assistance (ECSMA). Being present pursuant to the written authority of an immigration authority, it was “small wonder” that he should be treated as “lawfully present”: see para [14] of Lord Brown’s speech ... I respectfully agree with that but also, however, with Lloyd LJ’s view that there is a distinction between those who may be lawfully present in this country and those who have a right to reside here. As he pointed out in *Abdirahman*’s case ... the right to reside is conferred upon a limited number of people.

‘[65] [Counsel for the Secretary of State] is correct to submit that the concepts of lawful presence and lawful residence should not be elided and that is the error made by [counsel for YA]. One resides here lawfully when one has the right to do so. An indulgence is granted to a claimant for asylum, not a right, and in this context the word “lawful” means more than merely not unlawful but should be understood to connote the requirement of a positive legal underpinning. Being here by grace and favour does not create that necessary foundation. The underlying purpose of the Act as I have already analysed it reinforces that conclusion. “Lawful”

in this context means having leave to enter. It follows that I do not regard *Szoma's* case and *Ex p Shah* [[1983] 1 All ER 226, [1983] 2 AC 309] to be in conflict: they deal with quite different concepts.' *R (on the application of YA) v Secretary of State for Health* [2009] EWCA Civ 225, [2010] 1 All ER 87 at [63]–[65], per Ward LJ

[European Parliament and Council Directive (EC) 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states.] '[31] The contending arguments fall within a very short compass. It is conceded that the period actually spent in prison (which would of course typically be shorter than the actual sentence of imprisonment) would not count when determining whether the appellant had "resided legally" for the continuous period of five years necessary to constitute permanent residence within the meaning of art 16. Mr Bedford, counsel for the appellant, accepts that in order to be someone who had "resided legally", the residence must be—to use the concept employed in recital 23—for the purposes of availing themselves of the rights and freedoms conferred by the EC Treaty. ...' *HR (Portugal) v Secretary of State for the Home Department* [2009] EWCA Civ 371, [2010] 1 All ER 144 at [31], per Elias LJ

Lawfully in their territory

[United Nations Convention relating to the Status of Refugees 1951, art 32: contracting states not to expel a refugee 'lawfully in their territory' except on grounds of national security or public order.] '[24] The dispute between the parties is as to whether the appellant is entitled to the protection of art 32 of the convention, which precludes the contracting states from expelling a refugee who is "lawfully in their territory" save on grounds of national security or public order. At first sight the question at issue is a relatively narrow one, directed to the meaning of the phrase "lawfully in their territory". ...

...
[35] There is, of course, no question of the appellant being expelled from the United Kingdom while the processes of appeal that are afforded by the 2002 Act [Nationality, Immigration and Asylum Act 2002] remain open to her and have not been brought to an end. It might be thought, in these circumstances, that the Secretary of State could have no objection to it being held that, because she has been granted temporary admission pending her examination

or removal, the appellant was lawfully in the territory within the meaning of art 32(1) so long as it was clear that she will cease to be lawfully present once her temporary admission comes to an end. Mr Drabble made it clear that he would be content with that interpretation, subject to the qualification that the protection of art 32 would remain available after the removal of her temporary admission to prevent her being removed to a country which could not provide the full panoply of rights to which a refugee was entitled under the convention. But, as Miss Giovannetti explained, there is no basis in domestic law for holding that the appellant is entitled to be present in this country. To give her the protection of art 32 at this stage would have far-reaching consequences. As Nehemiah Robinson explained in his Commentary (p 157):

"The prohibition of the expulsion of refugees lawfully in the country means in substance that, once a refugee has been admitted or legalized, he is entitled to stay there indefinitely and can forfeit this right only by becoming a national security risk or by disturbing public order and having these grounds established in accordance with the procedure prescribed in para 2."

So one should be cautious about saying that, just because in practice the appellant is not at risk of removal for the time being, she is here "lawfully" within the meaning of that article.

[36] Furthermore, the proper interpretation of the word "lawfully" is of wider significance. This can be seen from the use of the same phrase "lawfully in their territory" in arts 18 and 26. A refugee who is lawfully present in the territory of a contracting state is entitled to the same treatment as regards self-employment as is accorded to aliens generally who are in the same circumstances: art 18. He must also be accorded the right to choose his place of residence and to move freely within the territory, subject to any regulations that are applicable to aliens generally in the same circumstances: art 26. The notifications that have been issued to the appellant from time to time, which require her to reside at an address notified to her by an immigration officer, to report to an immigration official every two months and not to work or engage in any business unless she has explicitly been granted permission to do so, make it plain that she is not being accorded the rights referred to in these articles. They are rights the granting of which a sovereign state could be expected to reserve to itself, in just the same way as it would wish to reserve to itself the decision as to

whether a refugee should be granted permission to enter in its territory.

[37] The fact that Mr Drabble's interpretation of the word "lawfully" in art 32 would apply to these articles too, so that the appellant could not be denied the rights that they afford to refugees lawfully in the territory, is a further indication that much caution is needed before that conclusion is drawn. It seems unlikely that the contracting states would have agreed to grant to refugees the freedom to choose their place of residence and to move freely within their territory before they themselves had decided, according to their own domestic laws, whether or not to admit them to the territory in the first place.

[40] For these reasons I would hold, provisionally, that the word "lawfully" in art 32(1) must be taken to refer to what is to be treated as lawful according to the domestic laws of the contracting state.

[49] ... I am not persuaded that there are sound grounds for departing from my provisional view that the word "lawfully" in art 32(1) must be taken to refer to what is to be treated as lawful according to the domestic laws of the contracting state. I think, in agreement with the Court of Appeal and with Lord Dyson, that this is what the framers of the convention intended by the use of this word in this context. ... *R (on the application of ST (Eritrea)) v Secretary of State for the Home Department* [2012] UKSC 12, [2012] 3 All ER 1037 at [24], [35]–[37], [40], [49], per Lord Hope DP

Lawfully used or occupied

Australia [Aboriginal Land Rights Act 1983 (NSW), s 36(1): exclusions from the definition of 'claimable Crown lands'.] '[12] The focus of this appeal is upon s 36(1)(b), which, in effect, excludes land which is lawfully used or occupied. It will be recalled that this was the reason given for the refusal of the NSW ALC's claim. The issue subsequently narrowed to one as to whether the claimed land was "lawfully occupied" at the date of the claim.

[14] It was not necessary in *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* [(2008) 237 CLR 285; 249 ALR 602; [2008] HCA 48] to decide whether "lawfully used or occupied" is a composite expression or is better understood by separate consideration of the words

"used" and "occupied". The latter understanding is correct. The two terms refer to different concepts and a natural reading of the phrase is that either a lawful use or a lawful occupation of the land will defeat a claim.' *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50, (2016) 339 ALR 367 at [12], [14], per French CJ, Kiefel, Bell and Keane JJ

LAY DAYS

[For 43(2) Halsbury's Laws of England (4th Edn) (Reissue) para 1503 see now 7 Halsbury's Laws of England (5th Edn) (2015) para 285.]

LEARNING DISABILITY

'Learning disability' means a state of arrested or incomplete development of the mind which includes significant impairment of intelligence and social functioning. (Mental Health Act 1983, s 1(4) (added by the Mental Health Act 2007, s 2(3), as from 3 November 2008))

LEASE

[For 27(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 73 see now 62 Halsbury's Laws of England (5th Edn) (2016) para 67.]

'At common law a lease is a contract between landlord and tenant which, if the landlord himself has or acquires an estate in the land, vests a leasehold estate in the tenant. The lease will ordinarily contain covenants to be performed by the tenant during the term of the lease and (in the absence of express contrary provision) these covenants mean what they say.' *Scottish & Newcastle plc v Raguz* [2008] UKHL 65, [2009] 1 All ER 763 at [1], per Lord Hoffmann

Agreement for lease

[For 27(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) paras 75, 82 see now 62 Halsbury's Laws of England (5th Edn) (2016) paras 69, 76.]

Mining lease

[For 31 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 321 see now 76 Halsbury's Laws of England (5th Edn) (2013) para 321.]

LEGACY

[For 17(2) Halsbury's Laws of England (4th Edn) (Reissue) paras 472–474 see now 102 Halsbury's Laws of England (5th Edn) (2010) paras 118–120.]

Demonstrative legacy

[For 17(2) Halsbury's Laws of England (4th Edn) (Reissue) para 474 see now 102 Halsbury's Laws of England (5th Edn) (2010) para 120.]

Specific legacy

[For 17(2) Halsbury's Laws of England (4th Edn) (Reissue) paras 472–474 see now 102 Halsbury's Laws of England (5th Edn) (2010) para 118.]

LEGAL PROCESS

[Insolvency Act 1986 Sch B1 para 43(6).] '[1] This appeal raises a point of construction of the provisions for a moratorium in connection with the administration of a company. Paragraph 43(6) of Sch B1 to the Insolvency Act 1986 provides that:

“No legal process (including legal proceedings, execution, distress and diligence) may be instituted or continued against the company or property of the company except—

- (a) with the consent of the administrator, or
- (b) with the permission of the court.”

This provision applies both from the time that a company enters administration and, by virtue of para 44(4), from the time that a company or its directors file with the court a copy of notice of intention to appoint an administrator. The issue concerns the meaning in this context of the expression “legal process (including legal proceedings ...) ... against the company” and whether it applies to an application by an interested non-party to be joined as a defendant to proceedings commenced by the company before the moratorium and to an appeal from a refusal of such an application.

...
 '[15] The moratorium under para 43(6) applies to any “legal process (including legal proceedings, execution, distress and diligence)”. The words in parenthesis show the breadth of the expression “legal process” in this provision.

Nonetheless, it seems to me clear that, if the application by Mr Cook to be joined in the proceedings and his appeal against the refusal of that application fall within the terms of para 43(6), it is because they are “legal proceedings”. They do not constitute some other form of “legal process”.

'[16] The essential feature of legal proceedings falling within the moratorium is that they must be “against the company”. A claimant who wishes to commence proceedings against a company in administration, or to continue proceedings against a company which has gone into administration since the commencement of the proceedings, must obtain the consent of the administrator or the permission of the court. No such consent or permission is required in the case of proceedings brought by a company which is in administration or which goes into administration after the commencement of the proceedings.

'[17] It follows, as a matter of basic fairness, that defendants to proceedings where the claimant is a company in administration should be able to defend themselves without restriction. This causes no difficulty in taking steps such as serving a defence or witness statements or participating in a trial. However, an issue could be said to arise where defence takes the form of an active step against the claimant company. It is established that essentially defensive steps are not within the statutory moratorium.

...
 '[24] The distinction between legal proceedings against a company and essentially defensive steps is illustrated by the approach taken by the courts to the application of moratorium provisions to counterclaims. If a counterclaim is pleaded solely to raise a defence by way of set off, it is a defensive measure and no permission of the court is required. If, on the other hand, the counterclaim seeks a net payment from the claimant to the defendant, it does constitute a legal proceeding against the company for which the permission of the court is required. See *Langley Constructions (Brixham) Ltd v Wells, Wells Estates (Dartford) Ltd v Wells* [1969] 2 All ER 46, [1969] 1 WLR 503, CA.

'[25] Even accepting that defensive steps may not constitute proceedings against the company for the purposes of the moratorium applicable in a compulsory liquidation, Ms Agnello submitted that this should not follow in the case of an administration where, as earlier discussed, the purposes of the moratorium were somewhat different. In my judgment, the broader purposes to be served by a moratorium in an administration do not, either

as a matter of the language of the provision or as a matter of principle, justify a different approach to defensive proceedings. As to language, there is no essential difference between s 130(2) (“no action or proceeding shall be proceeded with or commenced against the company or its property”) and para 43(6) (“No legal process (including legal proceedings ...) may be instituted or continued against the company or property of the company”). If Parliament had intended that the latter moratorium should apply to defensive proceedings, it is hardly likely that, in the light of the earlier authorities regarding a company in liquidation, it would have used substantially the same language without qualification. As to principle, while it is certainly true that dealing with defensive steps will engage the time of the administrator and result in costs, those considerations do not obviously justify putting a party at a disadvantage in the defence of claims made against it.’ *Cook v Mortgage Debenture Ltd* [2016] EWCA Civ 103, [2016] 3 All ER 975 at [1], [15]–[17], [24]–[25], per David Richards LJ

LEGAL RIGHT

Canada [Defence of provocation under the Criminal Code, RSC 1985, c C-46, s 232. By s 232(3), ‘no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do.’] ‘27. It is well established that the phrase “legal right” does not include all conduct not specifically prohibited by law. For example, the fact that a person may not be subject to legal liability for an insult directed at the accused does not mean that he or she has the “legal right” to make the insult within the meaning of s 232(3) and that provocation is not open to the accused. To require that an insult be specifically prohibited by law would effectively render the word “insult” under s 232(2) redundant, as any such “insult” would necessarily be a “wrongful act”. The phrase “legal right” has been defined, rather, as meaning a right which is sanctioned by law, such as a sheriff proceeding to execute a legal warrant, or a person acting in justified self-defence (*Thibert* [R v *Thibert*, [1996] 1 SCR 37], at para 29, citing *R v Haight* (1976), 30 CCC (2d) 168 (Ont CA), at p 175, and *R v Galgay*, [1972] 2 OR 630 (CA), at p 649). Interpreted in this manner, the notion of legal right serves to carve out from the ambit of s 232 legally sanctioned conduct which otherwise could amount, in fact, to an “insult”.

‘28. There has been academic criticism of this approach. Professor Roach argues, for example, that the concept of legal right could be rethought in the context of domestic violence. He writes: “It could be argued that people have a legal right to leave relationships and even to make disparaging comments about ex-partners. The Court’s continued refusal to recognize this broader interpretation of a legal right could deny women the equal protection and benefit of the law” ([Roach, Kent. *Criminal Law*, 4th edn, Toronto: Irwin Law, 2009] p 359).

‘29. In my view, these concerns, while legitimate, are better addressed at the stage when the gravity of the “insult” is objectively measured as against the ordinary person standard. In other words, while one spouse undoubtedly has a legal right to leave his or her partner, in some circumstances the means by which that spouse communicates this decision may amount *in fact* to an “insult”, within the ordinary meaning of the word. However, to be recognized *at law*, the insult must be of sufficient gravity to cause a loss of self-control, as objectively determined. The fact that the victim has the “legal right”, in the broad sense of the term, to leave the relationship is an important consideration in the assessment of this objective standard.’ *R v Tran* 2010 SCC 50, [2011] 3 SCR 350 at paras 27–29, per Charron J

LEGAL RIGHTS

Canada [1867 Address to Queen concerning Rupert’s Land and North-Western Territory; Rupert’s Land and North-Western Territory Order (1870) (UK) (reprinted in RSC 1985, App II, No 9), Schs A, B. Whether ‘legal rights’ included a right to legislative bilingualism.] ‘28. The appellants’ main argument is that the right to legislative bilingualism was entrenched by the *1870 Order* in which the Canadian Parliament assured the Queen that Canada would respect the “legal rights” of the population of Rupert’s Land and the North-Western Territory upon transfer to Canada. This assurance is found in the *1867 Address*, which is attached as a schedule to the *1870 Order*. The relevant passage reads as follows:

That in the event of your Majesty’s Government agreeing to transfer to Canada the jurisdiction and control over the said region, the Government and Parliament of Canada will be ready to provide that the legal rights of any corporation, company, or individual within the same shall be

respected, and placed under the protection of Courts of competent jurisdiction. [Emphasis added.]

'29. In this Court, the appellants rely in particular on the French version of the 1867 *Address*, in which "legal rights" is translated as "*droits acquis*" / "*droits légaux*".

'30. The appellants argue that in the context of the unrest in the Red River Settlement, the Lists of Rights, and the negotiations with the inhabitants of the territories, the promise to respect "legal rights" or "*droits acquis*" / "*droits légaux*" constitutionalized an historic compromise to protect legislative bilingualism in the entirety of the territories transferred to Canada in 1870 — which includes the modern-day province of Alberta. According to the appellants, this constitutional guarantee prevents the Province from legislating in a manner that would undermine legislative bilingualism, an area otherwise within its exclusive competence.

...
'39. For many reasons, we reject the appellants' submission that the guarantee of legal rights in the 1867 *Address* created a constitutional right to legislative bilingualism.

'40. As our brief historical overview shows, linguistic rights have always been dealt with expressly from the beginning of our constitutional history. Language rights were dealt with explicitly in s 133 of the *Constitution Act, 1867* and in the *Manitoba Act, 1870* in very similar and very clear terms. The total absence of similar wording in the contemporaneous 1870 *Order* counts heavily against the appellants' contention that the terms "legal rights" or "*droits acquis*" / "*droits légaux*" in the 1867 *Address* (attached to that order) should be understood to include language rights.

'41. The year 1867 saw both the Confederation of Canada and the adoption by Parliament of the 1867 *Address*. As our colleagues note, the negotiations surrounding Confederation turned in no small part on the issue of language rights. When these rights were addressed in the *Constitution Act, 1867*, they were addressed explicitly, not by means of implied inclusion in a general term such as "legal rights".

'42. Subsequently, the *Manitoba Act, 1870* and the 1870 *Order* formed a comprehensive political arrangement regarding annexation. Section 23 of the *Manitoba Act, 1870* expressly provided for legislative bilingualism in terms very similar to those found in s 133 of the *Constitution Act, 1867* ...

...
'48. In sum, contemporaneous guarantees of

language rights were explicit and clear: legislative bilingualism was provided for expressly in the *Constitution Act, 1867* and the *Manitoba Act, 1870*. And, as we shall see, the subject of legislative bilingualism was addressed — explicitly — in the amendments to *The North-West Territories Act* in 1877 and 1891 (*The North-West Territories Act, 1877*, SC 1877, c 7; *An Act to amend the Acts respecting the North-West Territories*, SC 1891, c 22). Never in Canada's constitutional history have the words "legal rights" been understood to confer linguistic rights. These facts considerably undermine the appellants' position.

'49. But it is not just the documents themselves that belie the appellants' claim. The context surrounding the creation of these documents further illuminates the point that "legal rights" are and always have been distinct from language rights. ...

...
'103. ... Absent some entrenched guarantee, a province has the authority to decide the language or languages to be used in its legislative process. Clearly, a province may choose to enact its laws and regulations in French and English. But we cannot simply infer a guarantee of legislative bilingualism that would override this exclusive provincial jurisdiction absent clear textual and contextual evidence to support an entrenched right. It has never been the case in our constitutional history that a right to legislative bilingualism was constitutionalized by inference through the vehicle of the words "legal rights". The words in the 1867 *Address* cannot support a constitutional guarantee of legislative bilingualism in the province of Alberta. Parliament knew how to entrench language rights and did so in the *Manitoba Act, 1870* but not in the 1867 *Address*.
Caron v Alberta [2015] SCJ No 56, [2015] 3 SCR 511 at paras 28–30, 39–42, 48–49, 103, per Cromwell and Karakatsanis JJ

LESSOR

New Zealand [Property Law Act 2007, ss 268, 269.] '[1] The question arising for determination before trial is whether relevant provisions of the Property Law Act 2007 (the PLA) or a deed of lease prevent a lessor from recovering damages from the lessee's employees for loss caused by a fire at the leased premises.

...
[22] While the PLA defines the "lessee" as a "person" who enters into a lease, the statutory interpretation of a person as *including* a

corporation sole does not exclude its extension to an employee. In other words, when adopting a purposive approach, an inclusive definition is not necessarily exclusive. In this context where the two employees were (1) acting in the course of their employment when causing the damage and (2) performing an activity for their employer's benefit, the word "lessee" must be construed where it appears in s 269 to include the lessee's employees. It is appropriate to adopt a construction which identifies the lessee's employees with the lessee for the purposes of s 269.

'[23] Any other construction would lead to a commercial injustice, if not nonsense, and frustrate the Law Commission's intention. Exclusion of a company's employees from the benefit of protection expressly created by Parliament for the employer would negate the underlying remedial purpose of ending unproductive litigation between insurers.

'[24] Alternatively, if that approach is held to be wrong in principle, I would reach the same result by concluding that the legislature's omission of "the lessee's employees" from statutory exoneration from liability was inadvertent. This case would fall within the extreme category where it is necessary to read qualifying words into the statute in order to avoid absurdity or unworkability or frustration of Parliament's purpose. In my judgment the three criteria identified by Lord Diplock in *Wentworth Securities Ltd v Jones* [1980] AC 74 at 105 are satisfied, namely that:

"First, [that it is] possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, [that it is] apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly, it [is] possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission before the Bill passed into law."

'[25] A similar approach has been adopted in New Zealand: see *R v Wall* [1983] NZLR 238 (CA) at 240; *R v Salmond* [1992] 3 NZLR 8 (CA) per Cooke P at 13 as follows:

"In many cases this Court has emphasised the importance of a practical and realistic

interpretation of Acts of Parliament. In cases of ambiguity or hiatus they should be interpreted so as to be made to work. Gaps may be filled to cover problems not foreseen when the legislation was enacted, provided that the policy-making function is not usurped by the Courts. This approach was adopted, for example, in *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530 and cases there mentioned. ... It is parallel to the approach that in dealing with new problems the common law should have regard to well-established parliamentary policy, as to which to avoid repetition I do no more than refer to *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282."

'[26] There may be shades of difference between these approaches. *Wentworth Securities* may be seen as authority for reading words into a statute, whereas *Salmond* and *Northland Milk Vendors* may be viewed as gap-filling, and giving a word or phrase a wider or more purposive meaning than might appear immediately obvious: see JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, Lexis-Nexis, Wellington, 2009) at 308–311.

'[27] While I am satisfied that adopting either approach justifies the same result, on balance, the former is, I think, appropriate. It is simply a matter of reading into s 269(3)(i) the words "or its employees" after the word "lessee", so that the lessor is prohibited from requiring either party to pay compensation for loss or damage caused to the premises by either party. This limitation pre-empts Mr Langstone's argument that it would be contrary to the legislative intention to exempt from the ambit of liability entities such as independent contractors or subcontractors. On the more limited approach which I favour it is unnecessary to speculate upon whether the omission of the wider phrase "lessee's agent" from s 269 is deliberate or inadvertent.

'[28] In these circumstances I am satisfied that the relevant provisions of the PLA prevent OJVP from recovering damages from GTR's employees for loss caused by a fire at the leased premises.' *Sheehan v Watson* [2010] 2 NZLR 419 at [1], [22]–[28], per Harrison J

LETTER OF CREDIT

[For 3(1) Halsbury's Laws of England (4th Edn) (2005 Reissue) para 131 see now 48 Halsbury's

Laws of England (5th Edn) (2015) para 242.]

LEVY

Levy distress

[The common law right to distrain for arrears of rent was abolished as from 6 April 2014: see the Tribunals, Courts and Enforcement Act 2007, s 71; Tribunals, Courts and Enforcement Act 2007 (Commencement No 11) Order 2014, SI 2017/768. See 62 Halsbury's Laws of England (5th Edn) (2016) para 282.]

Levy war

[For 11(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 363n see now 25 Halsbury's Laws of England (5th Edn) (2016) para 419n.]

LIABLE AS SUCH

New Zealand [Statutory exemption in the Carriage of Goods Act 1979, s 6, which provides that 'Notwithstanding any rule of law to the contrary, no carrier shall be liable as such, whether in tort or otherwise, and whether personally or vicariously, for the loss of or damage to any goods carried by him except – (a) in accordance with the terms of the contract of carriage and the provisions of this Act; or (b) where he intentionally causes the loss or damage'.] [20] The phrase "liable as such" appears in the critically important s 6. Allan J considered that those words mean that a carrier will be within the scope of s 6 if, at the time of the damage, it is acting in its capacity as a carrier. In the present case Allan J reasoned that since POAL [Ports of Auckland Ltd] was providing stevedoring and wharfinger services when the collision occurred, it was within the Act's definition of "carrier".

[21] During the course of the hearing, Mr Carruthers QC acknowledged that, whatever the scope of the Act's limited liability regime, there had to be at least a sensible connection between the cause of the damage and the particular physical carriage of the goods in question. He submitted that the present case clearly met this "connectedness" test, but he did not elaborate in detail the principle to be applied in determining the bounds of the Act's application.

[26] The central point which requires clarification is the meaning of, and relationship

between, the material definitions in s 2 of the Act, namely "carrier", "actual carrier" and "contracting carrier", and the circumstances in which a "carrier" will be "liable as such" under the Act.

[27] In essence Southpac seeks to hold POAL vicariously liable for the negligence of its employee involved in an unrelated activity not as a carrier of the truck. The facts of this case are complicated by the fact that POAL was contractually connected to the Wallace stevedore, who was in possession of the truck at the time of the collision.

[28] We hold, however, that the sphere of POAL's role as a "carrier" of Southpac's truck was bounded by its contractual relationship with the actual carrier, Wallace. To the extent that it is the fork hoist driver's negligence, and not any action of the Wallace driver, that founds Southpac's cause of action, POAL is not in fact being held liable as a carrier. POAL cannot claim the Act's protection because the kind of liability for which it is being sued is not the kind of liability contemplated by the Act. However, we consider in addition that POAL was not acting as a carrier "as such" when the collision occurred and therefore that it cannot be limited in its liability "as such". We discuss this next.

[29] We accept Mr Carruthers' submission that POAL was at the time of the collision a "carrier", because it procured the performance of an incidental service (the stevedoring of the truck) by its sub-subcontractor, Wallace. In this context, we are satisfied that procurement extends to a sub-subcontractual relationship. Indirect procurement of services is commonplace in contracts of carriage, and must therefore be sufficient for the purpose of the Act.

[30] As well as the bare definition of "carrier", the Act provides for two particular classes of "carrier": "actual carriers" and "contracting carriers". Actual carriers are those that are in possession of the goods for the purpose of performing a stage of their carriage, or an incidental service. A contracting carrier is one that has entered into a contract with a contracting party (the consignor or consignee of the goods).

[31] Allan J held that POAL was within the ss 6 and 16 regime because at the time the damage occurred POAL was a carrier by virtue of its sub-subcontractual relationship with the actual carrier, Wallace. On this analysis, POAL's contractual link to the truck's actual carriage made it a carrier, which for Allan J meant that its liability "as such" was limited under s 6.

[32] The problem with this interpretation is that if POAL's liability is limited under s 6 by virtue only of its being a carrier, then there is no meaning for the phrase "no carrier shall be *liable as such*" in the section (emphasis added). If all carriers are within the limited liability regime, the Act would simply provide that "no carrier shall be liable". The Act, read as a whole, provides that carriers are "liable as such" only when they are actual or contracting carriers, not when they are mere carriers without more.

[33] POAL was not in a contractual relationship with Kenworth (the contracting party), and was not therefore a contracting carrier. Nor do we accept Mr Carruthers' submission that POAL was an actual carrier of the truck at the time of the damage. We agree with Ms McLaren that actual carriage requires physical possession and that the Act envisages that only one carrier can be in possession of goods at any one time.

[34] Section 10, for example, provides that contracting carriers that are sued for damage to goods may seek reimbursement from any of the actual carriers involved in any stage of the goods' carriage. If actual carriage did not require physical possession, then there would be no distinction between a person who physically carried goods and one who procured their carriage. The impact of that in the present case would be that CP Ships, POAL, Southern Cross and Wallace would all have been actual carriers of Southpac's truck when the accident happened.

[35] In our view, the s 10 regime supports the contention that only one party can be an actual carrier of goods at any one time. The use of the terms "[e]ach actual carrier" (subs (3)(b)), "[actual carrier] is separately responsible for the goods" (subs (3)(b) and (4)) and "last actual carrier" (subs (6)(b)) indicate that the status of actual carrier passes from one party to another. Under subs (6), this occurs when the goods "are accepted by [the carrier concerned] for carriage" until they "are duly tendered by [the carrier concerned] to the next actual carrier". That is consistent with there being one actual carrier at a time, and the status of actual carrier being determined by reference to actual, rather than constructive, possession. The liability regime in subs (7) uses as a basis of calculation the consideration paid to each actual carrier for the carriage performed by it, which implies that an actual carrier has to physically carry goods (requiring actual possession) to be an actual carrier. Subsection (9) deals with the situation where one actual carrier undertakes part of the

carriage under contract with another actual carrier. It does not create any exception to the regime provided for earlier to determine when a party becomes the actual carrier (on handover of the goods). Rather, it provides a way of applying the subs (7) calculation to those actual carriers.

[36] We conclude that an actual carrier of goods must have physical possession of the goods: being the head contractor of the party in possession of the goods is not enough to qualify as an actual carrier. While we accept the point made by Baragwanath J that "possession" can sometimes be interpreted as something less than physical possession, we do not consider that that is the case in the present statutory context. In this case, Wallace, not POAL, was in possession of the truck when the fork hoist collided with it. At that moment, Wallace, and no other party, was the actual carrier of the truck.

[37] The words "liable as such" in the Act limit the sense in which a carrier is protected from liability for damage to goods in the course of a particular carriage. If damage occurs, then the party seeking the Act's limited liability cover must be in a position where it can be liable for the damage to the goods as a carrier under the Act at the material time. To trigger the application of s 16 of the Act (which deals with the vicarious liability of carriers' employees and is simply the vicarious equivalent of s 6) the fork hoist driver would need to have been acting as an actual carrier of the Southpac truck. Plainly he was not. His fork hoisting work was neither in furtherance of, nor incidental to, the truck's carriage, but wholly unrelated to it. It just so happens that he was a POAL employee, and that coincidence is not sufficient to trigger the Act's application.

[38] We are not persuaded that there is any reason to read down the words "liable as such" as Allan J did. For large companies like POAL, which provide myriad services, that would carve out a significant zone of limited liability, contrary to the letter and purpose of the Act (see Paul Myburgh, "Shipping Law" [2007] NZ Law Rev 749).

...

[41] It is not the existence of the contract that determines the position under s 6, it is the question of whether POAL was the actual carrier of the goods. For this reason, we consider it to be crucially relevant that the accident involving the fork hoist occurred while a person other than POAL was the actual carrier. That is the effect of the words "as such" in ss 6 and 16, which recognise that different activities

give rise to different risks. The risks inherent in acts of carriage (which are the mischief addressed by the Act) arise from a particular kind of activity. It is only where the particular kind of person, a carrier, is *also* either the contracting carrier or is performing (or is responsible vicariously or contractually as a contracting carrier for the performance of) a particular kind of activity, actual carriage, that the limited liability applies. It is not enough for the application of the Act that POAL offers services as a carrier or that it was the principal of the party which was the actual carrier of the goods at the time of the collision.

[42] Putting to one side the position of contracting carriers, what is critical for the application of s 6 is that at the time of the damage the actual carrier is in possession of the goods and responsible for them as an actual carrier. What is required by s 6 is that the liability be that of an actual carrier, which means a carrier that is in physical possession of the goods at the time the damage occurs. It does not matter, for the application of s 6, whether the damage is caused by the actual carrier, or (as in this case) by an unrelated third party. Section 6 simply limits the liability of actual carriers when the goods in their possession are damaged. To this extent, the Act provides for general limitation of actual carriers' liability. What the Act does not provide for is general limitation of *all* carriers' liability, whether or not they are in actual possession of the goods at the time of the damage. Actual possession is a precondition to the application of s 6. *Ports of Auckland Ltd v Southpac Trucks Ltd* [2008] NZCA 573, [2009] 2 NZLR 79 at [20]–[21], [26]–[38], [41]–[42], per Robertson J

LIABILITY—LIABLE

[For 43(1) Halsbury's Laws of England (4th Edn) (Reissue) para 880 et seq see now 94 Halsbury's Laws of England (5th Edn) (2008) para 796 et seq.]

[For 14 Halsbury's Laws of England (4th Edn) para 1106 see now 34 Halsbury's Laws of England (5th Edn) (2011) para 873.]

LIBEL

[For 28 Halsbury's Laws of England (4th Edn) (Reissue) para 11 see now 32 Halsbury's Laws of England (5th Edn) (2012) para 511.]

LICENCE—LICENSE

[For 27(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) paras 9, 10, 13 see now 62 Halsbury's Laws of England (5th Edn) (2016) paras 7, 10, 13.]

Australia [Local Government Act 1999 (SA), s 246.] [16] Section 246(1)(a) of the 1999 Act provides that subject to that "or another Act" the council may make by-laws that "are within the contemplation of this or another Act". Section 246(2) provides that the council cannot make a by-law that a person "obtain a licence from the council to carry out an activity at a particular place unless the council has express power to do so under an Act". However, s 246(3) provides that subject to the 1999 Act, or another Act, a by-law made by the council may:

- (a) operate subject to specified conditions; and
- ...
- (b) be of general or limited application, and provide for exemptions.

The second respondent, by a notice of contention, asserted that By-law No 4 infringed s 246(2) because the requirement for a "permission" constituted a requirement for a "licence" within the meaning of s 246(2). Absent any express power to license the activities otherwise prohibited by By-law No 4, By-law No 4 was beyond power. That submission should not be accepted.

[17] As Kourakis J observed, s 246(2) has to be read with s 246(3) so that the latter provision has work to do. The ordinary English meaning of the word "licence" extends to a "formal permission" and "exemption". However, if extended to permissions and exemptions in this statutory context it would be inconsistent with s 246(3). As Kourakis J said, s 246(2) in its legislative and historical context is directed to controlling the powers of local governments to license business or like activities in particular places. Provision for that kind of licensing was made in the 1934 Act. As enacted, that Act conferred power on local governments to license a variety of activities, including "noisy trades" (such as wood-cutting and boiler-making), horse bazaars and cattle markets, chimney-sweeps, ice cream carts and newsvendors. The second respondent's contention that By-law No 4 infringed the limitation on the by-law making power imposed by s 246(2) should be rejected. *A-G (SA) v Corporation of the City of Adelaide* [2013] HCA 3, (2013) 295

ALR 197 at [16]–[17], per French CJ

Licence, permit or other instrument

Australia [Native Title Act 1993 (Cth), s 211(2).] '[2] Section 211 of the NTA provides that a law which "prohibits or restricts persons" from fishing or gathering "other than in accordance with a licence, permit or other instrument granted or issued to them under the law" does not prohibit or restrict the pursuit of that activity in certain conditions where native title exists. ...

...
 '[45] The determination of whether s 211(2) of the NTA afforded a defence to the charge against the applicants depends upon whether an exemption under s 115 of the [Fisheries Management Act 2007 (SA)] was "a licence, permit or other instrument granted or issued to them" under that law within the meaning of s 211(1)(b). ...

...
 '[48] ... The construction of the term "licence, permit or other instrument granted or issued ... under the law" in s 211 ... is not to be read narrowly. It has application to a category of laws which prohibit or restrict activities, including fishing and gathering. Such laws may provide a variety of schemes for permitting some people or groups of people to conduct otherwise prohibited or restricted activities subject to terms and conditions which may be specified by law or lie within the discretion of the grantor or issuer of the "licence, permit or other instrument". Those terms accommodate a large range of possible statutory regimes. They are apt to cover any form of statutory permission issued to individuals or classes or groups of people to carry on one or other of the classes of activities described in s 211(3).

'[49] The exemption for which s 115 of the FMA 2007 provides may be granted to individuals or classes of persons for specified activities, on specified conditions and for a specified time. Such exemptions are at least a form of "other instrument" granted or issued under the relevant law of the state and fall within s 211(1) of the NTA. The defence under s 211 was available to the applicants.' *Karpany v Dietman* [2013] HCA 47, (2013) 303 ALR 216 at [2], [45], [48]–[49], per French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ

LIEN

[For 28 Halsbury's Laws of England (4th Edn) (Reissue) paras 702–703 see now 68 Halsbury's Laws of England (5th Edn) (2016) paras 802–803.]

Equitable lien

[For 28 Halsbury's Laws of England (4th Edn) (Reissue) para 754 see now 68 Halsbury's Laws of England (5th Edn) (2016) para 855.]

Innkeeper's lien

[For 24 Halsbury's Laws of England (4th Edn) (Reissue) paras 1144–1145 see now 68 Halsbury's Laws of England (5th Edn) (2016) para 676.]

Maritime lien

[For 43(2) Halsbury's Laws of England (4th Edn) (Reissue) para 1901 see now 94 Halsbury's Laws of England (5th Edn) (2008) para 1014.]

Solicitor's lien

[For 44(1) Halsbury's Laws of England (4th Edn) (Reissue) para 244 see now 66 Halsbury's Laws of England (5th Edn) (2015) para 768.]

LIFE INTEREST

[For 39(2) Halsbury's Laws of England (4th Edn) (Reissue) paras 144–145 see now 87 Halsbury's Laws of England (5th Edn) (2017) paras 138–139.]

LIGHT

Right to light

[For 16(2) Halsbury's Laws of England (4th Edn) (Reissue) para 223 see now 87 Halsbury's Laws of England (5th Edn) (2017) para 943.]

LIKELIHOOD OF LOSS OR DAMAGE

New Zealand [Under the Fair Trading Act 1986, s 43(5), an application under s 43(1) may be made at any time within three years after the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered.] '[22] This question concerns the

way the concept of “likelihood of loss or damage” fits within the subsection. Does likelihood look to loss or damage which has already occurred and, on that premise, represent a standard against which its occurrence is to be measured, or is likelihood descriptive of loss or damage which has not yet occurred but which is “likely” to occur in the future?

[23] In the High Court Asher J held that the phrase “likelihood of loss or damage” referred to knowledge of losses that were likely to arise in the future. He was of the view that the phrase made it clear that s 43(5) applies to future losses as well as present losses. His Honour added that the concept of likelihood was not meant to represent a test as to when potential discoverability started time running. It did not mean “probability” of loss in the present tense but rather the “probability” of loss in the future.

[24] This point was not addressed in specific terms in the Court of Appeal. In this Court CHH challenged Asher J’s analysis and submitted that in its context the expression “likelihood of loss or damage” was a reference to loss or damage which had already occurred. The concept of likelihood was the standard against which the discovery issue was to be assessed. Put another way, CHH submitted that the phrase “likelihood of loss or damage” meant that loss or damage is discovered by the applicant under s 43 when that person knows or ought to know it is likely that loss or damage has been suffered.

[25] We consider that Asher J was correct. The reference in s 43(5) to likelihood of loss or damage matches the similar references elsewhere in s 43. Subsection (1) refers to the Court finding that a person has suffered, or is likely to suffer, loss or damage. It does not say “likely to have suffered”. This reference to likelihood is clearly forward looking. Again, subs (2)(a) speaks of a contract made between the person who suffered, or is likely to suffer, loss or damage and the contravener. Similarly, paras (e) and (f) of subs (2) speak of the person “who suffered, or is likely to suffer, the loss or damage”. For the same reason these references are also forward looking.

[26] Mr Galbraith QC, for the Commission, submitted that this dichotomy of past and future loss or damage was appropriately reflected in subs (5) and explained the purpose and meaning of the concept of likelihood in that provision. We accept this argument which supports the meaning which otherwise naturally flows from the words of subs (5). If likelihood had been meant to refer to past loss, there would have been little point in employing the dichotomy of

loss or damage or its likelihood. Logically all that would have been necessary, if likelihood had been intended to be a standard against which occurrence was to be measured, was a reference to likelihood alone. Furthermore, if likelihood was backward looking, there would be no limitation period for applications based on future loss, unless one adopted the inherently improbable view that likelihood was intended to be both backward and forward looking.

[27] In short, time starts running when the applicant discovers or ought to have discovered that loss or damage has already occurred, or is likely to occur in the future. Discovery that loss or damage is likely to occur in the future will be relevant to applications seeking relief on account of that likelihood. If relief is sought for loss or harm already suffered, then time will start running from discovery (actual or constructive) of that fact. In the present case we are concerned with discovery of loss or harm which had already occurred.’ *Commerce Commission v Carter Holt Harvey Ltd* [2009] NZSC 120 [2010] 1 NZLR 379 at [22]–[27], per Tipping J

LIKELY

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

LIKELY TO BE USEFUL TO A PERSON COMMITTING OR PREPARING AN ACT OF TERRORISM

[Under the Terrorism Act 2000, s 58, a person commits an offence if (a) he collects or makes a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism, or (b) he possesses a document or record containing information.] [2] Count one of the indictment alleges that on 17 July 2005 the appellant “possessed records containing information of a kind likely to be useful to a person committing or preparing an act of terrorism, namely a CD rom containing a copy of the Al Qaeda training manual”. Count two charges the appellant with possession of a copy of a publication called *Zaad-e-Mujahid* on 9 May 2007, count three with possession of a copy of another publication, *The Absent Obligation*, on the same date. Each is alleged to “contain information likely to be useful to a person committing or preparing an act of terrorism”.

[3] The title of the material the subject of the first count speaks for itself. *Zaad-e-Mujahid* is a text directed to the formation and

organisation of Jihad movements, to the training requirements for the armed wing of Jihad movements and to the "Attributes and Qualities of Mujahideen". *The Absent Obligation* is in simple terms a text which argues that a Muslim is under an obligation to work for the establishment of an Islamic State.

[4] It was submitted before the judge that s 58 is insufficiently certain to comply with the common law or with art 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), secondly that s 58 was never intended to cover the possession of theological or propagandist material such as *Zaad-e-Mujahid* or *The Absent Obligation*. We have the benefit of a note of the learned judge's ruling. He ruled in relation to the first submission that "likely to be useful to" and "reasonable excuse" are normal everyday terms, that a jury would be perfectly able to determine whether the material, the subject of the counts in the indictment, was material likely to be useful to a terrorist, and possessed by the appellant without reasonable excuse, and that accordingly the offence was sufficiently certain. As to the second submission, the note of his ruling is in the following terms:

"Whether possession of the article crosses the line into illegality depends on the circumstances of the case and is all about the context in which it is found. That is a matter for a jury to decide in each case and not me. Here, the material, the prosecution submit is material capable of amounting to use for a terrorist without reasonable excuse. Whether a jury so find is a matter for them. Counts 2 and 3, the material may be innocent in itself ..."

[5] In his challenge to the ruling, Mr Moloney, who also appeared for the appellant before Judge Stewart QC, again submitted that that s 58 was insufficiently certain, and that in any event it was never intended to criminalise the possession of theological or propagandist material.

[6] As to the issue of certainty, he invited our attention to the speech of Lord Bingham of Cornhill in *R v Goldstein*, *R v Rimmington* [2005] UKHL 63, [2006] 2 All ER 257, [2006] 1 AC 459 in which the relevant principles were addressed at [32]–[35]. In essence Mr Moloney submitted that s 58 is insufficiently certain in its terms for a person to be able to regulate his conduct, even with appropriate advice, so as to ensure that he does not fall foul of the criminal

law. He argued that the term "likely to be of use to" is so broad, so undefined in common law or statute, as to criminalise the possession of a myriad items of information. He sought to support his argument by reference to the factual background to the proceedings. The appellant was not initially charged in relation to the material the subject of counts two and three, the additional charges were laid at the committal proceedings at the instigation of the Crown Prosecution Service. Mr Moloney submitted that it was clear from statements made by them in the interviews under caution that the officers from the anti-terrorist branch were uncertain as to whether possession of such publications could found a charge under s 58.

[7] As to his second submission, namely that s 58 was never intended to embrace the possession of theological or propagandist material, Mr Moloney reminded us that the offences of collecting, recording or possessing information likely to be of use to terrorists have existed for some time in Northern Ireland (see s 21 of the Northern Ireland Prevention of Terrorism (Temporary Provisions) Act 1978 and latterly s 33 of the Northern Ireland (Emergency Provisions) Act 1996). He submitted that there has never been any suggestion that those provisions were designed to criminalise the possession of propaganda or theological material. He also argued that if they had been designed to have such an effect, it is inconceivable that Parliament would have thought it necessary to enact ss 1 and 2 of the Terrorism Act 2006, which created offences relating to the dissemination of terrorist publications.

[8] We explored with Mr Jonathan Sharp, who appeared both before the judge and us on behalf of the Crown, what the Crown's case was (i) as to the ambit of the phrase 'of a kind likely to be useful to a person committing or preparing an act of terrorism' and (ii) as to the criteria for determining whether the possessor has 'a reasonable excuse for his... possession'. Regrettably it seemed to us that he was considering these questions for the first time, so that he was not in a position to give us a considered response.

[9] As to the first question, we asked whether (i) the information had on its face to be the kind of information that would raise a reasonable suspicion that it might be intended to be used for the commission or preparation of an act of terrorism or alternatively (ii) whether it was open to the prosecution to rely on extrinsic evidence to show that the information was intended to be used for the commission of an act

of terrorism. Mr Sharp replied that the latter was the Crown's case. Thus an *A to Z* of London would fall within the scope of the section if the person possessing it intended to provide it to a terrorist so that he could find his way to the place where a planned act of terrorism was to take place. It seems likely that the judge accepted such a submission when he held that whether possession of the article crossed the line into illegality depended on the circumstances of the case and the context in which it was found.

'[10] As to the question of what constituted a reasonable excuse, Mr Sharp submitted that this meant a purpose for possessing the information that was lawful. We asked Mr Sharp whether this meant that a defendant could properly be convicted under s 58 if he explained that he possessed information as to how to make explosives for the purpose of committing a bank robbery. Mr Sharp had no ready answer to that question.

'[11] We had a further question for Mr Sharp that it seemed to us was raised by the facts of this case. Was it the Crown's case that a document that exhorted the reader to commit acts of terrorism fell within the definition of a document "containing information of a kind likely to be useful to a person committing or preparing an act of terrorism"? Mr Sharp replied that it was.

'[12] We do not accept Mr Sharp's submissions as to the scope of s 58. It is helpful to consider them in the light of the provisions of the first part of s 2 of the 2006 Act [Terrorism Act 2006]. This provides:

- "(1) A person commits an offence if he engages in conduct falling within subsection (2) and, at the time he does so—(a) he intends an effect of his conduct to be a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism; (b) he intends an effect of his conduct to be the provision of assistance in the commission or preparation of such acts; or (c) he is reckless as to whether his conduct has an effect mentioned in paragraph (a) or (b).
- (2) For the purposes of this section a person engages in conduct falling within this subsection if he—(a) distributes or circulates a terrorist publication; (b) gives, sells or lends such a publication; (c) offers such a publication for sale or loan; (d)

provides a service to others that enables them to obtain, read, listen to or look at such a publication, or to acquire it by means of a gift, sale or loan; (e) transmits the contents of such a publication electronically; or (f) has such a publication in his possession with a view to its becoming the subject of conduct falling within any of paragraphs (a) to (e).

- (3) For the purposes of this section a publication is a terrorist publication, in relation to conduct falling within subsection (2), if matter contained in it is likely—(a) to be understood, by some or all of the persons to whom it is or may become available as a consequence of that conduct, as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism; or (b) to be useful in the commission or preparation of such acts and to be understood, by some or all of those persons, as contained in the publication, or made available to them, wholly or mainly for the purpose of being so useful to them ...
- (5) For the purposes of this section the question whether a publication is a terrorist publication in relation to particular conduct must be determined—(a) as at the time of that conduct; and (b) having regard to both the contents of the publication as a whole and to the circumstances in which that conduct occurs."

'[13] We draw attention to the contrast between sub-ss (3)(a) and (b). On Mr Sharp's submission s 58 of the 2000 Act covers documents described in either sub-s (3)(a) or (b). We consider that it is plain from the language of s 58 that it covers only documents that fall within the description in sub-s (3)(b). A document or record will only fall within s 58 if it is of a kind that is likely to provide practical assistance to a person committing or preparing an act of terrorism. A document that simply encourages the commission of acts of terrorism does not fall within s 58.

'[14] The provisions of s 2 of the 2006 Act, and in particular those of s 2(5), require the jury to have regard to surrounding circumstances when deciding whether a publication is likely to be useful in the commission or preparation of acts of terrorism. Contrary to Mr Sharp's

submission, we do not consider that the same is true of s 58 of the 2000 Act. The natural meaning of that section requires that a document or record that infringes it must contain information of such a nature as to raise a reasonable suspicion that it is intended to be used to assist in the preparation or commission of an act of terrorism. It must be information that calls for an explanation. Thus the section places on the person possessing it the obligation to provide a reasonable excuse. Extrinsic evidence may be adduced to explain the nature of the information. Thus had the defendant in *R v Rowe* [2007] EWCA Crim 635, [2007] 3 All ER 36, [2007] QB 975 been charged under s 58, evidence could have been admitted as to the nature of the substitution code possessed by the defendant. What is not legitimate under s 58 is to seek to demonstrate, by reference to extrinsic evidence, that a document, innocuous on its face, is intended to be used for the purpose of committing or preparing a terrorist act.

‘[15] As for the nature of a “reasonable excuse”, it seems to us that this is simply an explanation that the document or record is possessed for a purpose other than to assist in the commission or preparation of an act of terrorism. It matters not that that other purpose may infringe some other provision of the criminal or civil law.

‘[16] If s 58 is interpreted in accordance with this judgment, its effect will not be so uncertain as to offend against the doctrine of legality. It follows that this prosecution does not involve an abuse of process on that ground. ...’ *R v K* [2008] EWCA Crim 185, [2008] 3 All ER 526, [2008] QB 827 at [2]–[16], per Lord Phillips of Worth Matravers CJ

‘[42] Obviously, on one reading, s 58(1) could cover a multitude of records of everyday common or garden information, which might actually be useful to a person who was preparing to carry out an act of terrorism—eg a Yellow Pages directory listing outlets where he could buy fertiliser and other chemicals for making into a bomb, a timetable from which he could discover the times of trains to take him to the city where he was going to plant his bomb, or an A to Z directory of that city which he could use to find his way to the target. But, rightly, appearing for the Crown, Mr Perry QC repudiated any such interpretation. Parliament cannot have intended to criminalise the possession of information of a kind which is useful to people for all sorts of everyday purposes and which many members of the public regularly obtain or use, simply because

that information could also be useful to someone who was preparing an act of terrorism.

‘[43] Indeed, it is clear from what Lord Lloyd said in his report [*Inquiry into Legislation against Terrorism* (Cm 3420), 1996] that the aim [of s 58] was to catch the possession of information which would typically be of use to terrorists, as opposed to ordinary members of the population. So, to fall within the section, the information must, of its very nature, be designed to provide practical assistance to a person committing or preparing an act of terrorism. Because that is its nature, s 58(3) requires someone who collects, records or possesses the information to show that he had a reasonable excuse for doing so. The information is such as “calls for an explanation”, as Lord Phillips CJ said in *R v K* [2008] 3 All ER 526 at [14], [2008] QB 827. Of course, it is not necessary that the information should be useful only to a person committing etc an act of terrorism. For instance, information on where to obtain explosives is capable of falling within s 58(1), even though an ordinary crook planning a bank robbery might also find it useful.’

‘[44] The role of extrinsic evidence is limited. It can be used to explain to the jury the significance of something in the document, say, a chemical formula, in connection with the planning of an explosion. It can also be used to explain the true nature of the information in a document which has been prepared so as to appear innocuous but whose actual nature and contents are concealed by the use of some sort of code or equivalent device. But, since the document must contain information which is, of its very nature, likely to be useful to a potential terrorist, evidence cannot be led with the aim of showing that a document, such as a timetable, containing everyday information, should be treated as falling within s 58(1). That evidence will be relevant to a charge under s 57(1), but not to a charge under s 58(1).

‘[45] Interpreted in that way, s 58(1) would cover, for instance, a training manual about making or planting bombs or explosives, or a document containing information about how to get unauthorised entry to military establishments, government offices etc. It would also cover information, whether in the form of an electronic key or otherwise, which enabled a potential terrorist to obtain access to such information. Parliament has made it an offence to collect, record or possess such material, unless the defendant can show that he has a reasonable excuse for doing so.

...

‘[47] Is it a requirement for conviction of an

offence under s 58(1)(b) that the defendant not only possessed the document but was aware of the nature of the information which it contained? In our view, it is. The immediate setting of s 58(1)(b) is important. Section 58(1)(a) makes it an offence to collect or make a record of information of a kind likely to be useful to a person committing or preparing an act of terrorism. That paragraph envisages the defendant collecting or recording that particular kind of information, rather than collecting or recording a general mass of information which happens to contain information of the kind in question. But in order to collect or record that particular kind of information, the defendant must know what he is looking for. So knowledge of the nature of the information is certainly a necessary element in the offence in para (a). Paragraph (b) deals with someone who possesses a document or record containing information of the relevant kind, which he or someone else has collected or recorded. Given that knowledge of the nature of the material is required where the offence is committed in the manner specified in para (a), it would be very strange if similar knowledge were not also required for commission of the offence in the manner specified in para (b). We are therefore satisfied that the Crown must prove that the defendant was aware of the kind of information which was in the document or record which he possessed. That conclusion is in line with the approach of the House in *Sweet v Parsley* [1969] 1 All ER 347, [1970] AC 132.

‘[48] This does not mean, of course, that the Crown has to show that the defendant knew everything that was in the document or record. It is enough if he knew the nature of the material which it contains. That may often be apparent from the title of the document or from even a cursory glance at its contents. Nor can a defendant keep a document in his possession and claim ignorance of its contents by deliberately choosing not to inquire into them. If the document is hidden in some way, this will often be a basis on which the jury can be asked to infer that the defendant was aware of the nature of its contents.

‘[49] Section 58(1) focuses on the nature of the information which the defendant collects, records or possesses, rather than on the circumstances in which he does so. The description of the information is given in general terms: information will meet that description, irrespective of who might commit or prepare an act of terrorism and so be likely to find the information useful. It could be a third party or it could indeed be the defendant

himself. So the offence is apt to catch someone who gathers the information and stores it with a view to passing it on to someone else who is preparing an act of terrorism. But, equally, it will cover someone who does these things with the intention of using the information himself to prepare an act of terrorism. Or else, the accused may have gathered and stored the information without having any clear idea of what he intends to do with it. None of this matters, since the legislation makes it an offence simply to collect, record or possess information of this kind. Parliament must have proceeded on the view that, in fighting something as dangerous and insidious as acts of terrorism, the law was justified in intervening to prevent these steps being taken, even if events were at an early stage or if the defendant’s actual intention could not be established. At the same time, Parliament enacted s 58(3), which introduced the necessary element of balance by giving the accused a defence if, with the benefit of s 118, he proves that he had a reasonable excuse for doing what he did.

...

‘[72] At this stage we touch on the scope of the defence under s 58(3), the second of the issues raised in the appeal. Mr Perry submitted that this passage in the Court of Appeal’s judgment was wrong. The court had, in effect, substituted for the defence of reasonable excuse which Parliament had enacted in s 58(3) a quite different defence, which was, in substance, a reproduction of the defence in s 57(2). Where Parliament had deliberately framed different defences to charges under the two sections, the courts had to respect the difference and apply the defence which Parliament had enacted for the charge in question.

‘[73] We accept that submission. In our view the Court of Appeal went wrong in *R v K* when it interpreted the defence of reasonable excuse in s 58(3) in this way. The language of ss 57(2) and 58(3) is completely different and it is neither appropriate nor possible to interpret the two provisions as if they said substantially the same thing. Had Parliament intended to provide substantially the same defence to both sections, nothing would have been easier than to use the same language.’ *R v G; R v J* [2009] UKHL 13, [2009] 2 All ER 409 at [42]–[45], [47]–[49], [72]–[73], per Lord Rodger of Earlsferry

LIMITATION OF ACTIONS (NOW CLAIMS)

[For 28 Halsbury’s Laws of England (4th Edn) (Reissue) para 801 see now 68 Halsbury’s Laws

of England (5th Edn) (2016) para 901.]

LIMOUSINE

Australia [A New Tax System (Luxury Car Tax) Act 1999 (Cth), s 27-1.] '[17] It was common ground that the question of whether the Hummer fell within the definition of "car" in s 27-1 of the LCT Act is a question of law: *Hope v Council of the City of Bathurst* (1980) 144 CLR 1 at 7; 29 ALR 577 at 581-2 (*Hope*) and *Federal Cmr of Taxation v Broken Hill South Ltd* (1941) 65 CLR 150 at 154. However, the dispute between the parties concerned whether construction of the word "limousine" was a question of fact or on a question of law. Contrary to the appellant's submissions, it was a question of fact. That requires some explanation.

'[18] The process by which the question of whether the Hummer fell within the definition of "car" in s 27-1 of the LCT Act (a question of law) was explained by Kitto J in *NSW Associated Blue-Metal Quarries Ltd v FCT* (1956) 94 CLR 509 at 511-12; [1956] ALR 286 (and adopted by Mason J in *Hope* at CLR 7-8; ALR 581-2):

- (1) It is necessary to decide, as a matter of law, whether the LCT Act uses the word "limousine" in any other sense than that which it has in ordinary speech: *NSW Associated Blue-Metal* at 511-2; *Hope* at 7-8 and *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287; 115 ALR 1;
- (2) If the word "limousine" is to be given its ordinary meaning, the common understanding of the word has to be determined and that is a question of fact: *NSW Associated Blue-Metal* at 512; *Broken Hill South Ltd* at 155;
- (3) Having ascertained the ordinary meaning of the word "limousine", it is necessary to ask whether the material before the tribunal reasonably admits of different conclusions as to whether the Hummer fell within the ordinary meaning of the word and that is a question of law: *Australian Slate Quarries Ltd v Federal Commissioner of Taxation* (1923) 33 CLR 416 at 419; [1923] HCA 69; *NSW Associated Blue-Metal* at 512; *Hope* at 8; *Pozzolanic* at 287; and
- (4) If different conclusions are reasonably possible, it is necessary to decide which is the correct conclusion and that is a question of fact: *Australian Gas Light Co v Valuer-General* (1940) 40 SR (NSW) 126

at 136; *NSW Associated Blue-Metal* at 512; *Hope* at 10; *Attorney-General (NSW) v X* (2000) 49 NSWLR 653; [2000] NSWCA 199; BC200004289 at [126].

... '[24] First, the tribunal found that the word "limousine" was to be given its ordinary meaning. As noted earlier, the word "limousine" is not defined in the LCT Act and it has no technical legal meaning. The appellant referred to *Peacock v Zyfert* (1983) 48 ALR 549 and *Baxter Healthcare Pty Ltd v Comptroller-General of Customs* (1997) 72 FCR 467 in support of the proposition that the word "limousine" was imprecise and that resolution of its meaning was a question of law. Neither case assists. The question for the court in each case was "the construction of the relevant provision of the tariff" under the Customs Tariff Act in force at the relevant time (*Baxter* at 474) described by Fox J in *Zyfert* (at 555) as "complex... with many divisions and subdivisions and many definitions, or descriptions" so that "shades of meaning [were] bound to arise and to effect conclusions". Here, it cannot be said that the word "limousine" in the definition of "car" in s 27-1(b) of the LCT Act is a "statutory expression [that] has several ordinary senses" when used in ordinary speech: *Baxter* at 473. In fact, the appellant not only accepted in its oral and written submissions that the word "limousine" was to be given its ordinary meaning but Ground 4.2 proceeded on that basis.' *Dreamtech International Pty Ltd v Comr of Taxation* [2010] FCAFC 103, (2010) 270 ALR 471 at [17]-[18], [24], per Stone, Gordon and McKerracher JJ

LIQUIDATOR

[For 7(3) Halsbury's Laws of England (4th Edn) (2004 Reissue) para 555 see now 16 Halsbury's Laws of England (5th Edn) (2011) para 505.]

LITERARY WORK

[For 9(2) Halsbury's Laws of England (4th Edn) (Reissue) para 67 see now 23 Halsbury's Laws of England (5th Edn) (2016) para 561.]

Australia [Copyright Act 1968 (Cth), s 42; whether headlines are literary works.] '[32] The precise question of whether copyright subsists in newspaper headlines has not been decided by any court in Australia. The Scottish case of *Shetland Times Ltd v Wills* (1996) 37 IPR 71 concerned an application for an interlocutory

injunction. Despite a concession that a headline could be a literary work and an observation that the headlines in question were “designedly put together” for the purpose of imparting information, Lord Hamilton expressed the reservation that, “while literary merit is not a necessary element of a literary work, there may be a question whether headlines, which are essentially brief indicators of the subject matter of the items to which they relate, are protected by copyright”: at 74–5. His Lordship did not reach a final conclusion on the question.

“[40] In my view, the headline of each article functions as the title of the article. Indeed, “headline” is defined in the *New Shorter Oxford English Dictionary* (5th ed, Oxford University Press, 2002) to mean, relevantly, “The line at the top of a page containing the title etc; a title or subtitle in large type in a newspaper etc” and, in the *Macquarie Dictionary* (3rd ed, The Macquarie Library, 1998) to mean, relevantly, “a display line over an article etc, as in a newspaper; the line at the top of the page, containing the title, pagination etc”.

“[41] It may be a clever title. That is not sufficient: compare “Opportunity Knocks” for a game show; “The Man who Broke the Bank at Monte Carlo” for a song; “Splendid Misery” for a novel. It may be an indication of the content of the article and that is not sufficient: compare “The Lawyer’s Diary” for a diary: see generally *Copinger* at [3–16] and Laddie et al at [3.62]. It may be a grouping of words that convey, in themselves, the subject matter such that the expression was inseparable from the idea conveyed (“Help-Help-Driver- in-danger-Call-Police-Ph.000” in *Victoria v Pacific Technologies (Australia) Pty Ltd (No 2)* (2009) 177 FCR 61; 81 IPR 525; [2009] FCA 737). In each case it was determined that the contended work did not justify claims of copyright protection, although the reasoning was not identical. In *Lamb v Evans* [1893] 1 Ch 218 (*Lamb*), the “headings” in which copyright was held to subsist were more than mere headlines. They included three translations and catchwords. At 232, Kay LJ said:

There is sufficient literary labour involved in the production of these headings to make them properly the subject of copyright.

That decision does not necessitate a finding of copyright in newspaper headlines generally.

“[42] The headlines in the AFR [*Australian Financial Review*] range from the more prosaic: “Investors warned on super changes” and

“Builders report fall in house sales” to ones that employ what might be thought of as a more interesting and clever use of words, such as “Blackout probe sheds little light” and “Returns after tax will be simply super”. While the use of devices such as puns and double entendres may be clever, evoke admiration and attract attention, the reasons for the denial of copyright protection to “works” that are simply too slight have long been invoked and have formed the basis for much judicial precedent. In some cases the headline represents no more than the fact or idea conveyed.

“[43] In *Exxon Corporation v Exxon Insurance Consultants International Ltd* [1982] Ch 119; [1981] 3 All ER 241 (*Exxon*), protection for an invented word (*Exxon*) was denied on the basis that, while the word was original and was created after considerable research and labour, it was not a “literary” work because it was not intended to afford information and instruction or pleasure in the form of literary enjoyment (referring to the definition of “literary work” in *Hollinrake* [*Hollinrake v Truswell* [1894] 3 Ch 420, CA]). A headline may come within the well-used criteria for a literary work as set out in *Hollinrake* but those criteria do not afford an exhaustive definition. They may well be necessary but they are not sufficient. Such criteria may well describe a literary work but the mere fact that a word or sequence of words provides information or pleasure is not necessarily sufficient to constitute a literary work for the purposes of the Act.

“[44] Headlines generally are, like titles, simply too insubstantial and too short to qualify for copyright protection as literary works. The function of the headline is as a title to the article as well as a brief statement of its subject, in a compressed form comparable in length to a book title or the like. It is, generally, too trivial to be a literary work, much as a logo was held to be too trivial to be an artistic work (*Cortis Exhaust Systems Pty Ltd v Kitten Software Pty Ltd* (2001) ATPR 41–837; [2001] FCA 1189 at [33] per Tamberlin J), even if skill and labour has been expended on creation (*Exxon*).

“[45] Copyright can only subsist in a “work”. Originality does not require novelty, inventiveness or creativity, whether of thought or expression, or any form of literary merit. Any words written by an author, original in that sense and not copied, could be said to satisfy the “literary” part of a literary work for which copyright is claimed. Those words could well convey information and instruction (such as “go outside, the sun is shining”) or pleasure (such as “you look beautiful”). However, not every piece

of printing or writing which conveys information will be subject to copyright: *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458; 254 ALR 386; 80 IPR 451; [2009] HCA 14] at [45]. To obtain copyright protection under the Act, there must be a literary work. I appreciate that this has been the subject of much judicial consideration but I find it helpful to resort to dictionary definitions of "work". The *Macquarie Dictionary* relevantly defines "work" as "that on which exertion or labour is expended; the product of exertion, labour, or activity: a work of art, literary or musical works". There may well be writings of original words or phrases that simply do not reach the level of constituting a "work", regardless of literary merit. This is not just because they are short, as a deal of skill and effort can go into producing, for example, a line of exquisite poetry. It is because, on its face and in the absence of evidence justifying its description as a literary "work", the writing does not, qualitatively or quantitatively, justify that description. A headline is, generally, no more than a combination of common English words: at 88 per Jessel MR. It is "does not involve literary composition, and is not sufficiently substantial to justify a claim to protection" (*Francis Day [Francis Day & Hunter Ltd v Twentieth Century Corp Ltd* [1940] AC 112, PC] at 122); it does not, in the words of Jacobson J in *Sullivan [Sullivan v FNH Investments Pty Ltd* (2003) 57 IPR 63; [2003] FCA 323] at [112], have "the requisite degree of judgment, effort and skill to make it an original literary work in which copyright may subsist" for the purposes of the Act.

[46] It may be that evidence directed to a particular headline, or a title of so extensive and of such a significant character, could be sufficient to warrant a finding of copyright protection (*Francis Day* at 123; see also *Milwell v Olympic Amusements Pty Ltd* (1999) 85 FCR 436; 161 ALR 302; 43 IPR 32; [1999] FCA 63 at [29]) but that is not the case here. Fairfax claims copyright in each and every one of the ten selected headlines. It claims copyright in the headlines as a class of work, based on evidence of a general practice that headlines are determined by staff and settled at meetings of staff to provide a title to a story which also fits into the format of the page of the AFR. That is insufficient to overcome the reasoning for the established practice of denying copyright protection to titles which is the apt characterisation for headlines as a class.

[47] The majority of the headlines in the sample editions are short factual statements of

the subject of the article. The addition of a pun does not, of itself, in the absence of evidence, convert such statements into literary works. As to the evidence adduced with respect to the Telstra headline and the Health headline, I accept Reed's submission that the evidence is not sufficient to "carry" the rest of the headlines. Further, Mr Bailey's evidence differentiates the work involved in the headlines of the front page from that for other headlines and demonstrates that the work involved in the Telstra headline was primarily to ensure that the story was accurate, with the changing headline flowing from a changing appreciation of the facts. It is not the "ideas" of the author that is protected by copyright but their fixed expression: *IceTV* at [160].

[48] The headline and by-line is, as Reed says, meta-information about the work, not part of the work, the work being the article. The need to identify a work by its name is a reason for the exclusion of titles from copyright protection in the public interest. A proper citation of a newspaper article requires not only reference to the name of the newspaper but also reproduction of the headline. This was a matter of common ground between the witnesses. If titles were subject to copyright protection, conventional bibliographic references to an article would infringe. Such considerations may well be a reason for the fact that headlines and "short phrases" are excluded from copyright in the United States: *Alberto-Culver Co v Andrea Dumon Inc* 466 F2d 705 (7th Cir 1972); *Salinger v Random House Inc* 811 F2d 90 (2d Cir 1987) at 98; *CMM Cable Rep Inc v Ocean Coast Props Inc* 97 F3d 1504 (1st Cir 1996) at 1520 n 21.

[49] At *IceTV* at [161], Gummow, Hayne and Heydon JJ criticised the Full Court in *Nine Network Australia Pty Ltd v IceTV Pty Ltd* (2008) 168 FCR 14; 76 IPR 31; [2008] FCAFC 71 of tipping the balance too far against the interest of viewers in digital free to air television in the dissemination by means of new technology of programme listings in favour of the interest in the protection of Nine against perceived competition by IceTV. Their Honours noted at [163] a submission that no litigation alleging breach of confidence would have succeeded to protect Nine after the information reached the public domain and that the copyright litigation was an attempt to control the further dissemination of the information. This was discussed in the context of broadcasting information but it does raise a matter of possibly more general application. In my view, to afford published headlines, as a class,

copyright protection as literary works would tip the balance too far against the interest of the public in the freedom to refer or be referred to articles by their headlines.

‘[50] This does not exclude the possibility of establishing a basis for copyright protection of an individual headline but Fairfax has failed to prove that the ten selected headlines amount to literary works in which copyright can subsist.’ *Fairfax Media Publications Pty Ltd (ACN 003 357 720) v Reed International Books Australia Pty Ltd (ACN 001 002 357) (t/as LexisNexis)* [2010] FCA 984, (2010) 272 ALR 547 at [32], [40]–[50], per Bennett J

LITIGATION FRIEND

[For 5(3) Halsbury’s Laws of England (4th Edn) (Reissue) paras 1803–1804 see now 10 Halsbury’s Laws of England (5th Edn) (2012) paras 1314–1315.]

[For 30(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 634 see now 75 Halsbury’s Laws of England (5th Edn) (2013) para 995.]

LOCALITY

[The Rent Officers (Housing Benefit Functions) Order 1997, SI 1997/1984, requires rent officers, on request, to determine, and, where appropriate, to re-determine, the maximum amount of housing benefit that a particular tenant should receive. Among other tasks, the rent officer is required to determine a local reference rent (LRR) with reference to an assured tenancy in the same ‘locality’ as the dwelling (Sch 1 para 4(1), (2)(a)(i)).] ‘[39] It will be noted that paras 1–4 of the Schedule refer variously to the “vicinity”, the “neighbourhood”, and the “locality”. Until the amendments effected by the [Rent Officers (Housing Benefit Functions) (Amendment) Order 2001, SI 2001/3561], the word used throughout the first four paragraphs of the Schedule was “locality”, which was not defined. The amendments were effected following the decision in *R (Saadat) v Rent Service, R (Dinsdale) v Rent Service, R (Wilson) v Rent Service, R (Shaw) v Rent Service* [2001] EWCA Civ 1559, [2002] HLR 613, in which the Court of Appeal had disapproved the working definition of “locality” in para 4 as adopted by rent officers.

‘[40] These amendments not only introduced the words “vicinity” and “neighbourhood” in addition to “locality”; they also provided definitions of all three expressions. Paragraph 1(4) defines “vicinity” as meaning “the

area immediately surrounding the dwelling”, with a fallback provision if there is no other dwelling in the vicinity. By para 3(5) “neighbourhood” is defined as meaning:

- “(a) where the dwelling is in a town or city, that part of that town or city where the dwelling is located which is a distinct area of residential accommodation; or
- (b) where the dwelling is not in a town or city, the area surrounding the dwelling which is a distinct area of residential accommodation and where there are dwellings satisfying the description in sub-paragraph (4)(b).”

‘[41] Of central relevance to the present appeal, is the definition of “locality”, which is to be found in para 4(6) and it is in these terms:

“... locality means an area—

- (a) comprising two or more neighbourhoods, including the neighbourhood where the dwelling is situated, each neighbourhood adjoining at least one other in the area;
- (b) within which a tenant of the dwelling could reasonably be expected to live having regard to facilities and services for the purposes of health, education, recreation, personal banking and shopping which are in or accessible from the neighbourhood of the dwelling, taking account of the distance of travel, by public and private transport, to and from facilities and services of the same type and similar standard; and
- (c) containing residential premises of a variety of types, and including such premises held on a variety of tenancies.”

‘[42] The Schedule reflects a balancing exercise which has to be carried out where a person claims housing benefit. On the one hand, it would be a waste of public funds to pay for accommodation which is inappropriately expensive or extensive for that person. On the other hand, it would be unduly harsh to require a radical deterioration in such a person’s residential circumstances. ...

‘[43] Accordingly, the Schedule involves a graduated approach on the part of the rent officer. First, under para 1, he considers the rent payable for the actual dwelling, and decides whether it is “significantly higher” on the basis of rents payable within a relatively small area,

namely the “vicinity”. Secondly, he asks whether the dwelling is too large for the tenant, in which case he fixes a market rent for an appropriately sized dwelling in the vicinity. Thirdly, under para 3, he inquires whether the rent payable is “exceptionally high” by reference to similarly sized dwellings “in the same neighbourhood”, a rather larger area than the vicinity. Finally, under para 4, he has to assess the LRR, and it is this paragraph which, although “a blunt instrument” (see *[R (Saadat) v Rent Service, R (Dinsdale) v Rent Service, R (Wilson) v Rent Service, R (Shaw) v Rent Service]* [2001] EWCA Civ 1559, [2002] HLR 613 at [10] per Sedley LJ), most vividly encapsulates the balancing exercise. Bearing in mind rents paid in the “locality” for various types of property of the same size as the dwelling, the tenant should not be funded for living extravagantly (hence “L”), but he should not be expected to move to substantially less attractive accommodation (hence “H”). It is clear that the “locality” is larger than the “neighbourhood”, not least because it must consist of at least two neighbourhoods.

...
[58] At first sight, it may seem somewhat curious to approach para 4(6) by treating sub-para (a) and (c) as the governing provisions, with sub-para (b) as a limiting provision. However, in my judgment, such an approach is justified once one looks more closely at the drafting. There is no doubt that, as a matter of language and layout, sub-para (a), (b) and (c) each appear to refer to the “area” and hence to the “locality”, as mentioned in the opening part of para 4(6). That is, indeed, the true meaning and effect of sub-para (a) and (c). However, it seems to me that, by contrast, sub-para (b) refers to each “neighbourhood” in sub-para (a). As both counsel accepted in argument, if sub-para (b) referred to the “area”, it would appear to be meaningless, as the dwelling itself must be in the area, and therefore ex hypothesi the locality would always satisfy sub-para (b), unless that subparagraph has to be satisfied in relation to every part of the locality, which would seem a little impractical. Hence, it does not seem inappropriate to treat sub-para (a) and (c) as governing the number and purpose of the neighbourhoods to be included in the locality, and to treat sub-para (b) as excluding any neighbourhood which might otherwise be included, if it does not comply with that subparagraph’s requirements.

[59] This approach has the advantage of limiting the extent to which the identification of the locality is left to the judgment of the

individual rent officer in a particular case. While the choice of the particular adjoining neighbourhood to be added will be a matter for him, there will be a limit to the number of neighbourhoods he can add: once he has enough properties to satisfy sub-para (c) he should stop. The notion that the identification involves less subjectivity than the rent officers in these two re-determinations seem to have assumed is consistent with the need for consistency and certainty. ...

...
[74] The final issue concerns the meaning of the word “locality”. It is obviously dangerous to reformulate, or to put a gloss on, a legislative definition, however vague and unsatisfactory it is. However, when interpreting “locality” in para 4, it is legitimate to bear in mind its ordinary English meaning, especially given that there is nothing in para 4(6) which conflicts with that meaning. It seems to me that, while the expression could easily extend to an area which included, for instance, a postal district (or a number of postal districts), it could not apply (in addition or instead) to a long road outside, but running off, the district (or districts). On the other hand, albeit with some hesitation, I think it could cover a doughnut-shaped area. The word “locality” would not normally convey, as a matter of ordinary English, an area as large as a city, but it is such an imprecise word that I do not think it could be said that the attribution of such a meaning is excluded as a matter of ordinary language. Subject to that, it is hard to be prescriptive about what para 4(6) means, beyond analysing the effect of sub-para (a), (b) and (c).’ *R (on the application of Heffernan) v Rent Service* [2008] UKHL 58, [2009] 1 All ER 173 at [39]–[43], [58]–[59], [74], per Lord Neuberger of Abbotsbury

LOCK-OUT

[For 47 Halsbury’s Laws of England (4th Edn) (2001 Reissue) para 1502 see now 41 Halsbury’s Laws of England (5th Edn) (2009) para 1304.]

LOCKUP

Canada ‘43. While there is no standard or trade definition of “lockup”, the expert evidence satisfies me that the term is commonly used and well understood in the construction industry. The term has some flexibility. It does not absolutely require the windows, exterior doors, or temporary staircases to be installed. Its

specific meaning must be derived from the construction agreement itself, along with the particular facts and circumstances of the building project to which it is being applied.’ *Skadberg Construction Ltd v Buchholz* [2010] BCJ No 1210, 2010 BCSC 869 at para 43, per J M Gropper J

LODGING HOUSE

[Note that the passage from 24 Halsbury’s Laws of England (4th Edn) (Reissue) para 1110 is not reproduced in the 5th Edn.]

LONG LEASE

[The Companies Act 1985, Sch 4 para 3, Sch 9 para 82(1), Supreme Court Act 1981 9A para 81(1) are repealed by the Companies Act 2006 and the definitions are not reproduced in the 2006 Act.]

LOSS

Actual total loss

[Whether on the capture of a vessel by the pirates and its removal into Somali waters the cargo became an actual total loss in terms of the Marine Insurance Act 1906, s 57(1).] ‘I conclude that, subject to Sir Sydney’s second point about the public policy of paying a ransom, piratical seizure in the circumstances of this case, where there was not only a chance, but a strong likelihood, that payment of a ransom of a comparatively small sum, relative to the value of the vessel and her cargo, would secure recovery of both, was not an actual total loss. It was not an irretrievable deprivation of property. It was a typical “wait and see” situation. The facts would not even have supported a claim for a CTL [constructive total loss], for the test of that is no longer uncertainty of recovery, but unlikelihood of recovery. That is itself recognised by the insured’s dropping of its CTL claim. There is no rule of law that capture or seizure is an ATL. The subject-matter is not amenable to a rule of law at all: it is all ultimately a question of fact. The typical case of capture, by a nation’s warship, subject to condemnation as a prize, is not an ATL, although it may mature into one. Piratical seizure, in the absence of a policy of ransom, may amount to an ATL, where the pirates escape with their prize for their own use and there is no prospect whatever of finding or recovering vessel or cargo: but where a chance

of recapture remains even such a seizure will not give rise to an immediate ATL, and in any event that is very far from this case. In the circumstances, *Dean v Hornby* [(1854) 3 E & B 180] is best explained as a case concerning CTL, which in any event reference there to the assured’s notice of abandonment strongly suggests. Similarly, *Andersen v Marten* [[1908] AC 334], where there was on any view an ATL, is probably best explained as suggested above, ie as a case on proximate cause (and possibly where the ATL of condemnation relates back to the time of capture). Although Mr Kerr appears to have left the point open in *Re Dawson’s Field Award* (29 March 1972, unreported), I think I was therefore wrong to suggest, in the *Kuwait Airways* case [*Kuwait Airways Corp v Kuwait Insurance Co SAK* [1996] 1 Lloyd’s Rep 664], that those cases showed that the mere intention to exercise dominion over seized property constitutes an ATL.’ *Masefield AG v Amlin Corporate Member Ltd; The Bunga Melati Dua* [2011] EWCA Civ 24, [2011] 3 All ER 554 at [59], per Rix LJ

Of ship

[For 43(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 880 et seq see now 93 Halsbury’s Laws of England (5th Edn) (2008) para 464 et seq.]

Physical loss or damage to the property

New Zealand · [Earthquake Commission Act 1993; whether there is cover under the Act, and in turn insurance cover, for a homeowner’s loss of the right to occupy his home.] ‘[32] Under the Act there is cover if the plaintiffs’ house has suffered natural disaster damage. As defined in the Act, natural disaster damage can be one of three things:

- (a) physical loss or damage to the residential building which occurs as the direct result of a natural disaster;
- (b) physical loss or damage to the residential building that (in the opinion of [the Earthquake Commission (EQC)]) is imminent as the direct result of a natural disaster that has occurred; or
- (c) physical loss or damage to the residential building (including physical loss or damage to the residential building that is imminent) that occurs as a direct result of measures taken under proper authority to avoid the

spreading of, or otherwise to mitigate the consequences of any natural disaster, but does not include any physical loss or damage to the property for which compensation is payable under any other enactment.

[33] The plaintiffs do not contend that physical loss or damage to their house is “imminent” (option (b) above). They contend that the statutory phrase “physical loss or damage to the property” should be read as “physical loss of or physical damage to the property”. They say that it includes circumstances in which a house is rendered uninhabitable because of the direct physical threat from rockfall hazard created by a natural disaster event. They say that the house practically and legally cannot be physically used for the foreseeable future and this deprivation is a “physical loss”. They say that this is a direct result of the earthquakes (option (a) above) or as a direct result of measures taken to avoid the spreading of or otherwise to mitigate consequences of the earthquakes (option (c) above).

[34] EQC says “physical loss or damage to the property” means physical destruction or damage to the materials or structure of the house. It says that the plaintiffs’ deprivation of the use of their house is not physical loss or damage to the house (options (a) and (c)) because this is an economic rather than physical loss. It says that there is no imminent threat to the house from rockfall (option (b)). It says that the insurance under the Act does not cover the consequences of a threat of future rockfall to the house that is not imminent. Nor does it cover any consequential action of the Council from deciding to place a s 124 notice on the property in March 2011 (or the subsequent renewals of that notice) as a result of a threat of rockfall which is not imminent. It says that it is these consequences and effects for which the plaintiffs seek cover.

[43] Under the Act “physical loss or damage to the property” is deemed to include physical loss or damage that is imminent. On a natural and ordinary meaning of that deeming provision, cover is intended to be available where a house has not yet been physically damaged or destroyed, but where such damage or destruction is considered to be imminent. In the present case there is a threat of physical loss or damage to the property and it is because of that threat that the plaintiffs are deprived of use of their house. If the loss of use of the house is covered, then there is cover under the Act even though it is accepted that the threat which has caused the

loss is not imminent. In other words, the interpretation put forward by the plaintiffs has the effect of extending the deeming provision which is itself an extension of the meaning of “physical loss or damage”. This counts against the plaintiffs’ interpretation.

[46] [The legislative] history shows that careful consideration was given to what “natural disaster damage” was to mean. A decision was made to move from the “loss or destruction of, or damage to” wording in the Bill to the “physical loss or damage to” wording as enacted. In legislation concerned with cover for natural disaster damage caused to the homes of New Zealanders up to a specified monetary limit, it cannot have been intended to provide that cover for a property that suffered loss or damage but not one that was destroyed. It must therefore be assumed that Parliament considered that “loss or damage” covered instances where a property was destroyed, so that the word “destruction” was unnecessary (being included within the meaning of either “loss” and/or “damage”).

[47] It must also be assumed that the change from “destroyed or damaged” property in the predecessor legislation to “physical loss or damage to the property” was also deliberate. But it does not follow that the changed wording was intended to extend the cover to loss that was other than to the materials or structure of the house. The underlined words in “physical loss or damage to the property” seem intended to continue to ensure that the cover was related to the materials or structure of the house rather than to cover other kinds of loss relating to a house affected by a natural disaster. It may be, for example, that “physical loss or damage to the property” was more consistent with the wording of house insurance policies which were to provide top up cover above \$100,000. I have not been provided with evidence as to the wording of house insurance policies at this time so this is no more than a thought. The point is that the wording did change but that does not mean that an extension in cover was intended.

[68] In this case the loss suffered is loss of the ability to exercise a legal right that is part of the bundle of rights comprising the fee simple estate. It is not “physical loss... to the property”. Loss in the context of the Act means loss to the physical materials or structure of the building. That interpretation is consistent with the natural and ordinary meaning of those words in the context of the Act. The legislative history does not suggest otherwise. To the extent that

case law in the United States in respect of house insurance supports a different interpretation that case law is limited and should not be followed here. Case law in respect of other kinds of policies is of limited assistance but also does not support the interpretation advanced by the plaintiffs.’ *Kraal v Earthquake Commission* [2014] NZHC 919, [2014] 3 NZLR 42 at [32]–[34], [43], [46]–[47], [68], per Mallon J; affd [2015] NZCA 13, [2015] 2 NZLR 589

LOST MODERN GRANT

[For 16(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 91 see now 87 Halsbury’s

Laws of England (5th Edn) (2017) para 819.]

LUGGAGE

Ordinary luggage

[For 5(1) Halsbury’s Laws of England (4th Edn) (Reissue) paras 613–615 see now 7 Halsbury’s Laws of England (5th Edn) (2015) paras 53–54.]

M

MACHINE

[25]... We have not been referred to any dictionary definitions of the word “machine”, but reference to the standard dictionaries does not indicate any linguistic reason to confine the word to a single item of equipment. It is in some ways a chameleon-like word, and the dictionaries contain a variety of meanings. A typical and in my view accurate definition, taken from the Concise Oxford English Dictionary, is: “an apparatus using or applying mechanical power, having several parts, each with a definite function and together performing certain kinds of work.” *Revenue and Customs Commissioners v Rank Group plc* [2015] UKSC 48, [2015] 4 All ER 77 at [25], per Lord Carnwath

New Zealand [Whether a hang-glider was an ‘aircraft’ as defined in the Civil Aviation Act 1990, s 2; ie a ‘machine’ that could derive support in the atmosphere from the reactions of the air otherwise than by the reactions of the air against the surface of the earth.] [2] The Civil Aviation Act 1990 (the Act) is concerned with the operation of the New Zealand Civil Aviation system. For present purposes, the key definition in s 2 is that of the term “aircraft”. That provides:

Aircraft means any machine that can derive support in the atmosphere from the reactions of the air otherwise than by the reactions of the air against the surface of the earth ...

[3] The applicant’s primary submission is that a hang-glider is not an aircraft as defined. That is the first question which must be answered.

[4] It is not disputed by the applicant that a hang-glider can derive support in the atmosphere from the reactions of the air. It is also not in dispute that it does so otherwise than by the reactions of the air against the surface of the earth. The sole question then is whether a hang-glider is a “machine”. Counsel for the appellant submits that it is not a machine because it contains no moving part and is controlled by the controller’s body; that it is used by a human to perform an activity but is

entirely passive in that the human controls the flight by shifting body position. The respondents submit that a hang-glider is an aircraft.

[5] There is expert evidence filed on behalf of the first respondent which is relevant to the question whether a hang-glider is an aircraft, though in the end the question is one of law. The aerodynamics of an aircraft (using that term in a broad sense to encompass any object that can derive support in the atmosphere from the reactions of the air) involves the balancing of four forces operating on the aircraft. The first is lift. That force derives from the movement of air around a wing section. The amount of lift generated is determined principally by the rate of the airflow over the aircraft wing, the shape of the wing section and the angle at which that section meets the air flow (the angle of attack). Lift operates vertically upwards through the aircraft’s centre of pressure. The second force is that of gravity. That force also acts vertically, but downwards. It operates through the centre of gravity of the aircraft and the extent of the force is dependent upon the weight of the aircraft. The third force is thrust, which operates horizontally and provides forward motion. This can be provided by engine power (in the case of a powered aircraft) or by descent through the air (in the case of an unpowered aircraft). The fourth, also operating horizontally but in a reverse direction, is drag. That results from the resistance of the aircraft to the flow of air around it and its extent is largely dependent upon the shape of the aircraft. The operation of an aircraft in flight involves maintaining a balance of these four forces which is appropriate to the desired flight condition. An alteration in the balance of those forces will alter the flight condition of the aircraft – for example, from flying straight and level to ascending or descending. The way in which that alteration in the balance of the forces is achieved varies with the type of aircraft concerned. In a powered aircraft, or in a rigid glider, it will be achieved by the operation by the pilot of the controls which transmit the pilot’s intentions to that part of the aircraft where an alteration to its state must be made to effect the change in forces. That involves, for example, the use of engine controls, or of controls which operate flaps, ailerons and other moving parts of the aircraft’s structure. In the type of hang-glider which is here under consideration, the necessary movements in the aircraft’s state relative to the air through which it is moving will be effected not by the transmission of the pilot’s intention through mechanical means, but through the pilot’s movement of his own body weight.

[6] The essence of the question is whether a hang-glider, in which the necessary changes in its condition to alter the balance of forces are made in that manner, is properly described as a "machine". The word "machine" is not a defined term in the Act. It bears its ordinary meaning. Given the crucial importance of that word in the present context, it is helpful to compare a number of different dictionary definitions. The relevant definition in the *Concise Oxford Dictionary* (10th rev ed, 2001) is: "an apparatus using or applying mechanical power and having several parts, each with a definite function and together performing a particular task; *technical* any device that transmits a force or directs its application". The most relevant definition in the new *Shorter Oxford English Dictionary* (1993) is: "An apparatus, an appliance; a device for applying mechanical power and having a number of interconnected parts, each with a definite function, *esp* one that does not utilize human strength; an apparatus of a particular (specified or understood) kind; a bicycle, a motor vehicle; an aircraft; a computer; a typewriter ... *Mech* any instrument that transmits force or directs its application". The *Oxford English Dictionary Online* includes among the definitions the following: "*mech*: anything that transmits force or directs its application". Under that definition is given a usage dated from 1704, which says: "machine, or engine, in mechanicks, is whatsoever hath Force sufficient either to raise or stop the Motion of a Body ... Simple Machines are commonly reckoned to be Six in Number, viz the Balance, Leaver Pulley, Wheel, Wedge, and Screw ... Compound Machines, or Engines, are innumerable". The *New Zealand Oxford Dictionary* (2005) defines the term as: "an apparatus using or applying mechanical power, having several parts each with a definite function and together performing certain kinds of work"; "an instrument that transmits a force or directs its application". *Chambers 20th Century Dictionary* (new ed, 1983) includes: "any artificial means or contrivance: any instrument for the conversion of motion". *Chambers 21st Century Dictionary* (online) gives as the relevant meaning: "A device with moving parts, and usually powered, designed to perform a particular task". *Merriam-Webster's Collegiate Dictionary* (11th ed) contains as the relevant meaning the following: "an assemblage of parts that transmit forces, motion, and energy one to another in a predetermined manner; an instrument (as a lever) designed to transmit or modify the application of power, force or motion".

[7] All of those dictionaries, except possibly *Chambers*, include, as one of the meanings of the word "machine", an instrument which directs the application of a force. There is no requirement, on that meaning of the word, that there be any moving parts. I consider that, on that ordinary meaning of the word, a hang-glider is a machine. The hang-glider is a device which directs the application of the four forces to which I have referred. In the case of lift, it is the hang-glider itself which, through its shape, and the angle at which it is maintained relative to the movement of the air around it, directs the application of the force of lift. The shape of the hang-glider also directs the application of the force of gravity on it, and, by the way in which that force is applied in controlling the descent of the hang-glider, directs the application of the force of thrust. The shape of the hang-glider also largely determines the application of the force of drag. The fact that the alteration of the angle of attack of the hang-glider, and other aspects of its relationship to the forces acting upon it, is achieved by the movement of the pilot and not by the operation of moving parts within the hang-glider itself does not mean that it is not a machine. Of the six simple machines which have been recognised at least since 1704, most of those have no moving parts. They depend on the application of force to them, normally directly by human agency, for their ability to transmit or direct the application of force. In this sense a hang-glider is essentially similar to them.

[8] Mr Anderson for the applicant refers to one case in which the meaning of the word "machine" has been judicially considered. That is *Telecom Auckland Ltd v Auckland City Council* [1995] 3 NZLR 489. The question in that case was whether telephone lines and booths were rateable property. One of the issues was whether they fell within an exemption which applied to "machinery, whether fixed to the soil or not". Telecom acknowledged that in isolation its telephone lines could not be regarded as machines or machinery in that they are passive conduits conveying impulses from transmitting devices at one end of the line to receiving devices at the other. However, it argued that the lines form part of a larger device which in its totality should be regarded as a "machine". Fisher J's conclusion was that Telecom's network as a whole was not a "machine" for the purposes of that exemption and that the lines within it were not "machinery". That fact situation is so different from the present that I derive no assistance from it on the case which confronts me.

‘[9] The conclusion that the ordinary dictionary definition of the word “machine”, in at least one of its meanings, is sufficient to include a hang-glider is consistent with the scheme and purpose of the Act. The Act is concerned with civil aviation and aviation safety. It is consistent with that purpose to include within the ambit of the Act any object capable of flight, and in particular any object capable of carrying a human being into flight where the safety of any person or persons may be at risk as a consequence of their being carried aloft by that object. Mr Anderson submits that a finding that hang-gliders are not aircraft would not remove the ability of the Act to regulate their operation. He submits that their interaction with and possible effect on aircraft and aviation facilities would come within the powers conferred by the Act. That may be so, but the purposes of the Act suggest that the Act is intended to apply to objects which might, through flight, pose a danger to human safety, by the imposition of controls on them in their own right, and not merely in respect of their interaction with other aviation elements.

‘[10] The adoption of a meaning such as is urged by counsel for the applicant would also involve the making of fine distinctions between different objects capable of flight, depending upon whether any alteration in the application of the forces to the object was achieved by the operator moving a part of the object or by moving his body relative to the object. The purposes of the Act do not suggest that fine distinctions of that sort, turning on the nature of the object, are intended in deciding what is an aircraft.

‘[11] New Zealand’s obligations under international aviation agreements are an important aspect of the Act, as the long title makes clear. The view of the definition of “aircraft” which I have expressed is consistent with international practice, so far as that is apparent from the evidence before me. The definition of “aircraft” in the Act is the same as that in the international standards contained in the Convention on International Civil Aviation. The classification of aircraft in those international standards includes a glider among the categories of non-power-driven heavier-than-air aircraft. It makes no distinction such as that urged by counsel for the plaintiff.

‘[12] For these reasons I hold that a hang-glider is an aircraft within the meaning of the Act.’ *Smith v Attorney-General* [2009] 1 NZLR 535 at [2]–[12], per MacKenzie J

MAINTENANCE (OF INFANT)

[For 48 Halsbury’s Laws of England (4th Edn) (2007 Reissue) para 1049 see now 98 Halsbury’s Laws of England (5th Edn) (2013) para 515.]

MAKE

‘[1] A person infringes a patent for a particular product if “he makes, disposes of, offers to dispose of, uses or imports the product or keeps it ... “—see s 60(1)(a) of the Patents Act 1977 (the 1977 Act). The principal issue on this appeal concerns the meaning of the word “makes”. ...

‘[25] It seems clear that the effect of s 60(1)(a) is that a person infringes a patent for a product if that person “makes” the product, as claimed in the patent concerned. As to the “making”, that is the verb used in s 60(1)(a). As to the product being defined by the claim, that seems clear from s 125(1). In any event, if it is not the product as claimed in the patent, it is hard to see what else the subject matter of the “making” could rationally be.

‘[26] The word “makes” must, of course, be interpreted contextually. In this case, the word should, in my view, be approached bearing in mind a number of considerations (which sometimes may be “apparently irreconcilable” in this field, as Robert Walker LJ pointed out in *Cartonneries de Thulin SA (t/a Carthuplas) v CTP White Knight Ltd* [2000] IP & T 1393 at 1403, quoting *A-G v HRH Prince Ernest Augustus of Hanover* [1957] 1 All ER 49 at 54, [1957] AC 436 at 461). First, the word “makes” must be given a meaning which, as a matter of ordinary language, it can reasonably bear. Secondly, it is not a term of art: like many English words, it does not have a precise meaning. Thirdly, it will inevitably be a matter of fact and degree in many cases whether an activity involves “making” an article, or whether it falls short of that.

‘[27] Fourthly, the word “makes” must be interpreted in a practical way, by reference to the facts of the particular case. Fifthly, however, there is a need for clarity and certainty for patentees and others, and for those advising them. Sixthly, it should be borne in mind that the word applies to patents for all sorts of products, from machinery to chemical compounds. Seventhly, one should bear in mind, at least as part of the background, the need to protect the patentee’s monopoly while not stifling reasonable competition.

‘[28] Eighthly, the word “makes” must be interpreted bearing in mind that the precise scope of a claim may be a matter almost of happenstance in the context of the question whether the alleged infringer “makes” the claimed product. Lord Diplock described the specification of a patent as “a unilateral statement by the patentee, in words of his own choosing” by which he states “what he claims to be the essential features of the new product”—*Catnic Components Ltd v Hill and Smith Ltd* [1982] RPC 183 at 242. As Lord Hoffmann explained in *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2004] UKHL 46 at [21], [2005] 1 All ER 667 at [21], [2005] RPC 169, a claim is, or at least should be drafted—

“not only ... in the interest of others who need to know the area ‘within which they will be trespassers’ but also in the interests of the patentee, who needs to be able to make it clear that he lays no claim to prior art or insufficiently enabled products.”

As Lord Hoffmann went on to explain in para [35], all sorts of factors, only some of which may appear to be rational, can influence the person drafting a claim.

‘[29] Ninthly, where, as here, there is a decision (the *United Wire* case [*United Wire Ltd v Screen Repair Services (Scotland) Ltd* [2000] 4 All ER 353, [2001] RPC 439) of the House of Lords or this court on the meaning of the word, it cannot be departed from save for very good reasons indeed. Finally, particularly given that s 60 (like s 125) is one of the sections mentioned in s 130(7) of the 1977 Act, the word should be interpreted bearing in mind that it is included in a provision which is intended to be part of a scheme which applies in many other jurisdictions.

‘[60] Since neither the judge nor the Court of Appeal approached the issue in this case in the right way, we must reconsider and, if possible, determine for ourselves, the central issue, namely, whether Delta “makes” a patented article when it removes a damaged Schütz bottle from a Schütz cage, and replaces it with a Werit bottle.

‘[61] As is clear from the *United Wire* case, this question requires the court to focus on the question of whether, when it replaces a component of the article (viz the bottle) the subject of the claim, Delta “makes” that article (viz the IBC [intermediate bulk container] as described in the claim). In answering that question, I consider that it is both legitimate and

helpful to consider the question of whether the bottle is such a subsidiary part of the patented article that its replacement, when required, does not involve “making” a new article.

...

‘[78] Deciding whether a particular activity involves “making” the patented article involves, as Lord Bingham said, an exercise in judgment, or, in Lord Hoffmann’s words, it is a matter of fact and degree. In some such cases, one can say that the answer is clear; in other cases, one can identify a single clinching factor. However, in this case, it appears to me that it is a classic example of identifying the various factors which apply on the particular facts, and, after weighing them all up, concluding, as a matter of judgment, whether the alleged infringer does or does not “make” the patented article. In the present case, given that (a) the bottle (i) is a freestanding, replaceable component of the patented article, (ii) has no connection with the claimed inventive concept, (iii) has a much shorter life expectancy than the other, inventive, component, (iv) cannot be described as the main component of the article, and (b) apart from replacing it, Delta does no additional work to the article beyond routine repairs, I am of the view that, in carrying out this work, Delta does not “make” the patented article.’ *Schütz (UK) Ltd v Werit (UK) Ltd* [2013] UKSC 16, [2013] 2 All ER 177 at [1], [25]–[29], [60]–[61], [78], per Lord Neuberger P

MAKE (RECORDING)

Australia [Copyright Act 1968 (Cth), s 111.] ‘[62] Who “makes” the copy for the purposes of the Copyright Act in a situation like that provided by the TV Now service? In some ways, this question resembles the old conundrum of which came first: the chicken or the egg? Different courts confronted by a similar dilemma to that presented here have approached it by recognising that identification of a policy choice may be a key to construing whether an infringement of copyright has occurred ...

‘[63] I am of opinion that the user of the TV Now service makes each of the films in the four formats when he or she clicks on the “record” button on the TV Now electronic program guide. This is because the user is solely responsible for the creation of those films. He or she decides whether or not to make the films and only he or she has the means of being able to view them. If the user does not click “record”, no films will be brought into existence that he or she can play back later. The service

that TV Now offers the user is substantively no different from a VCR or DVR. Of course, TV Now may offer the user a greater range of playback environments than the means provided by a VCR or DVR, although this can depend on the technologies available to the user.

[64] The ordinary and natural meaning of “makes” and “making” in the sense in which those words are used in s 111(1) and (2) is “to create” by initiating a process utilising technology or equipment that records the broadcast. No doubt a director could be said to “make” a film as his or her creation of an original work in the sense of “make”, as that word is used in s 22(4). But, s 111 is dealing with an individual creating a film, being a copy of a broadcast by using some available technology or equipment to reproduce someone else’s original work. The complexity of making a recording or film of a broadcast requires the person referred to in s 111(1) to use a means external to himself or herself to do so. The concept of “making a film or recording” employed by s 111(1) and (2) is concerned with the creation by one person of a copy of a second person’s original work so that, as a result, a film or recording is brought, somehow, into existence by the first person’s action. The concept is not concerned about the technological or other means by which that result is created. It is unlikely that the parliament intended to confine, in a presumptive way, the technology or other means available to be used by a person who wished to make a film solely for private or domestic use and subject to the other conditions in s 111.

...
[70] I am of opinion that when s 111(1) and (2) refer to the “maker” and “making” they are dealing with individuals who are creating films or copies in the process of time-shifting. The use of the words “maker” and “making” elsewhere in the Act is different, namely, the latter use is the technical means of identifying the subsistence and ownership of copyright. Rather, in s 111(1) and (2), those words are used in the more colloquial sense, indeed in their natural and ordinary meaning, in order to identify who is to have the benefit, not of copyright in the film or copy, but of the exemption from liability for infringing another’s copyright: see *Australian Securities and Investments Commission v DB Management Pty Ltd* (2000) 199 CLR 321; 169 ALR 385; [2000] HCA 7 at [34]–[35] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ.’ *Singtel Optus Pty Ltd (ACN 052 833 208) v National Rugby League Investments Pty Ltd (ACN 081 778 538) (No 2)* [2012] FCA 34, (2012) 285

ALR 157 at [62]–[64], [70], per Rares J

MALICE

[For 28 Halsbury’s Laws of England (4th Edn) (Reissue) para 149 see now 32 Halsbury’s Laws of England (5th Edn) (2012) para 651.]

[For 45(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 470 see now 97 Halsbury’s Laws of England (5th Edn) (2015) para 728.]

Malice aforethought

[For 11(1) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 89 see now 25 Halsbury’s Laws of England (5th Edn) (2016) para 102.]

MALICIOUS PROSECUTION

[For 45(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 458 see now 97 Halsbury’s Laws of England (5th Edn) (2015) para 716.]

MANAGED AS A WHOLE

[Financial Services and Markets Act 2000, s 235(3): arrangements may be a collective investment scheme if... (b) the property is managed as a whole by or on behalf of the operator of the scheme.] [7] The main issue, which is common to all the schemes, is whether, if the terms of an investment scheme provide that the property within the scheme is to consist of individual plots managed in such a way as to give individual returns for each investor based on the yield from his plot, this ensures that it will not be a CIS. The defendants’ case, which reflects what seems to be a view commonly held in the alternative investment market, is that a scheme that is so organised has neither of the characteristics required by sub-s (3), pooling of profit or management as a whole, and is therefore not a CIS.

[8] In my opinion, for the reasons given in more detail at paras [60], [163]–[203], [208], [258]–[259], [265], below:

- (a) pooling and management as a whole are separate issues; such an investment scheme will not involve pooling of profit or income within s 235(3)(a), but may nonetheless be “managed as a whole” within s 235(3)(b) and, if it is, and if it otherwise fulfils the relevant criteria, will be a CIS;
- (b) all the schemes in this case are managed as a whole, because all the investment

property is managed by or on behalf of the operator as one entity for the collective benefit of all investors, without any substantial regard for the individual interests of any of the investors, and without the investors themselves having any involvement in management; and

- (c) in each case, the object of the division of the property into separate plots so as to generate individual income returns is to attempt to avoid the scheme being a “regulated activity” requiring its operators to be authorised persons, but this neither benefits investors nor involves any substantial individual as opposed to collective management, and therefore does not save it from being a CIS.

...

[176] It is, as always, necessary to consider carefully the language of the statute. Here, s 235(3)(b) does not apply if the property is “managed” by the operator or if the “whole of the management” is by the operator; it has to be “managed as a whole”. Reference to a standard dictionary or thesaurus reveals a range of meanings for “as a whole”, involving some which approximate to “on the whole”. In this context, however, it seems clear, as all parties contend, that what is meant is collective management of Yoni Farm as one entity, as opposed to management of the investors’ individual interests.

[177] One obvious difficulty is that whether work is done on property “as a whole” or not may differ, depending on from whose perspective one is considering the question. A window cleaning firm employed to clean the windows of a block of flats might see itself as employed to work on the property as a whole, while the owner of each flat might think that his windows were being cleaned. D9–11 submit that what matters is the standpoint of the investor but, since s 235(3)(b) is about management, it seems logical to look at the position of the manager and consider whether from his point of view he is managing the property as one entity. Investors need protection if managers are not looking after their individual interests, which is likely if the managers see their role as to look after a project as a whole. There is in my view no doubt that GMX, and its predecessors, would see themselves as managing Yoni Farm as a whole, as is clear, in the case of GMX, from their actions in 2013.

[178] The other question which however arises is, what if some management activities are directed at the property as a whole and others at individual plots. Is it necessary that all

management is carried out as a whole, or is it enough that some is? The language is consistent with either. This is an ambiguity which could arise if there were twin investment objectives, eg profit from planning permission and in the meantime from agricultural activities, where only one is managed as a whole by the operator. Here it arises because, although the farm is clearly managed as one entity, some management activity is directed at the harvesting of individual plots. This is the key issue in this case.

...

[195] The issue, as I have said earlier, is whether the property is “managed as a whole” if all the management activities are carried out by or on behalf of the operator, but some are carried out in the interests of the body of investors and others in the interests of individual investors. As a matter of language, it could be said that the property is managed “as a whole” if the manager is responsible for its entire management, irrespective of whether all or any of it is directed at the individual interests of investors. Equally, it could be said that the property is not managed “as a whole”, if there is any element at all of individual management. Given the purpose of s 235(3)(b), neither of these extreme interpretations is attractive; what must be sought is an interpretation that catches what might realistically be regarded as collective management, requiring protection for individuals’ interests.

...

[198] Having regard to the objective of the subsection, to protect investors where there is collective management, in my view the correct test is whether the elements of individual management, arising either from attention given by the management to the interests of individual investors, or from participation by the investors themselves in the management of the property, is substantial. If so, the management by or on behalf of the operator is not to be regarded as management “as a whole.” *Financial Conduct Authority v Capital Alternatives Ltd* [2014] EWHC 144 (Ch), [2014] 3 All ER 780 at [7]–[8], [176]–[178], [195], [198], per Nicholas Strauss QC

MANAGEMENT

In connection with the ... management ... of a company

[11] The power of the court to make an order disqualifying a defendant from acting as a

director of a company following conviction on indictment is to be found in s 2(1) of the Company Directors Disqualification Act 1986 which, so far as relevant, provides:

"The court may make a disqualification order against a person where he is convicted of an indictable offence (whether on indictment or summarily) in connection with the ... management ... of a company."

'[12] Mr Krolick submits that this offence of assisting the retention of criminal property through the client account was not an offence in connection with the management of a company. He says that the appellant was not the manager of the company; he was not convicted of operating either that company or any other company for the purpose of the fraud; he has done no more than to receive sums of money and to shelter them, and that it was immaterial to that offence whether he received them from a company or from an individual criminal.

'[13] The meaning of s 2(1) was carefully considered by this court in *R v Goodman* [1993] 2 All ER 789, [1994] 1 BCLC 349. In the judgment given by Staughton LJ this court said this ([1993] 2 All ER 789 at 792, [1994] 1 BCLC 349 at 352-353):

"There are three possible ways of looking at the test to be applied. The first might be to say that the indictable offence referred to in the 1986 Act must be an offence of breaking some rule of law as to what must be done in the management of a company or must not be done. Examples might be keeping accounts or filing returns and such matters. It is clear from the authorities that the section is not limited in that way ... Another view might be that the indictable offence must be committed in the course of managing the company. That would cover cases such as [*R v Georgiou* (1988) 87 Cr App R 207, *R v Corbin* (1984) 6 Cr App R (S) 17 and *R v Austen* (1985) 7 Cr App R (S) 214]. What the defendants in all those cases were doing was managing the company so that it carried out unlawful transactions. The third view would be that the indictable offence must have some relevant factual connection with the management of the company. That, in our judgment, is the correct answer. It is perhaps wider than the test applied in the three cases we have mentioned, because in those cases there was no need for the court to go wider than in fact it did. But we can

see no ground for supposing that Parliament wished to apply any stricter test ..."

The precise facts of that case are not greatly analogous with the present. The appellant in that case, who was the chairman of a company, used his knowledge of its affairs to commit an offence of insider trading, but it is to be observed that the offence which he committed was, at least arguably, and in our view plainly, not an offence committed via the management of the company but it nevertheless had a relevant factual connection with the management of the company.

'[14] The question in the present case is whether this sheltering of criminal property by the appellant had a relevant factual connection with the management of Pentagon Securities. It seems to us that it did. What were being sheltered were the criminal proceeds of fraud obtained through the vehicle of the company. Moreover, the relevant factual connection was with the financial management of Pentagon. The appellant made available his client account as a private banking facility for the assets of Pentagon so that those who managed it could manage its affairs by placing its funds there rather than in the bank. The assets were in fact criminal proceeds. He suspected that they were and he received them in circumstances in which no further disbursement of them could be made by those who managed Pentagon's financial (and criminal) affairs without his participation. That as it seems to us is quite sufficient relevant factual connection between the financial management of Pentagon and the offence which the appellant committed. It is not, as *R v Goodman* makes clear, necessary that the offence be committed by the defendant himself using the company as a vehicle for fraud, though that of course is another situation in which a disqualification order is appropriate.

'[15] It follows that our conclusion is that the judge was entitled to disqualify. Mr Krolick alternatively submits that he should not have done so, or not for so long. The appellant is a man of not inconsiderable assets, even after a confiscation order of a little over £1m has been satisfied. Those assets are held, as we understand it, by various private companies controlled and managed by him. The assets are no doubt substantially property and the properties are managed through the companies. Mr Krolick submits that the public do not need any protection from the appellant in the management of those companies. There has never been any criticism of criminal conduct in the course of the management of them. He

reminds us of the observations of Potter LJ in *R v Edwards* [1998] 2 Cr App R (S) 213 at 215, namely:

“The rationale behind the power to disqualify is the protection of the public from the activities of persons who, whether for reasons of dishonesty, or of naivety or incompetence in conjunction with the dishonesty of others, may use or abuse their role and status as a director of a limited company to the detriment of the public.”

‘[16] It seems to us that the judge was perfectly entitled to say that the appellant fell within that category. It may well be true that there is no criticism of his management of his private companies, but there is every reason to criticise him for other company-related offences. First, the serious money laundering of nearly £1m; and secondly, the offences in New York.’ *R v Creggy* [2008] EWCA Crim 394, [2008] 3 All ER 91 at [11]–[16], per Hughes LJ

Of ship

[For 43(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 1835 see now 7 Halsbury’s Laws of England (5th Edn) (2015) para 389.]

MANDATE

[For 3(1) Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 20 see now 4 Halsbury’s Laws of England (5th Edn) (2011) para 126.]

MANDATORY ORDER

[For 1(1) Halsbury’s Laws of England (4th Edn) (2001 Reissue) para 133 et seq see now 61 Halsbury’s Laws of England (5th Edn) (2010) para 703 et seq.]

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

MANIFESTLY UNREASONABLE

See also VEXATIOUS

[Freedom of Information Act 2000 [‘FOIA’], s 14; Environmental Information Regulations 2004, SI 2004/3391 [‘EIR’], reg 12: power of a public authority to reject a request for information on the grounds that the request was ‘vexatious’ or ‘manifestly unreasonable’.] [78] That leads to the question whether there is any difference between “vexatious” (s 14 FOIA) and

“manifestly unreasonable” (reg 12(4)(b) EIR). The expression “manifestly unreasonable” has to be interpreted so as to give effect to the objectives of Directive 2003/4 [Council Directive 2003/4/EC (on public access to environmental information) (OJ 2003 L41 p 26)]. It differs on its face from “vexatious” since it clearly imposes an objective test and appears alongside a requirement in reg 12(1)(b) ... for the authority to be satisfied as to the public interest in the disclosure. Leaving the word “manifestly” to one side for a moment, if I am right that the approach to s 14 should primarily be objective and should take as its starting point the approach that “vexatious” means without any reasonable foundation for thinking that the information sought would be of value to the requester or the public or any section of the public, then the difference between the two phrases is vanishingly small. It is difficult to see how they would differ in practice, though it cannot be discounted that EU jurisprudence may develop in the future in a different way to our own, and in addition that the public interest requirement in reg 12(1) might lead to a different outcome from that under s 14. The word “manifestly”, which I put to one side, means of course the unreasonableness must be clearly shown. This saves the authority from having to make any detailed investigation into matters which it does not know or are not in the public domain. I doubt whether “manifestly” in practice adds much since before it uses s 14 FOIA or reg 12, the authority would have to be confident that the request was vexatious or as the case may be manifestly unreasonable before it rejected it.

‘[79] No one has suggested that, on the particular facts of this case, s 14 FOIA could have led to a different answer to the test in reg 12 EIR. In those circumstances, in my judgment, the UT was right to proceed on the basis that there was no distinction between the two tests in her case.’ *Dransfield v Information Commissioner; Craven v Information Commissioner* [2015] EWCA Civ 454, [2016] 3 All ER 221 at [78]–[79], per Arden LJ

MANNER

Manner of manufacture

Australia [Patents Act 1990 (Cth), s 18(1)(a): an invention is a patentable invention, for the purposes of a standard patent, if the invention, so far as claimed in any claim, is a manner of manufacture within the meaning of the Statute

of Monopolies 1623 (Imp), s 6.] ‘[14] *A manner of manufacture*, or kind of manufacture, must be construed as including *the practice* of making or *the process* of making, as well as *the means* of making and *the product* of making. Thus, even though an inventor may not use any newly devised mechanism, nor produce a new substance, he may nevertheless, by providing some new and useful effect through his practice or process, acquire a monopoly in such improved result by explaining how that result is secured by his practice or process. In that regard, the *product* of a process simply means something in which the new and useful effect may be observed. The something need not be a thing, in the sense of an article or object: it may be any physical phenomenon in which the effect, be it creation or merely alteration, may be observed. A method or process will be a manner of manufacture if it results in the production of some *vendible product*, improves or restores a *vendible product* to its former condition, or has the effect of preserving from deterioration some *vendible product* to which it is applied: *NRDC [National Research Development Corporation v Commissioner of Patents (1959) 102 CLR 252; [1960] ALR 114; (1959) 1A IPR 63]* at CLR 271; ALR 122; IPR 71. Here, the word *product* must be understood as covering every physical result that is an artificially created state of affairs and the word *vendible* must be understood as pointing only to the requirement of utility in practical affairs that renders the product of economic significance: *NRDC* at CLR 276–7; ALR 126; IPR 75. To be patentable, the effect produced by a claimed invention must exhibit those two essential qualities of being an artificially created state of affairs that is of economic significance: *NRDC* at CLR 277; ALR 126; IPR 75.

...
 ‘[18] The structure of s 18(1) emphasises that the grounds relating to novelty, inventive step, utility and secret use were each excised from the general body of case law that had previously developed the phrase *manner of new manufactures*. That is made clear by the reference in s 18(1)(a) to *manner of manufacture*, rather than to *manner of new manufactures*: *Ccom [Ccom Pty Ltd v Jiejing Pty Ltd (1994) 51 FCR 260; 122 ALR 417; 28 IPR 481]* at CLR 290; ALR 446; IPR 510. Thus, manner of manufacture, novelty, inventiveness and utility are now stated as distinct requirements of a patentable invention. The criterion of *manner of manufacture* requires a decision as to what, at the present time, properly falls within the scope of the patent system. In so far as *manufacture*

suggests a *vendible product*, that is to be understood as including every result produced by a method or process where that result is an artificially created state of affairs that is of utility in practical affairs and thus of economic significance: *Ccom* at CLR 291; ALR 447; IPR 511.’ *Research Affiliates LLC v Commissioner of Patents* [2013] FCA 71, (2013) 300 ALR 724 at [14], [18], per Emmett J

Australia [Patents Act 1990 (Cth), s 18(1): ‘... a patentable invention is an invention that, so far as claimed in any claim: (a) is a manner of manufacture within the meaning of section 6 of the Statute of Monopolies ... ‘.] ‘[124] As was emphasised in *National Research Development Corporation v Commissioner of Patents* [(1959) 102 CLR 252, [1960] ALR 114, (1959) 1A IPR 63, [1959] HCA 67] (*NRDC*), in relation to the Patents Act 1952 (Cth), the conception of a manner of manufacture is not limited to physical production but takes its meaning from the whole category under which all grants of patents which may be made in accordance with the developed principles of patent law are to be subsumed ...

‘[125] In *NRDC*, it was also held that it was enough for a process to constitute a manner of manufacture that it resulted in an artificially created state of affairs of economic significance ...

That holding is, however, to be understood as importing the Court’s earlier observations as to the meaning of an “invention” and the idea that all that had come to be understood by that word, as used in patent law, is comprehended in the phrase “new manufactures”. It should not be taken to suggest that an “artificial state of affairs” and “economic utility” are the only considerations relevant to whether an invention is “a manner of manufacture” for the purposes of s 18(1)(a) of the Act.

‘[126] For a claimed invention to qualify as a manner of manufacture it must be something more than a mere discovery. The essence of invention inheres in its artificiality or distance from nature; and thus, whether a product amounts to an invention depends on the extent to which the product “individualise[s]” nature. ...

‘[127] The question then is whether the subject matter of the claim is sufficiently artificial, or in other words different from nature, to be regarded as patentable.’ *D’Arcy v Myriad Genetics Inc* [2015] HCA 35, (2015) 325 ALR 100 at [124]–[127], per Gageler and Nettle JJ

MANOR

[For 12(1) Halsbury's Laws of England (4th Edn) (Reissue) para 695 see now 32 Halsbury's Laws of England (5th Edn) (2012) para 95.]

MANSION HOUSE

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) paras 789, 791 see now 91 Halsbury's Laws of England (5th Edn) (2012) paras 690, 692.]

MANSLAUGHTER

[For 11(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) paras 86, 92 see now 25 Halsbury's Laws of England (5th Edn) (2016) paras 99, 105.]

MANTRAP

[Offences against the Person Act, 1861, s 31.] ' [11] ... Mantraps take many forms, although the most common is something like a large bear trap, with steel springs armed with teeth which meet on the victim's leg and trap him. Both spring guns and mantraps appear to involve the deployment of stored energy, and this consideration led Mr Magarian to reject the suggestion in argument that a disguised deep hole dug in the ground with a vicious spike or spikes fixed at the bottom would constitute a mantrap. While we are inclined to agree that a shallow hole, on its own, might not do so, probably because it would not be calculated to inflict grievous bodily harm, as a matter of statutory construction, notwithstanding the concession by the Crown in *R v Munks* [1963] 3 All ER 757, [1964] 1 QB 304, we entertain no doubt that a deep hole containing potentially lethal spikes would fall within the description "mantrap". The legislation is not confined to objects which operate through "stored energy".' *R v Cockburn* [2008] EWCA Crim 316, [2008] 2 All ER 1153 at [11], per Sir Igor Judge P

MANUFACTORY

In Lands Clauses Consolidation Act

[For 8(1) Halsbury's Laws of England (4th Edn) (2003 Reissue) para 110 see now 18 Halsbury's Laws of England (5th Edn) (2009) para 626.]

MANUFACTURE (VERB)

New Zealand [Customs and Excise Act 1996, s 2(1)(b).] '[3] The question in this appeal is whether this blending of motor spirit with butane constitutes "manufacture" for the purposes of the Customs and Excise Act 1996. In other words, the issue is whether the blending constitutes "any operation, or process, involved in the production of the [motor spirit]". The Comptroller of Customs contends that it does, with the consequence that Terminals ought to have been paying duty at a higher rate on the full volume of motor spirit resulting from the process. Terminal's position is that it does not and that no further duty is payable.

... '[81] The process of blending butane with motor spirit conducted by Terminals leads to the production of the motor spirit produced by that blending process. It therefore falls within the definition of manufacture in the Act.' *Terminals (NZ) Ltd v Comptroller of Customs* [2013] NZSC 139, [2014] 1 NZLR 121 at [3], [81], per Glazebrook J

MARINER OR SEAMAN

[Wills Act 1837, s 11; Wills (Soldiers and Sailors) Act 1918, s 2; whether the privilege accorded to 'mariner or seaman' is restricted to persons serving or engaged to serve on British-registered ships.] '[42] By s 11 of the 1837 Act: "[A]ny soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act." This ensured that the privileged will could be made, even orally, without the ordinary formalities as to execution and attestation required by s 9 of the Act.

'[43] Then, by s 2 of the Wills (Soldiers and Sailors) Act 1918 it was provided that s 11 of the 1837 Act "shall extend to any member of His Majesty's naval or marine forces not only when he is at sea but also when he is so circumstanced that if he were a soldier he would be in actual military service within the meaning of that section."

'[44] Mr Cooper's submission, which (as he accepts) is not supported directly by any authority, is that the privilege accorded to mariners and seamen by s 11 is restricted to those who are serving, or have been engaged to serve, on British-registered ships. Put another way, the privilege is enjoyed only by members of the Merchant Navy, and not by people like

Ashley who are serving on foreign-registered vessels. Mr Cooper said that such persons could be equated, in military terms, with mercenaries.

[45] There are occasional references in decided cases which indicate that a particular judge may have been thinking in terms only of British ships, but the question which confronts me was not being litigated. The remarks are, in the true sense of the term, obiter dicta and Mr Cooper rightly does not make too much of them. He relies primarily on what he says must be the underlying rationale of s 11, and, as a subsidiary point, on what he says is a signpost which is provided by s 2 of the 1918 Act.

[46] The argument from the rationale of s 11 is that persons who are covered by the privilege are: (1) engaged in unusually hazardous activities; (2) likely, while undertaking those activities, to find themselves in places in which there is no ready access to the means of making a will in the conventional way; and (3), this being crucial, undertaking their activities in the national interest. It is this last point which, in Mr Cooper's submissions, differentiates someone in Ashley's position from a seafarer who is a member of the crew of a British ship. In a reductio ad absurdum, Mr Cooper asks whether the privilege would be extended to pirates (or, in the case of war, to traitors).

[47] Mr Cooper's argument on s 2 of the 1918 Act runs thus. He accepts that the section does not deal in any way with persons serving on civilian vessels. The words "His Majesty's naval or marine forces" show that the draftsman had in mind only members of the Royal Navy and the Royal Marines. This is said to show that there are "some words missing from s 11", which I take to be words which would exclude members of foreign (armed) naval services, "and there may be other words which have to be implied". Those "other words" would be words which limited the privilege, as regards civilian seafarers, to persons employed on British vessels.

[48] I am unable to accept this restrictive construction of s 11.

[49] I begin from the fact that I am faced with four very ordinary words, "a mariner or seaman", which are easily understood and which, on their plain meaning, apply to all mariners and seamen. If the meaning is to be in some manner restricted, then the ground on which the restriction is to be attached must appear from the context in which the words are used or from the underlying purpose of the legislation. The concept of "national service" is, with respect to Mr Cooper's submissions, nowhere to be found in s 11, and it does not

have to be introduced in order to make the section workable or rational. Arguments from absurdity are rarely appealing, and I am not deterred from my conclusion by the example of the pirate. If I am disposing of a carefully constructed argument in a brusque manner, I apologise: but, if a question of language appears to be as clear as this does, nothing will be gained by dealing with it at greater length.' *Re Servoz-Gavin (deceased); Ayling v Summers* [2009] EWHC 3168 (Ch), [2010] 1 All ER 410 at [42]–[49], per Judge Peter Langan QC (notes omitted)

MARKET

Australia [Trade Practices Act 1974 (Cth), s 45. Applicants argued that air cargo services on routes into Australia and routes between two or more points outside Australia are not supplied in competition in a market in Australia because, in essence, competitive activity between airlines offering cargo services takes place at the point of origin of the cargo.] '[23] In the operation of s 45 of the Act, a key concept is "market". There is a plethora of case law regarding the meaning of that term, but the High Court has warned that attempts to define "market" too precisely are dangerous. In *NT Power Generation Pty Ltd v Power and Water Authority* (2004) 219 CLR 90; 210 ALR 312; [2004] HCA 48, the High Court advocated a broader approach, stating (at [68]):

[68] The Act is seeking to advance the broad goal of promoting competition. Certain provisions of the Act, particularly in Pt IV, necessarily turn to a significant degree on expressions which are not precise or formally exact. *One example is "market": there can be overlapping markets with blurred limits and disagreements between bona fide and reasonable experts about their definition, as in this case.* Other examples are "substantial", "competition", "arrangement", "understanding", "purpose" and "reason" (which need only be a "substantial" purpose or reason: s 4F). *It is not appropriate to subject the application of this type of legislation to a process of anatomising, filleting and dissecting* [Emphasis added; citations omitted.]

...

[28] It is significant to note that consideration must be given to both actual and potential transactions between buyers and sellers in

identifying the “field of rivalry” between competitors.

‘[66] In my view, the place of contracting is not determinative of the geographic locality of the relevant market. The references relied upon in Heydon J D, *Trade Practices Law* (Lawbook Co, subscription service) do not, in context, stand for such a proposition. As the authorities referred to previously indicate, the concept of a “market” refers to a range of “competitive activities” relating to the field of actual or potential activities between buyers and sellers among whom there is, or can be, close competition. It involves the “field of rivalry”, not just referable to the place of contracting.

‘[67] With the advent of modern telecommunications any other approach may fail to give protection to, and enhance the welfare of, Australians who use and obtain services in Australia. After all, the focus of s 45 is on the supply of the services.

‘[68] The notion of a “market in Australia” was recently referred to by Lindgren J in *Australian Competition and Consumer Commission v Qantas Airways Ltd* (2008) 253 ALR 89; [2008] FCA 1976 (*Qantas*), where his Honour stated (at [33]–[34]):

[33] Although the notion of a “market in Australia” in s 4E has been referred to in two cases (*Riverstone Computer Services Pty Ltd v IBM Global Financing Australia Ltd* [2002] FCA 1608 at [21] per Hill J and *Auskay International Manufacturing and Trade Pty Ltd v Qantas Airways Ltd* (2008) ATPR 42–256 at [19] per Tracey J), the concept has not been the subject of extensive judicial consideration.

[34] In *Riverstone*, Hill J rejected the proposition that in order to be a “market in Australia” a market must be wholly within Australia. His Honour said (at [21]) that the fact that a market was global did not signify that there could not be a market in Australia for the same products. As the Commission points out, a contrary view would considerably reduce the efficacy and utility of the competition law provisions of the Act, especially in the modern telecommunications era.

‘[69] Justice Lindgren went on to conclude that the definition of “market in Australia” in s 4E excludes a market that is wholly outside Australia, a conclusion with which I respectfully agree. As other aspects of the decision in *Qantas* proceeded upon agreed facts, however,

that case provides little assistance in determining the other issues raised before me which involved “a concrete dispute reached after contest in argument”: see *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53; 203 ALR 217; [2003] HCA 75 at [62] per Gummow, Hayne and Heydon JJ.

‘[70] In my opinion, Hill J in *Riverstone Computer Services Pty Ltd v IBM Global Financing Australia Ltd* [2002] FCA 1608 (*Riverstone*) was correct in concluding that the fact that a market was global did not signify that there could not be a market in Australia for the same products (or services).

‘[71] However, I do not take the reference by Hill J to a global market which includes Australia as arguably a market in Australia “if sales are made [in Australia]” (*Riverstone* at [22]) as making it a requirement that the contract under which services are supplied in Australia must be entered into in Australia or that the transactions themselves must be entered into in Australia. In my view, Hill J was simply proffering an example of how one might identify the possible location of competition, and was not providing a definitive statement that buyers and sellers of services must enter into transactions in Australia.

‘[72] Tracey J in *Auskay* did observe that “[b]uyers and sellers of goods and services must negotiate and enter transactions in an area in which suppliers are engaged in close competition with each other” and “[t]hat area must be located within Australia” (at [19]). However, his Honour also referred to the importance of the place where the relevant competition takes place, and where parties compete to obtain contracts (at [21]). I do not read his Honour’s comments (made in the context of a pleading dispute) as dictating that in determining the geographic location of the market one is confined by the location of the making of the contract for the subject services.

‘[73] Once it is accepted that the place of contracting is not determinative, then in view of the above reasoning, it cannot be concluded that the particular conduct complained of is not capable of constituting a contravention of the Act. We are not then dealing with a market that is wholly outside Australia, but rather, with a possible contravention s 45 of the Act in relation to inbound and outbound services in a market in Australia.’ *Emirates (ARBN 073 569 696) v Australian Competition and Consumer Commission* (VID 252 of 2008) [2009] FCA 312, (2009) 255 ALR 35 at [23], [28], [66]–[73], per Middleton J

Market in Australia

Australia [Trade Practices Act 1974 (Cth) ('the TPA'), s 4E.] [12] The authorities confirm that a market, within the meaning of the TPA, is a notional facility which accommodates rivalrous behaviour involving sellers and buyers. In *Queensland Wire [Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd]* (1989) 167 CLR 177; 83 ALR 577], Deane J, after noting that "[s]ection 4E confines 'market' for the purposes of the Act to 'a market in Australia'", went on to say that "'market' should, in the context of the Act, be understood in the sense of an area of potential close competition in particular goods and/or services and their substitutes". Dawson J agreed generally with Deane J, adding:

"A market is an area in which the exchange of goods or services between buyer and seller is negotiated. It is sometimes referred to as the sphere within which price is determined and that serves to focus attention upon the way in which the market facilitates exchange by employing price as the mechanism to reconcile competing demands for resources."

[13] Similarly, in *Boral [Boral Besser Masonry Ltd v Australian Competition and Consumer Commission]* (2003) 215 CLR 374; 195 ALR 609; [2003] HCA 5], McHugh J observed:

"[T]he market is the area of actual and potential, and not purely theoretical, interaction between producers and consumers where given the right incentive... substitution will occur. That is to say, either producers will produce another similar product or consumers will purchase an alternative but similar product."

[14] Section 4E of the TPA proceeds upon the express footing that, notwithstanding the abstract nature of the concept of a market, it is possible to locate the market where the competition protected by the TPA occurs in Australia. Reconciling the abstract notion of a market with the concrete notion of location, so that they work coherently, presents something of a challenge. Particularly is this so because "competition" describes a process rather than a situation. But given that the TPA regulates the conduct of commerce, it is tolerably clear that the task of attributing to the abstract concept of a market a geographical location in Australia is to be approached as a practical matter of business. It is important that any analysis of the competitive processes involved in the supply of

a service is not divorced from the commercial context of the conduct in question.

[15] It was common ground between the parties that a market in Australia does not cease to be so located because it encompasses other places as well. The issue then is whether the rivalrous behaviour—in the course of which suppliers and acquirers might be matched—occurred in Australia, whether or not it also occurred elsewhere.

...

[27] The market spoken of in s 4E is a market in Australia. Section 4E treats substitutability as the principal driver of the rivalrous behaviour accommodated by a market. The act of switching or substitution marks the conclusion of that rivalry: one of the rivals has prevailed. The place where that success is formalised by the signing of a contract may often, as a practical matter of business, say something significant about the location of the process of rivalry for the purposes of s 4E of the TPA. But it will not necessarily do so.

[28] The locations of the making of the contractual match and of the performance of the contract may be significant, not in themselves, but as (usually) reliable indicators of the location of the mechanism or facility which accommodates the process of rivalry and matching essential to the concept of a market. In this regard, it is the substitutability of services as the driver of the rivalry between competitors to which s 4E of the TPA looks to identify a market, not the circumstances of the act of substitution itself. The place where the act of substitution occurs does not necessarily locate the geographical area of the rivalry which precedes that act of substitution. Where the service being supplied is the transport of goods between two countries, the place at which the act of substitution is recorded or formalised may say little about where the interplay of supply and demand, driven by the conditions of substitutability, has occurred. Thus, for example, contracts for air freight from Hong Kong to Sydney may be signed at the head office of the airline based in Europe, but that does not locate the geographical dimension of the market in Europe.' *Air New Zealand Ltd v Australian Competition and Consumer Commission (Matter No S245/2016)* [2017] HCA 21, (2017) 344 ALR 377 at [12]–[15], [27]–[28], per Kiefel CJ and Bell and Keane JJ

MARKET MAKER

[Note that the Taxes Management Act 1970, s 25 and the Income and Corporation Taxes

Act 1988, s 728(6) have been repealed.]

MARRIAGE

See also **CIVIL PARTNERSHIP; REMARRIAGE**

[For 29(3) Halsbury's Laws of England (4th Edn) (Reissue) paras 33, 35 see now 72 Halsbury's Laws of England (5th Edn) (2015) paras 251, 4 respectively.]

Of convenience

'[6] The immigration rules, and the right to respect for family life protected by art 8 of the convention [European Convention for the Protection of Human Rights and Fundamental Freedoms 1950], confer a measure of protection on some persons having limited or no leave to enter or remain in this country who marry here. This gives rise to an acute and difficult administrative problem: that persons seeking leave to enter or remain in this country may marry here, not for the reasons which ordinarily and legitimately lead people to marry, but in order to strengthen their claims for leave to enter or remain. Such marriages have been variously described as "bogus" and "sham" and as "marriages of convenience". All are descriptions of marriages entered into for the purpose of securing an immigration advantage. It is difficult to improve on the definition (which the Secretary of State accepts as apposite) in art 1 of Council Resolution (EC) 97/C 382/01 of 4 December 1997 on measures to be adopted on the combating of marriages of convenience (OJ 1997 C 382 p 1), according to which a marriage of convenience is—

"a marriage concluded between a national of a Member State or a third-country national legally resident in a Member State and a third-country national, with the sole aim of circumventing the rules on entry and residence of third-country nationals and obtaining for the third-country national a residence permit or authority to reside in a Member State."

I shall refer to marriages of convenience in that sense.' *R (on the application of Baiji) v Secretary of State for the Home Department* (Nos 1 and 2) [2008] UKHL 53, [2008] 3 All ER 1094 at [6], per Lord Bingham of Cornhill

Void and voidable

[For 29(3) Halsbury's Laws of England (4th Edn) (Reissue) paras 373, 377–379 and paras 383, 390, 393–394, 396–397 see now 72 Halsbury's Laws of England (5th Edn) (2009) paras 375, 382, 387–391.]

[Add the following ground: A marriage celebrated after 31 July 1971 is voidable on the ground that an interim gender recognition certificate under the Gender Recognition Act 2004 has, after the time of the marriage, been issued to either party to the marriage, or on the ground that the respondent is a person whose gender at the time of the marriage had become the acquired gender and the court is satisfied that the applicant was at the time of the marriage ignorant of this. (72 Halsbury's Laws of England (5th Edn) (2015) para 390)]

MARSHALLING

[For 16(2) Halsbury's Laws of England (4th Edn) (Reissue) para 758 see now 47 Halsbury's Laws of England (5th Edn) (2014) para 195.]

MATERIAL

[For 31 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 774 see now 76 Halsbury's Laws of England (5th Edn) (2013) para 773.]

MATERIAL PARTICULAR

New Zealand [Local Electoral Act 2001, s 134(1): offence of transmitting a return of electoral expenses, knowing it to be false in one or more material particulars.] '[36] The words "any material particular" also drew their meaning from the context in which they appeared. The word "material" introduced a question of degree. Clearly, the statute implied that not every particular would be material. For example, if a donor's name was simply misspelt, I doubt that any Court would find falsity in a material particular. In the present case, s 109 assisted in determining what materiality embraced. Where a donor donated more than \$1,000, the section required the disclosure of the name and address of the donor. It also required disclosure of the amount of the donation. Where a donation of more than \$1,000 was made anonymously, then that fact had to be set out as well as the amount of the donation. The scheme of the Act was such that the public, who had the right to inspect returns of electoral expenses, could readily see who had

financially supported a candidate, and therefore could ascertain to whom a candidate might be beholden. Where anonymity could properly be claimed, a candidate would not be beholden because he or she would not know who had made the donation. Nevertheless, the amount of the donation, and the fact that it was made anonymously, were required to be disclosed. The disclosure of identity, where known, and anonymity, where properly claimable, were, in my judgment, material particulars. So was the amount of any donation over \$1,000.⁷ *R v Banks* [Reasons for verdict] [2014] NZHC 1244, [2014] 3 NZLR 256 at [36], per Wylie J

MATERIALLY LARGER

[Under the relevant Green Belt policy for Metropolitan Open Land ('MOL') (Planning Policy Guidance 2: Green Belts (PPG 2)) one category of permitted development was 'limited extension, alteration or replacement of existing dwellings', provided that the new dwelling is not materially larger than the dwelling it replaces (para 3.6 of PPG 2).] '[13] The issue is a short one: whether the "materially larger" test imports, solely or primarily, a simple comparison of the size of the existing and proposed buildings; or whether it requires a broader planning judgment as to whether the new building would have a materially greater impact than the existing building on the interests which MOL policy is designed to protect. Mr Elvin QC's case, in a nutshell, is that, in the context of policies designed to protect the MOL, the development cannot said to be "materially" larger, if the increase has no "material" impact on the objectives of the MOL; or at least that the authority could reasonably take that view.

... [33] Mr Elvin's case can be simply and attractively stated. The word "material" is deeply embedded in planning law as meaning "material in planning terms". It is a settled principle that matters of planning judgment, including the weight if any to be given to "material" considerations are for the local planning authority not the courts (see Lord Hoffmann's discussion of "Materiality and planning merits" in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All ER 636 at 657-658, [1995] 1 WLR 759 at 780-781). The authority correctly identified the increased size of the building, in all its aspects, as a relevant consideration in accordance with the MOL policy, but they decided that on the facts of the case it was not "material". That was

a judgment for them, and involves no issue of law justifying the intervention of the court.

'[34] Although I see the force of that submission, it ignores the context in which the word is used. The words "materially larger" in para 3.6 should not be read in isolation. There are two important aspects of the context. First is that para 3.6 is concerned with the definition of "appropriate development", as contrasted with inappropriate development, which is "by definition harmful to the Green Belt" ... This first stage of the analysis is concerned principally with categorisation rather than individual assessment.

'[35] As Mr Elvin points out, the distinction is far from clear-cut. He is able to point, for example, to the sports and cemeteries category ..., where one part of the test is whether the particular uses "preserve the openness of the Green Belt" and "do not conflict with the purposes of including land in it". Even more pertinent, perhaps, is the category of "redevelopment of major existing developed sites". There "appropriateness" depends on meeting the criteria set out in Annex C1 para C4, including a requirement that redevelopment should "have no greater impact than the existing development on the openness of the Green Belt and the purposes of including land in it." To my mind, however, those examples point a contrast with the narrower language of para 3.6. The test is whether the replacement is "materially larger". Had it been intended to make appropriateness dependent on a broad "no greater impact" test, as in Annex C1, the same words could have been used. Instead the emphasis is on relative size, not relative visual impact.

'[36] That leads to the second aspect of the context, which is that of para 3.6 itself. It is part of the test for a category which covers "limited extension, alteration or replacement ...". "Limited" to my mind implies a limitation of size. Paragraph 3.6 deals with both extension and replacement. An extension must be "proportionate" to the size of "the original building". The emphasis given to the word "original" shows how tightly this is intended to be drawn, in order presumably to avoid a gradual accretion of extensions, each arguably "proportionate". It would be impossible, in my view, to argue that "proportionate" in this context is unrelated to relative size. For example, an extension three times the size of the original, however beautifully and unobtrusively designed, could not, in my view, be regarded as "proportionate" in the ordinary sense of that word.

'[37] The words "replacement" and "not

materially larger” must be read together and in the same context. So read, I do not think that the meaning of the word “material”, notwithstanding its use in planning law more generally, can bear the weight which the authority sought to give it. Size as Sullivan J said is the primary test. The general intention is that the new building should be similar in scale to that which it replaces. The *Surrey Homes* case [*Surrey Homes Ltd v Secretary of State for Environment* (18 August 2000, unreported), QBD] illustrates why some qualification to the word “larger” is needed. A small increase may be significant or insignificant in planning terms, depending on such matters as design, massing and disposition on the site. The qualification provides the necessary flexibility to allow planning judgment and common sense to play a part, and it is not a precise formula. However, that flexibility does not justify stretching the word “materially” to produce a different, much broader test. As has been seen, where the authors of PPG 2 intend a broader test, the intention is clearly expressed.

‘[38] For these reasons, which are in line with those of Sullivan J, I conclude that the council misunderstood and misapplied MOL policy. Had they properly understood the policy, in my view, they could not reasonably have concluded that a building more than twice as large as the original (in terms of floor space, volume and footprint) was not “materially larger.”’ *R (on the application of the Heath and Hampstead Society) v Vlachos* [2008] EWCA Civ 193, [2008] 3 All ER 80 at [13], [33]–[38], per Carnwath LJ

MATRIMONIAL HOME

[For 29(3) Halsbury’s Laws of England (4th Edn) (Reissue) para 277 et seq see now 72 Halsbury’s Laws of England (5th Edn) (2015) para 269 et seq.]

MATTER

[Nationality, Immigration and Asylum Act 2002, s 96(1)(b): an appeal under s 82(1) against an immigration decision (‘the new decision’) in respect of a person may not be brought if the Secretary of State or an immigration officer certifies ... (b) that the claim or application to which the new decision relates relies on a matter that could have been raised in an appeal against the old decision.]

‘[4] ... the issue that falls for me to decide is whether or not the claimant is right to say that one should interpret “matter” as being limited to

an “issue”, or whether the defendant is right in saying that “matter” includes both “issue” and “evidence”.

...

‘[8] Both sides claim in this case that they are assisted by the case of *Lamichhane v Secretary of State for the Home Dept* [2012] EWCA Civ 260, [2012] 1 WLR 3064. The central observation of the Court of Appeal in that case is to be found at [37]:

“... One can interpret ‘matter’ in section 96(1) as including both a new ground and evidence, and conclude that in practice in that subsection it can only include evidence. However, these are such recondite distinctions, leaving such little scope for subsection (1)(c), that I have difficulty in believing that Parliament intended the statutory machinery to work in this way. On the other hand, if an applicant is free to raise any new matter in his appeal, whether or not a section 120 notice has been served, section 96(1) would have real scope and practical utility. But, if so, section 120 would have little purpose.”

‘[9] I accept the argument raised on behalf of the defendant in this case, that the distinction in this passage is between an argument that suggests that it can only include evidence in terms of the definition of “matter” in contrast to new grounds and evidence. I accept the submissions made by Mr David Blundell that that is strongly supportive of his interpretation of “matter” so as to include evidence. He rightly points out that if any special meaning were to be given to “matter” within s 96 then one might expect such meaning to be incorporated in a definition to be found either in the glossary or, alternatively, in a freestanding provision. No such definition to be found within the text of the Act. Furthermore, he points out that “the matter” is used in the context of s 96 in an unadorned way in contrast to s 85, and invites me to conclude that it should be given a broad and natural meaning. I accept that. I reject the suggestion that “matter” as defined generally should be taken to exclude “evidence” simply as an issue of construction of the English language. In my view, it is a noun which is apt to include as broad a section of relevant material, however it is categorised, as possible. I also take the view that if one were to give a narrow definition to “matter”, there would be endless difficulties in relation to whether something should be categorised as “evidence” or “an issue” or a combination of the two. I do not regard that it is

likely to have been Parliament's intention that those sorts of issues should be generated and I cannot conceive what useful function would be achieved by that distinction.

'[10] In all the circumstances, therefore, I am persuaded that "matter" should be given a broad interpretation within the scope of this subsection. ...' *R (on the application of Khan) v Secretary of State for the Home Department* [2013] EWHC 601 (Admin), [2013] 3 All ER 499 at [4], [8]–[10], per Turner J; affd [2014] EWCA Civ 88, [2014] 2 All ER 973

MATTER (LEGAL PROCEEDING)

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

Australia [Judiciary Act 1903 (Cth), s 39B(1A)(c).] '[42] It is established that the word "matter" in s 39B(1A)(c) of the Judiciary Act adopts the meaning and content given it in ss 75, 76 and 77 of the Constitution. "Matter" in this context means the underlying justiciable controversy or dispute between the parties, made up of the substratum of facts, claims and defences representing or amounting to the dispute, of which the federal issue forms part. It means more than the legal proceeding between the parties, and is identifiable independently of such proceedings: *Fencott v Muller* (1983) 152 CLR 570 at 603–8; 46 ALR 41 at 63–8 (*Fencott*); *Re Wakim*; *Ex parte McNally* (1999) 198 CLR 511; 163 ALR 270; 24 Fam LR 669; 31 ACSR 99; [1999] HCA 27 at [132]–[149] (*Wakim*). What is a single justiciable controversy depends on what the parties have done, the relationships between them and the laws which attach rights or liabilities to their conduct and relationships: *Fencott* CLR 608; ALR 68; *Wakim* at [140].' *Castel Electronics Pty Ltd (ACN 074 561 087) v TCL Air Conditioner (Zhongshan) Co Ltd* [2012] FCA 21, (2012) 287 ALR 297 at [42], per Murphy J

MATTERS IN DIFFERENCE

[For 2(3) Halsbury's Laws of England (4th Edn) (2003 Reissue) para 14 see now 2 Halsbury's Laws of England (5th Edn) (2017) para 515.]

MATTERS OF AN ADMINISTRATIVE NATURE

Australia [Freedom of Information Act 1982 (Cth), s 6A; access to documents relating to

matters of an administrative nature.] '[23] The Full Court held that the relevant distinction drawn by s 6A(1) of the FOI Act, between "matters of an administrative nature" and matters which were not of such a nature, reflected a distinction between the substantive powers and functions of the Governor-General and the "apparatus" for the exercise of those powers or functions, which was merely supportive. The Full Court considered that the terms of the appellant's request for documents referred to a substantive power or function, namely the administration of the Order of Australia. In particular, that substantive power or function involved nominations for appointments and awards, and consideration of those nominations, which culminated in a decision of whether or not to appoint or award a particular person. It followed that the appellant's request sought access to documents relating to that substantive power, which were excluded from disclosure under s 6A(1) of the FOI Act.

'[36] The next matter of textual significance is that s 6A(1), and ss 5(1) and 6, reveal a plain intention to constrain the extent to which the FOI Act pursues its purposes and objects against persons (or entities) providing administrative support to individuals who hold independent offices and are not subject to the operation of the FOI Act. The Official Secretary, like courts and other bodies governed by the FOI Act, is only required to grant access to a limited class of documents, characterised by a relationship between the document and subject matter of an "administrative nature". The meaning of that statutory characterisation cannot be determined without some reference to the FOI Act as a whole, and the circumstance that the documents to which access must be granted are an exception to the position that the Governor-General is not subject to the operation of the FOI Act.

'[40] However, the task of statutory construction here is not resolved by asking whether any particular document relates to processes and activities "supporting" the role of the Governor-General, because documents answering that description fall within both the exclusion, and the exception, in s 6A(1).

'[41] The "non-application" of the FOI Act to requests for access to documents of the Official Secretary, as stated in s 6A(1), inevitably refers to a class of documents relating to matters which are not "of an administrative nature". In conformity with the exclusion of the Governor-General from the operation of the FOI

Act, those documents relate to the discharge of the Governor-General's substantive powers and functions. By contrast, the exception of a class of document which relates to "matters of an administrative nature" connotes documents which concern the management and administration of office resources, examples of which were given above. This is a common enough connotation of the epithet "administrative". The Full Court apprehended this distinction in s 6A(1) correctly, referring to the latter class of documents as relating to the office "apparatus" which supported the exercise of the Governor-General's substantive powers and functions.

[42] The preceding construction of s 6A(1) governs its operation and application in relation to the range of diverse powers and functions of the Governor-General in respect of which the Official Secretary may be called upon to provide assistance and support. The limited construction adopted by the Full Court of the class of documents relating to "matters of an administrative nature" is appropriate because s 6A(1) must apply equally to powers and functions whose exercise is of the greatest sensitivity, requiring high levels of confidentiality, as it must apply to powers and functions of lesser sensitivity. The correctness of the construction of s 6A(1) adopted by the Full Court is illustrated by the specific case of its application in relation to the order. In that application it strikes a balance between the public interest in maintaining an Australian system of honours and the public interest in efficient public administration, which is supported by the scrutiny for which the FOI Act provides. *Kline v Official Secretary to the Governor-General* [2013] HCA 52, (2013) 304 ALR 116 at [23], [36], [40]–[42], per French CJ, Crennan, Kiefel and Bell JJ

MAY

Permissive

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

[For 44(1) Halsbury's Laws of England (4th Edn) (Reissue) para 1238 see now 96 Halsbury's Laws of England (5th Edn) (2012) para 615.]

New Zealand [Smoke-free Environments Act 1990, s 6: an employer may permit smoking by patients or residents in a dedicated smoking room. Whether there is an obligation on the district health board to provide a dedicated

smoking room to allow smoking in its mental health institutions.] '[30] The argument that the word "may" in s 6(1) means that the Board "must" permit smoking does not appear to have been central to the appellant's case in either the High Court or the Court of Appeal, but both Courts concluded s 6 was permissive. Asher J considered the wording was clear, namely, that "employers may permit smoking, if the statutory criteria are fulfilled". The Court of Appeal did not consider there was any basis for interpreting "may" to mean "must", noting that the context of the Act did not support that interpretation.

'[31] The word "may" is usually permissive or empowering. However, in some situations read in context, "may" means "must". Richardson P, delivering the judgment of the Court of Appeal in *Tyler v Attorney-General* [[2000] 1 NZLR 211, CA, at [25]], endorsed the observation of Windeyer J in *Finance Facilities Pty Ltd v Commissioner of Taxation (Cth)* [(1971) 127 CLR 106 at 134] who stated that the general position is that "[w]hile Parliament uses the English language the word 'may' in a statute means 'may'". As Windeyer J also observed, in some circumstances, the permitted power must be exercised, and that will be dictated by "the particular context of words and ... circumstances in which the power is to be exercised—so that in those events the word 'may' means 'must'".

'[32] We consider "may" in s 6 is permissive. That is its ordinary usage. In addition, we make the following points.

'[33] First, to interpret "may" to mean "must" would be inconsistent with the statutory scheme. ...

'[34] Secondly, it is difficult on the face of s 6 to read the section as imposing an obligation. Rather, the plain meaning is that the section carves out an exception to the prohibition subject to the specified conditions being met. Hence, the phraseology "may" followed by "if". Further, in s 6(3) the word "authorise" is used to describe the effect of subs (1). For example, s 6(3)(a) provides that subs (1) "does not authorise an employer to permit" non-residents to smoke in a dedicated smoking room. That language again suggests subs (1) is permissive rather than imposing an obligation.

'[35] Thirdly, if the appellant was right, the effect would be to require a wide range of different types of institutions to provide dedicated smoking rooms. The institutions referred to in s 6 are defined in s 2 by reference to the definition of those institutions in s 58(4) of the Health and Disability Services (Safety)

Act 2001. As counsel for the respondent submits, the facilities covered by these definitions are very broad and include both public and privately funded providers of a range of services. Such a broad obligation seems an unlikely result given the legislative history, in particular, the strengthening in 2003 and in 2013, of the protections against exposure to second-hand smoking.’ *B v Waitemata District Health Board* [2017] NZSC 88, [2017] 1 NZLR 823 at [30]–[35], per Ellen France J

MEASURE (LEGISLATIVE)

[For 34 Halsbury’s Laws of England (4th Edn) para 731 see now 34 Halsbury’s Laws of England (5th Edn) (2011) paras 3, 55; and for 44(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 1205, 1205n see now 96 Halsbury’s Laws of England (5th Edn) (2012) para 606, 606n.]

MEASURES PREPARATORY TO ADOPTION

[European Council Regulation 2201/2003/EC (concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility) (‘BIIA’), art 1(3)(b).] ‘[68] Article 1(3)(b) of BIIA provides that BIIA:

“shall not apply to ... decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption ...”.

Plainly this applies to an application for an adoption order under the 2002 Act [Adoption and Children Act 2002], but how much further does the exception reach? What is meant by “measures preparatory to adoption”?

‘[69] This is a question which we recently considered in *Re CB (a child)* [2015] EWCA Civ 888. There the question was whether a parent’s application under s 47(5) of the 2002 Act for permission to oppose the making of an adoption order was a “measure preparatory” to adoption within the meaning of art 1(3)(b). Approving my earlier decision at first instance in *Re J and S (children) (adoption proceedings: opposition)* [2014] EWFC 4, [2015] 1 FLR 850 in preference to the dicta of Ryder LJ in *Re M (Brussels II Revised: Art 15)* [2014] EWCA Civ 152, [2014] 2 FCR 585, [2014] 2 FLR 1372 (at [12]), we held that an application under s 47(5) was a “measure preparatory”. In the present case, we are concerned with two rather

different questions. First, is an application for a placement order in accordance with s 21 of the 2002 Act a “measure preparatory”? Secondly, is an application for a care order in accordance with s 31 of the 1989 Act [Children Act 1989] a “measure preparatory” in a case where the local authority’s plan which it invites the court to approve is for adoption? In my judgment, the answer to the first question is Yes; the answer to the second question is No.

...
‘[72] In my judgment, on the plain language of art 1(3)(b), which like all other provisions of BIIA must be given an autonomous meaning, and having regard to the *Lagarde Report*, it is clear that an application for a placement order is a “measure preparatory” to adoption within the meaning of art 1(3)(b). It forms part of the process of adoption as set out in the 2002 Act; it is a precursor to the making in due course of an adoption order, and it has to do, as its name indicates, with the “placement” of the child, specifically with a view to adoption. In contrast, care proceedings, even if the plan is for adoption, are not, as such, part of the process of adoption. A care order, even if the court has approved a plan for adoption, does not of itself authorise a placement with a view to adoption. It may be a step along the way of implementing the local authority’s plans for the child, but it is not a “measure preparatory” to adoption. There are many illustrations of this in the case law: see, for example, *Leicester City Council v S* [2014] EWHC 1575 (Fam), [2015] 1 FLR 1182 and *Re J (a child) (Brussels II revised: art 15: practice and procedure)* [2014] EWFC 41, [2014] All ER (D) 199 (Nov).

‘[73] In the course of argument before us it was suggested that the crucial stage in the process at which art 1(3)(b) begins to operate is when the child is placed for adoption. Thus it was submitted that an application for a placement order is not a “measure preparatory” to adoption, in contrast to an actual placement of a child for adoption pursuant to an order of the court, which is. With all respect to those propounding this argument, it is, in my judgment, plainly wrong. It elevates the placement—a concept which is not even referred to in art 1(3)(b)—to a determinative role. No doubt, the placement of a child following the making of a placement order is a “measure preparatory” to adoption, but there is nothing, either in art 1(3)(b) or in the *Lagarde Report*, to prevent some earlier step being such a “measure”. The application for a placement order, the inevitable precursor to the actual placement of the child for adoption, is, in my

judgment, as much a “measure preparatory” as the placement itself.’ *Re N (children) (adoption: jurisdiction)* [2015] EWCA Civ 1112, [2016] 1 All ER 1086 at [68]–[69], [72]–[73], per Sir James Munby P; decision revsd [2016] UKSC 15, [2017] 1 All ER 527

MEDICAL PRACTITIONER

[For 30(1) Halsbury’s Laws of England (4th Edn) (Reissue) paras 3, 4 see now 74 Halsbury’s Laws of England (5th Edn) (2011) para 176.]

MEETING

General meeting

[For 7(2) Halsbury’s Laws of England (4th Edn) (2004 Reissue) para 1130 see now 15 Halsbury’s Laws of England (5th Edn) (2016) para 701, 15A Halsbury’s Laws of England (5th Edn) (2016) para 1983.]

MEMBER

Of company

[For 7(1) Halsbury’s Laws of England (4th Edn) (2004 Reissue) para 750 see now 14 Halsbury’s Laws of England (5th Edn) (2016) para 323.]

[For the Companies Act 1985, s 22 see now the Companies Act 2006, s 112.]

Of partnership

New Zealand [Goods and Services Tax Act 1985, ss 57 and 58. Receivers of partners were not appointed receivers of the partnership but procured appointment of themselves as the Board set up by the partnership agreement. Whether receiver was a ‘member’ of the partnership.] ‘[14] A person who is carrying on a taxable activity is required by s 51 to be registered. Because a partnership is not in law a legal personality separate from its partners but only the means whereby they conduct a business in common, the requirement that someone carrying on a taxable activity must register might, if not qualified elsewhere in the Act, require registration both by the partnership and by each partner. That would plainly be overcomplicated and undesirable. There are accordingly special registration rules in s 57 for partnerships and other unincorporated bodies.

...

...

‘[16] In short, speaking of a partnership, only the partnership can be registered and can make and receive taxable supplies, but both the partnership and every member of it are concurrently liable for compliance with the Act in relation to its taxable supplies. The common law position of a partnership and its members is therefore maintained but subject to the device, for administrative convenience, that the GST registration is in the name of the partnership only. This is akin to the provision in the High Court Rules enabling a partnership to sue and be sued in its firm name. It creates no separate legal personality for the partnership.

‘[17] Section 58 further modifies the position concerning registration during any period when a registered person is “incapacitated”. ...

‘[18] The effect of s 58 is that where someone is acting as an agent, including as a receiver, of an incapacitated person, and is carrying on the taxable activity of the incapacitated person, that agent is to be treated as personally carrying on the taxable activity whilst entitled to act as agent and until ceasing to act as such or until a third party becomes registered in respect of the taxable activity. During the agency period the incapacitated person is not to be treated as carrying on the taxable activity. Those who act in circumstances which make them specified agents under s 58 can be anticipated under ordinary agency principles to be entitled to have recourse to the assets of their principal by way of indemnity and to an equitable lien arising as a matter of law to afford them a security. The lien ranks ahead of the claims of secured creditors in respect of the fund created by the taxable supply. In this indirect way the Commissioner achieves a priority for the GST for which liability arises during the incapacity.

...
‘[27] The Commissioner’s alternative argument was in respect of s 57(3), which makes a member of an unincorporated body jointly and severally liable for all the tax payable by the body during that person’s membership. A “member” is defined in s 2 as *including* a partner, a joint venturer, a trustee, or a member of an unincorporated body. The Commissioner submitted that in s 57(3) it should be read as also including a receiver of a member. Once more, and in common with the High Court and the Court of Appeal, we decline to accept this argument. It again involves reading into the statute something which is certainly not implicit. Those expressly designated as members by the definition are all persons who would

be the owners of the assets of, or a share or interest in, the unincorporated body. It is a stretch too far to treat as a member for the purposes of s 57 someone like a receiver who has no legal or beneficial entitlement to any such assets or share or interest—in this case, to the assets of the partners. And it would involve the imposition of a receiver's personal liability in circumstances where s 58, directed, *inter alia*, at the position of insolvency administrators, does not do so.' *Stiassny v Commissioner of Inland Revenue* [2012] NZSC 106, [2013] 1 NZLR 453 at [14], [16]–[18], [27], per Blanchard J

MEMBERS OF HIS FAMILY FORMING PART OF HIS HOUSEHOLD

[Diplomatic Privileges Act 1964, Sch 1, art 37: the members of the family of a diplomatic agent 'forming part of his household' should, if not nationals of the receiving state, enjoy diplomatic immunity.] '[20] In framing the Vienna Convention the International Law Commission adopted the phrase "forming part of his household" as the basis for a limited extension of personal immunity beyond the ambassador himself to close members of his family because it reflected general practice at the time: see *Denza*, p 392. Attempts during negotiations to agree a more specific definition came to nothing.

... '[24] When Parliament came for the first time to codify head of state immunity in s 20 of the 1978 Act [State Immunity Act 1978], it chose to define its extension to close members of the head of state's family by precisely the same formula, "members of his family forming part of his household", as had been used in the Vienna Convention for the same purpose in relation to diplomats, and Parliament must be taken to have understood what had by then become the United Kingdom government's practice as to its day-to-day application. Further, the drafter makes that connection between diplomatic and head of state immunity expressly in s 20(1) by using precisely that phrase twice, in sub-s (b) and again in the words following sub-s (c). The second use of the phrase is specifically in relation to diplomats. There is no hint of a suggestion that the functional basis for either the immunity itself, or its limited extension to persons other than the head of state, was intended to be any different than it had been understood to be in connection with diplomats and their families. There is in

particular no indication that the use of the same phrase was, for the first time, intended to accommodate the notion that close members of a head of state's family deserved head of state immunity for the better performance of their own royal, governmental or constitutional duties.

'[25] As the judge noted (at [76]), there is a compelling indication that the United Kingdom government intended no wider meaning when using the phrase "members of his family forming part of his household" in relation to heads of state than in relation to diplomats, in the form of the United Kingdom Immigration Directorate's instructions, constituting internal guidance to be used by the United Kingdom Border Agency for immigration purposes ...

...

'[35] In my judgment there is no interpretational basis for giving the phrase "members of his family forming part of his household" a wider meaning in relation to heads of state than in relation to diplomats. My reasons follow. First, I have already noted how the phrase had a relatively settled meaning in 1978 and that, when referring to it twice in s 20(1) of the 1978 Act, Parliament may reasonably be supposed to have understood that meaning or, at least, the understanding of it customarily applied by the United Kingdom government.

'[36] Secondly, the essence of the mechanism by which the 1978 Act grafts a form of personal immunity upon the immunity *ratione materiae* already conferred on heads of state by Pt I of the 1978 Act is, precisely and without any specific relevant modification, by reference to diplomatic immunity. Had s 20, as originally intended, been confined so as to confer personal immunity on heads of state only when visiting the United Kingdom, then no extension of the nature and ambit (within the head of state's family) would have been appropriate. When by amendment the restriction of the period of immunity to visits to the United Kingdom was removed, and replaced with what the House of Lords in *Ex p Pinochet* [*R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte* (*Amnesty International, intervening*) (No 3) [2000] 1 AC 147, [1999] 2 All ER 97, HL] regarded as an immunity for as long as the head of state remained in office, there was no consideration by Parliament whether this necessitated a broader approach to the meaning of household, as applied to heads of state. The purpose of the amendment was (as is clear from its presentation in Parliament) simply to avoid a misapprehension that personal head of state

immunity was limited to the short periods of royal visits.

[37] Thirdly, it is, as the judge recognised, clear that the United Kingdom government did not think that s 20 used the household concept more widely in relation to heads of state than to diplomats, as is evident from the Immigration Directorate's instructions. Nothing in the Secretary of State's letter to the judge seems to me to come near undermining the effect of those instructions as indicative of the United Kingdom government's view.

[38] Fourthly, and of high importance in my judgment, the rationale for the identification of some extended meaning of household when applied to heads of state appears both in Sir Arthur's lecture [Sir Arthur Watts KCMG QC, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*] and indeed in para [99] of the judge's judgment (quoted above) to be based upon a perception that it would be desirable to extend head of state immunity to those closely assisting the head of state in doing his job, for the protection of the dignity and independence of the assistants themselves, rather than of the head of state. But, as is clear from Lawrence Collins LJ's analysis in *Aziz v Aziz* [*Aziz v Aziz* (*Sultan of Brunei intervening*) [2007] EWCA Civ 712, [2008] 2 All ER 501], the extension of immunity beyond ambassadors to close members of their family was never designed for any such purpose, nor is it any part of the functional purpose of head of state personal immunity that it should be.

[39] Fifthly, once some form of extension of the meaning of household beyond spouses, civil partners, dependent children and relatives is contemplated, it is impossible to discern as a matter of interpretation of s 20 where the boundary should be set. The interpreter is cast adrift upon an uncharted sea in which, like the judge, he is forced to make up the rules as he goes along.' *Apex Global Management Ltd v Fi Call Ltd* [2013] EWCA Civ 642, [2013] 4 All ER 216 at [20], [24]–[25], [35]–[39], per Briggs LJ

MEMORANDUM OF ASSOCIATION

[For the Companies Act 1985, s 2 see now the Companies Act 2006, s 8; and the Companies (Registration) Regulations 2008, SI 2008/3014, art 2, Schs 1, 2.]

Articles of association distinguished

[For 7(1) Halsbury's Laws of England (4th Edn) (2004 Reissue) para 285 see now 14 Halsbury's

Laws of England (5th Edn) (2016) para 227.]

MENS REA

[For 11(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 4 see now 25 Halsbury's Laws of England (5th Edn) (2016) para 4.]

MENTAL DISORDER

[For 30(2) Halsbury's Laws of England (4th Edn) (Reissue) paras 401–402 see now 75 Halsbury's Laws of England (5th Edn) (2013) paras 559, 761.]

[Note that the definition of 'mental disorder' in the Mental Health Act 1983, s 1(2) is replaced by the following as from 3 November 2008:

'Mental disorder' means any disorder or disability of the mind; and 'mentally disordered' shall be construed accordingly. (Mental Health Act 1983, s 1(2) (definition substituted by the Mental Health Act 2007, s 1(2)).]

Canada [Criminal Code, RSC 1985, c C-46, s 16. Whether a toxic psychosis that results from a state of self-induced intoxication caused by an accused person's use of chemical drugs constitutes a "mental disorder" within the meaning of s 16.] '55. Section 16(2) Cr. C. provides that "[e]very person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility". An accused who seeks to avoid criminal responsibility on this ground must prove on a balance of probabilities that, at the material time, he or she was suffering from "a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong" (s 16(1) Cr. C.). In *Chaulk* [*R v Chaulk* [1990] 3 SCR 1303], this Court held that imposing this burden of proof on the accused infringed the presumption of innocence guaranteed by s 11(d) of the Charter but that this was nonetheless a reasonable limit on that presumption in a free and democratic society.

'56. An accused who wishes to successfully raise the defence of mental disorder must therefore meet the requirements of a two-stage statutory test. The first stage involves *characterizing* the mental state of the accused. The key issue to be decided at trial at this stage is whether the accused was suffering from a mental disorder in the legal sense at the time of the alleged events. The second stage of the defence provided for in s 16 Cr. C. concerns the

effects of the mental disorder. At this stage, it must be determined whether, owing to his or her mental condition, the accused was incapable of "knowing that [the act or omission] was wrong" (s 16(1) Cr. C.).

...
 '58. The *Criminal Code* does not contain a precise definition of the "mental disorder" concept for the purposes of s 16 Cr. C. Section 2 Cr. C. simply provides that the term "mental disorder" means "a disease of the mind" ("*toute maladie mentale*" in French). Because of the circular nature of this definition, the courts have had to gradually delineate this legal concept over time.

'59. The line of authority based on *Cooper* [*Cooper v The Queen* [1980] 1 SCR 1149] clearly confirms that the scope of the legal concept of "mental disorder" is very broad. In *Cooper*, Dickson J stated that the "disease of the mind" concept includes "any illness, disorder or abnormal condition which impairs the human mind and its functioning" (p 1159). In *Rabey* [*Rabey v The Queen* [1980] 2 SCR 513], Dickson J explained that "the concept is broad, embracing mental disorders of organic and functional origin, whether curable or incurable, temporary or not, recurring or non-recurring" (p 533). While it must be borne in mind that a verdict of not criminally responsible triggers a special mechanism for the management of the accused, the inclusive nature of the definition of "mental disorder" can be explained in particular by Parliament's wish to give the public a high level of protection from persons who could be a threat to others (J Barrett and R Shandler, *Mental Disorder in Canadian Criminal Law* (loose-leaf), at p 4-12).

'60. The "mental disorder" concept continues to evolve, which means that it can be adapted continually to advances in medical science (*R v Simpson* (1977) 35 CCC (2d) 337 (Ont CA)). As a result, it will undoubtedly never be possible to define and draw up an exhaustive list of the mental conditions that constitute "disease[s] of the mind" within the meaning of s 2 Cr. C. As Martin JA, writing for the Ontario Court of Appeal, stated in *R v Rabey* (1977) 17 OR (2d) 1, this concept "is not capable of precise definition" (p 12). It is thus flexible enough to apply to any mental condition that, according to medical science in its current or future state, is indicative of a disorder that impairs the human mind or its functioning, and the recognition of which is compatible with the policy considerations that underlie the defence provided for in s 16 Cr. C.

'61. For the purposes of the *Criminal Code*,

"disease of the mind" is a legal concept with a medical dimension. Although medical expertise plays an essential part in the legal characterization exercise, it has long been established in positive law that whether a particular mental condition can be characterized as a "mental disorder" is a question of law to be decided by the trial judge. In a jury trial, the judge decides this question, not the jury. As Martin JA stated in an oft-quoted passage from *Simpson*, "[i]t is the function of the psychiatrist to describe the accused's mental condition and how it is considered from the medical point of view. It is for the Judge to decide whether the condition described is comprehended by the term 'disease of the mind'" (p 350). If the judge finds as a matter of law that the mental condition of the accused is a "mental disorder", it will ultimately be up to the jury to decide whether, on the facts, the accused was suffering from such a mental disorder at the time of the offence.

...
 '64. The central issue in this appeal is a question of law within the meaning of *Stone* [*R v Stone* [1999] 2 SCR 290]. It is common ground that the appellant was in a psychotic condition that prevented him from distinguishing right from wrong. The main issue is whether a toxic psychosis caused exclusively by a single episode of intoxication constitutes a "mental disorder" within the meaning of s 16 Cr. C.

'65. It can be seen at this point that the appellant's position poses a serious problem. To argue that toxic psychosis must always be considered a "mental disorder" is to say that the legal characterization exercise under s 16 Cr. C. depends exclusively on a medical diagnosis. If the appellant's position were accepted, psychiatric experts would thus be responsible for determining the scope of the defence of not criminally responsible on account of mental disorder. This argument conflicts directly with this Court's consistent case law over the past three decades and cannot succeed. It would shift the responsibility for deciding whether the accused is guilty from the judge or jury to the expert.

...
 '85. In this context, I conclude that the appellant was not suffering from a "mental disorder" for the purposes of s 16 Cr. C. at the time he committed the assault. He has failed to rebut the presumption that his toxic psychosis was a "self-induced stat[e] caused by alcohol or drugs" in accordance with the definition in *Cooper*. A malfunctioning of the mind that results *exclusively* from self-induced intoxication cannot be considered a disease of the mind

in the legal sense, since it is not a product of the individual's inherent psychological makeup. This is true even though medical science may tend to consider such conditions to be diseases of the mind. In circumstances like those of the case at bar, toxic psychosis seems to be nothing more than a symptom, albeit an extreme one, of the accused person's state of self-induced intoxication. Such a state cannot justify exempting an accused from criminal responsibility under s 16 *Cr. C.* *R v Bouchard-Lebrun* [2011] SCJ No 58, [2011] 3 SCR 575 at paras 55–56, 56–61, 64–65, 85, per LeBel J

MENTAL IMPAIRMENT

[Note that the definitions of 'mental impairment' and 'mentally impaired' in the Mental Health Act 1983, s 1(1) are repealed by the Mental Health Act 2007, s 1(3) as from 3 November 2008.]

MERCANTILE AGENT

[For 2(1) Halsbury's Laws of England (4th Edn) (Reissue) para 12 see now 1 Halsbury's Laws of England (5th Edn) (2008) para 12.]

MERGER

[For 39(2) Halsbury's Laws of England (4th Edn) (Reissue) paras 255–256 see now 87 Halsbury's Laws of England (5th Edn) (2017) paras 267–268.]

MESNE PROFITS

[For 27(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 285 see now 62 Halsbury's Laws of England (5th Edn) (2016) para 279.]

MILITARY SERVICE

[Delete the first paragraph and the reference to 8(2) Halsbury's Laws of England (4th Edn) (Reissue) para 126n, which is not reproduced in 20 Halsbury's Laws of England (5th Edn) (2014).]

MINE

[For 31 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 5 see now 76 Halsbury's Laws of England (5th Edn) (2013) para 3.]

Open mine

[For 31 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 7 see now 76 Halsbury's Laws of England (5th Edn) (2013) para 5.]

MINERALS

[For 31 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 12 see now 76 Halsbury's Laws of England (5th Edn) (2013) para 10.]

MINISTER (RELIGION)

[For 14 Halsbury's Laws of England (4th Edn) para 432 see now 34 Halsbury's Laws of England (5th Edn) (2011) para 143.]

MISBEHAVIOUR

New Zealand [Constitution Act 1986, s 23.] '[64] We consider, for the reasons given by Commissioner the Hon Andrew Wells QC in *Murphy* [*Parliamentary Commission of Inquiry Re The Honourable Mr Justice Murphy: Ruling on Meaning of "Misbehaviour"* (1986) 2 Aust Bar Rev 203], that it is not appropriate to attempt a rigid categorisation or definition of the types of conduct that will amount to misbehaviour for the purposes of s 23 of the Constitution Act 1986. As always, context is everything, and the point where conduct crosses the line between misconduct and misbehaviour justifying removal will be a matter of fact and degree. We have already observed that it is not for the Commissioner to reach a final conclusion regarding the standard to be applied, if only because he will not know the full facts. Enunciation of the standard is a matter for the panel and, ultimately, the House.

'[65] In some cases it will be relatively easy to determine that moral turpitude is involved. An obvious example is a case involving actual dishonesty. In other cases the answer will be far from clear. The *Madam Justice Levers* case [*Hearing on the Report of the Tribunal to the Governor of the Cayman Islands—Madam Justice Levers* [2010] UKPC 24] provides a good example of this. The Privy Council accepted that she was a sound lawyer and an industrious judge who set high standards for herself and those with whom she worked. The Board described the conduct that led to her removal as "fatal flaws in a judicial career that has had many admirable features". Her misconduct included disparaging her Chief Justice and other judicial colleagues. Of most concern to the

Privy Council was “completely inexcusable conduct that [gave] the appearance of racism, bias against foreigners and bias in favour of the defence in criminal cases”. The Board did not assess that conduct in terms of moral turpitude. Rather, it focused upon the cumulative effect of the Judge’s conduct, ultimately holding that the Judge, by her misconduct, had shown that she was not fit to serve as a Judge of the Grand Court of the Cayman Islands.

‘[66] The Board may not necessarily have reached the same conclusion if it had determined that moral turpitude was an essential element of misbehaviour justifying removal. In marginal cases such an approach also runs the risk of shifting the focus from the conduct in question to an inquiry into what may constitute moral turpitude. We see no need to add a gloss to the words of the statute. We consider that the approach that the Privy Council took in *Madam Justice Levers* is appropriate in the New Zealand context. We therefore do not accept that misbehaviour in terms of s 23 of the Constitution Act 1986 necessarily involves moral turpitude. It may or may not. For reasons we give at [90] we do not need to decide whether moral turpitude was an essential element of misbehaviour in the circumstances of this case.’ *Wilson v Attorney-General* [2011] 1 NZLR 399 at [64]–[66], per Wild, Miller and Lang JJ

MISCARRIAGE

[For 20(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 140 see now 49 Halsbury’s Laws of England (5th Edn) (2015) para 677.]

MISCARRIAGE OF JUSTICE

[Compensation is payable under the Criminal Justice Act 1988, s 133 when a person has been convicted of a criminal offence and subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice.] ‘[9] “Miscarriage of justice” is a phrase that is capable of having a number of different meanings. In giving the judgment of the Court of Appeal in relation to Adams’s case Dyson LJ divided the circumstances in which convictions may be quashed on the basis of the discovery of fresh evidence into four categories, which I shall summarise in my own words.

(1) Where the fresh evidence shows clearly that the defendant is innocent of the crime of

which he has been convicted.

(2) Where the fresh evidence is such that, had it been available at the time of the trial, no reasonable jury could properly have convicted the defendant.

(3) Where the fresh evidence renders the conviction unsafe in that, had it been available at the time of the trial, a reasonable jury might or might not have convicted the defendant.

(4) Where something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted.

These four categories have provided a useful framework for discussion.

...

[After holding that none of categories (1), (3) and (4) provided the correct definition of ‘miscarriage of justice’ Lord Phillips P continued.]

‘[55] ... I do not consider the second category, as formulated by Dyson LJ, provides a satisfactory definition of “miscarriage of justice”. I would replace it with a more robust test of miscarriage of justice. *A new fact will show that a miscarriage of justice has occurred when it so undermines the evidence against the defendant that no conviction could possibly be based upon it.* This is a matter to which the test of satisfaction beyond reasonable doubt can readily be applied. This test will not guarantee that all those who are entitled to compensation are in fact innocent. It will, however, ensure that when innocent defendants are convicted on evidence which is subsequently discredited, they are not precluded from obtaining compensation because they cannot prove their innocence beyond reasonable doubt. I find this a more satisfactory outcome than that produced by category 1. I believe that it is a test that is workable in practice and which will readily distinguish those to whom it applies from those in category 3. It is also an interpretation of miscarriage of justice which is capable of universal application.’ *R (on the application of Adams) v Secretary of State for Justice; Re MacDermott* [2011] UKSC 18, [2011] 3 All ER 261 at [9], [55], per Lord Phillips P

MISCONDUCT

Australia [Alleged misconduct by senior lecturer at university. Clause 46.2 of academic staff agreement provided that ‘*Misconduct* means wilful conduct by a staff member which is unsatisfactory.’] ‘[29] Dr Soliman’s conduct, so

the second argument ran, was not “unsatisfactory”. The conduct, it was submitted, “was not a breach of any specific direction, rule or policy of the university, and was therefore not ‘misconduct’”. There was no rule or guideline published by the university which provided that in-class revision for examinations could not take the form of providing students with the very questions and answers that they would later be called upon to answer in the examination itself. There were many methods, so it was submitted, whereby revision could be undertaken. No authority was cited in support of any such constraint upon the natural and ordinary meaning of the words employed in cl 46.2 of the agreement.

[30] That conduct which may fall within the reach of cl 46.2 may be the subject of legitimate argument. Clearly enough, cll 46.2 and 46.3 seek to draw a distinction between “misconduct” and “serious misconduct”. And even the term “misconduct” is confined by the fact that the “misconduct” must be both “wilful” and “unsatisfactory”. As in other contexts, what constitutes “misconduct” is to be informed by reference to the context in which the term is employed: compare *North v Television Corporation Ltd* (1976) 11 ALR 599 at 608–9 per Smithers and Evatt JJ; *Re La Trobe University; Ex parte Wild* [1987] VR 447 at 458.

[31] But there is no reason why the term “misconduct” should be confined to only that conduct which is contrary to or “in breach of any specific direction, rule or policy of the University”. Indeed, given the context in which cl 46.2 appears, the power conferred upon the vice-chancellor to establish a committee to investigate allegations of “misconduct” and “serious misconduct” and the constitution of such a committee, it may well be that what constitutes “misconduct” or “serious misconduct” is left—at least initially—to the deliberation and good judgment of those with experience in university affairs.

[32] Although questions may arise as to the extent to which the accumulated expertise of an expert body can be relied upon as a substitute for evidence, that is not the issue presented for resolution in this case. What is in issue is the conclusion to be drawn from the facts presented—whether those facts can constitute “misconduct”. The expertise of the committee established by the vice-chancellor can, within limits, be relied upon to properly characterise those facts. The manifest intention behind cl 46 of the agreement is that the conduct in question be subject to the evaluation of those with knowledge of university affairs: compare

Minister for Health v Thomson (1985) 8 FCR 213 at 217; 60 ALR 701 at 705–6 per Fox J. A committee is “entitled to bring to bear its own experience and expertise in reaching its conclusions”: *Romeo v Asher* (1991) 29 FCR 343 at 349; 100 ALR 515 at 520; 23 ALD 168 at 171 per Morling and Neaves JJ. See also: *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546 at 569 per Hayne JA (as his Honour then was). In the context of a legal practitioner it has thus been concluded that “misconduct” means “conduct which other solicitors in good repute would regard as disgraceful or dishonourable”: *Re a Solicitor* [1960] VR 617 at 620 per Dean J. Even during the course of its proceedings, an expert member may utilise that expertise in questioning a party before it: *Simjanoski v La Trobe University* [2004] VSC 180 at [25]–[30] per Balmford J.

[33] The experience and expertise of members of an administrative committee, it is concluded, can be brought to bear in its questioning of witnesses, in its deliberations and in interpreting the meaning and content of terms in use within its field of expertise. The content of the term “misconduct” is to be informed by those with knowledge of the standards to be maintained by university lecturers and is not confined to only that conduct which has been the subject of specific rules, directions or guidelines.

[34] There is no reason why the definition in cl 46.2 should be confined by a constraint that “misconduct” only embrace that conduct which is contrary to some written rule or guideline. Whether facts fall within that term or not is left initially to the judgment of the committee established by the vice-chancellor.’ *Soliman v University of Technology, Sydney* [2012] FCAFC 146, (2012) 296 ALR 32 at [29]–[34], per Marshall, North and Flick JJ

MISFEASANCE

[For 7(3) Halsbury’s Laws of England (4th Edn) (2004 Reissue) para 362 see now 17 Halsbury’s Laws of England (5th Edn) (2011) para 646.]

MISREPRESENTATION

[For 31 Halsbury’s Laws of England (4th Edn) (2003 Reissue) paras 742–743 see now 76 Halsbury’s Laws of England (5th Edn) (2013) paras 740–741.]

Fraudulent misrepresentation

[For 31 Halsbury's Laws of England (4th Edn) (2003 Reissue) paras 756–757 see now 76 Halsbury's Laws of England (5th Edn) (2013) paras 755–756.]

Innocent misrepresentation

[For 31 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 763 see now 76 Halsbury's Laws of England (5th Edn) (2013) para 761.]

MISTAKE

[For 32 Halsbury's Laws of England (4th Edn) (2005 Reissue) paras 3–6 see now 77 Halsbury's Laws of England (5th Edn) (2016) paras 3–6.]

[Rectification of the register under the Land Registration Act 2002, Sch 4, paras 1, 5, to correct a mistake.] '[18] Ms Galley submits that *correcting a mistake* has limited ambit. She did not put it quite as it had been put by leading counsel below, namely that the ambit was limited to procedural mistake. She submitted that the whole purpose of the new procedure was to do away with the previous law under which difficult questions of fact could arise where a squatter claimed the benefit of the Limitation Act 1980. Whether the squatter been in exclusive possession for 12 or more years was a notoriously difficult question to try and created uncertainty in dealings in land which might be subject to "squatter's rights". The inquiry of the deputy adjudicator in this case was just the sort of dispute the Act was intended to do away with.

... '[24] I start with the language of the Act. Schedule 6(1) says that *a person may apply to the registrar to be registered ... if he has been in adverse possession of an estate*. That surely indicates that a person who has not in fact been in adverse possession is simply not entitled to apply. Parliament cannot have intended that such a person could get registered title. A registration obtained by a person not entitled to apply for it would be mistaken. So, putting the register back in the condition it was prior to the application would be *correction of a mistake* within the meaning of Sch 4(1) and (5).

'[25] I can see no reason for limiting *correction of a mistake* to a mistake through some official error in the course of examination of the application, as Ms Galley in part contended for.

'[26] Secondly, like the judge, I think the

proposed construction would be an invitation to fraud. A dishonest applicant (perhaps knowing the registered proprietor would be away or otherwise unable or unlikely to send in a NAP form in time or at all) could falsely claim he had been in adverse possession for ten years. His application would succeed because on its face it looked in order and the true owner would lose his land. The fact that there is no possibility of extending the prescribed time means that Parliament either intended that the rectification power could cover such a case or that the true owner could lose his land for want of a form in time. The latter is wholly improbable.

'[27] Ms Galley felt the force of that. She first suggested the difficulty could be overcome because a fraudulent applicant would be met by a counternotice. But that will not cover the case where the counternotice is not sent back in time—which could include the case where the fraudster knew the registrar's letter would not be received or, if received, would not be dealt with in time.

'[28] Her second submission on this point involved a concession: that a registration pursuant to a fraudulent application could amount to a mistake, whereas a registration pursuant to an innocent but mistaken application could not. Thus she accepted that a registration obtained by the use of a forged conveyance could be rectified as *correcting a mistake*. And, when she was pressed by the case of an application made when the applicant knew that the landowner would not respond in time, eg because he or she would be away or for some other reason other than mental incapacity—specifically provided for in para 8 of Sch 6—she accepted that that too would be a mistake within the meaning of Sch 4. Her concession was made by a general appeal to the old adage "fraud unravels everything".

'[29] The insuperable difficulty with this submission is that it is impossible to draw any rational distinction between a mistake induced by fraud and a mistake induced by a wrong application. The reason for the mistake—that the registrar was given false information—is the same in both cases.

'[30] Thirdly her submission goes against the policy of the Act as regards obtaining land by adverse possession. That policy was to make it *more* difficult to do that. It was set out in the consultation document thus:

"10.2 We then put forward proposals for a wholly new substantive system of adverse possession that would apply only to registered land, and which is consistent

with the principles of title registration. This would offer much greater security of title for a registered proprietor than exists under the present law, and would confine the acquisition of land by adverse possession to cases where it was necessary either in the interests of fairness or to ensure that land remained saleable.”

As the judge observed, “it would be very strange if a registered proprietor could be at risk of losing his land to a squatter who had never been in adverse possession”.

... [35] Finally, although we were referred to other passages of *Ruoff and Roper* and to passages of Megarry and Wade *The Law of Real Property* (7th edn, 2008) whose editors include Mr Harpum, none of the passages were directly in point—no bull’s eye for either side. But one passage in *Registered Land, Law and Practice under the Land Registration Act 2002* (2004) co-authored by Mr Harpum is—to use a mixed metaphor—squarely in point. It is a footnote to para 30.1 and says this:

“If an applicant was registered under the scheme provided by the LRA 2002 and it then transpired that he had not in fact been in adverse possession for 10 years, his registration would be a mistake, and there would, therefore, be grounds for an application for rectification of the register: see LRA 2002, Sch. 4 paras 2(1)(a), 5(a).”

So the opinion of the architect of the Act is dead against Ms Galley’s contentions. That clearly has considerable weight in view of Mr Harpum’s deep connection with the Act and its drafting.

[36] Accordingly I unhesitatingly reject the main point on this appeal.’ *Baxter v Mannion* [2011] EWCA Civ 120, [2011] 2 All ER 574 at [18], [24]–[30], [35]–[36], per Jacob LJ

MIXING

[Asbestos Industry Regulations 1931, SI 1931/1140, reg 2, referring to ‘mixing or blending by hand of asbestos’.] [45] Active dispute arose as to whether the term “mixing” in the Regulations should be given a specialised, technical, or its ordinary, meaning. In support of its argument that it should be given a restricted, technical meaning, the appellant conducted a close textual analysis of the Merewether and Price Report [*Effects of Asbestos Dust on the Lungs and Dust Suppression in the Asbestos Industry* by Merewether and Price published in

March 1930], citing instances of where the term had been used in conjunction with other processes of manufacture. Reliance was also placed on the Report on Conferences [*Report of Conferences between Employers and Inspectors concerning Methods for Suppressing Dust in Asbestos Textile Factories* (35–214, HMSO)] where it was clear, the appellant claimed, that the expression “mixing” was used in the technical sense of mixing raw asbestos as a preparatory step to its use in the manufacture of asbestos products.

[46] In the Merewether and Price Report at p 11, “mixing” is first in a list of processes which includes crushing, opening and disintegrating. And at p 21 the process of “mixing” is identified in the same context as the breaking, crushing, disintegrating, opening and grinding of asbestos and before reference to the sieving of asbestos. This, the appellant claims, is a reference to the preparatory steps for use of asbestos mineral in product manufacture, rather than mixing asbestos to create a paste. This claim is fortified, the appellant says, by the reference on p 31 of the report to the dusty process of hand mixing incidental to opening (ie manufacturing) processes.

[47] The appellant argues that the recommendations contained in the Merewether and Price Report correlate directly to the classification of processes in the preamble to the 1931 Regulations. Thus the first recommendation (relating to exhaust ventilation at dust producing points) was the foundation for reg 1. The reference in this recommendation to the fact that such measures have not been applied to “hand work” and that “special difficulties remain to be overcome in some cases eg ... mixing” clearly referred back to “mixing” identified on pp 21 and 31 of the report. The recommendation that, unless the problem was surmounted, there should be “general ventilation of a high standard applied so as to draw the dust-laden air away from the worker” became reg 2(a), the appellant claimed, and therefore applied specifically to “mixing or blending by hand” with this clear technical meaning.

[48] These arguments are founded on the premise that the Merewether and Price Report and the Report on Conferences were translated directly to the provisions in the Regulations. This is a false premise ...

[49] Although Merewether and Price had, for understandable reasons, chosen workers whose activities were confined to the manufacture of asbestos, the significance of their findings went well beyond the impact on that restricted category of employees. In particular,

it was well known, at the time that the Regulations were made, that mixing of asbestos to create a paste was a regular feature of lagging. And Merewether and Price's findings, properly understood, pointed clearly to the risk that chronic exposure to asbestos would entail, whatever the circumstances in which it occurred. If it had been intended to exclude from the ambit of the Regulations mixing for the purpose of creating a paste for lagging, this would have been, in light of contemporaneous knowledge, a surprising outcome. In any event, it would have had to be made explicitly clear and it was not. I am satisfied, therefore, that the term "mixing" in the Regulations should not be given the restricted, technical meaning for which the appellant contends and that it should be taken to cover mixing asbestos powder with water such as occurred in this case.' *McDonald v National Grid Electricity Transmission plc* [2014] UKSC 53, [2015] 1 All ER 371 at [45]–[49], per Lord Kerr

MONEY

[For 32 Halsbury's Laws of England (4th Edn) (2005 Reissue) paras 101–102 see now 49 Halsbury's Laws of England (5th Edn) (2015) paras 1–2.]

[Income Tax (Earnings and Pensions) Act 2003, Pt 7 Ch 2.] '[96] A further argument advanced by the Revenue was that the shares could not be regarded as "restricted securities" because they were "money", and therefore excluded from the definition of "securities", for the purposes of Ch 2, by s 420(5)(b). The shares were said to be money on the basis that the commercial reality of the scheme was the payment of cash: in particular, the shares were always intended to be redeemable for cash.

'[97] It may well be that, in an appropriate case, the statutory term "money", construed purposively, might apply to arrangements which, viewed realistically, were no more than disguised or artificially contrived methods of paying cash to employees. For the reasons explained in para [92], above, however, that approach cannot be applied on the facts of the present appeals. It is also apparent from some of the examples of "securities" given in s 420(1)(b), such as debentures, certificates of deposit, and other instruments creating or acknowledging indebtedness, that the ability to redeem an instrument for cash does not render it "money". Indeed, the implication of s 424(c) is that redeemable shares are included within the scope of Ch 2'. *UBS AG v Revenue and*

Customs Commissioners; Deutsche Bank Group Services (UK) Ltd v Revenue and Customs Commissioners [2016] UKSC 13, [2016] 3 All ER 1 at [96]–[97], per Lord Reed SCJ

In will

[For 50 Halsbury's Laws of England (4th Edn) (2005 Reissue) para 584 see now 102 Halsbury's Laws of England (5th Edn) (2010) para 295.]

MONEY'S WORTH

Australia '[15] ... The meaning of the expression "money's worth" has been considered in different circumstances. *Secretan v Hart* [1969] 3 All ER 1196; [1969] 1 WLR 1599 (*Secretan*) concerned capital gains tax. The Finance Act 1965 (UK) provided that for the purposes of the tax certain deductions could be made from the consideration received on the sale of an asset. One such deduction was "the amount or value of the consideration, in money or money's worth, given by him ... for the acquisition of the asset". As to this Buckley J said in *Secretan* at All ER 1198; WLR 1603: "The expression 'consideration in money's worth' is, of course, one which is very familiar to lawyers as being a way of expressing the price or consideration given for property where property is acquired in return for something other than money, such as services or other property, where the price or consideration which the acquirer gives for the property has got to be turned into money before it can be expressed in terms of money".

'[16] *Gideons International Service Mark* [1991] RPC 141 (*Gideons*) was a case that considered whether a mark qualified as a "service mark" under the relevant trade mark legislation. In order to satisfy the definition, the mark had to be used in relation to services "for money or money's worth". The hearing officer said in *Gideons* at 142–3: "This is a common phrase in everyday use in England. The definition given in the *Concise Oxford Dictionary* is 'anything recognised as equivalent to money'. My own general knowledge of English usage indicates that 'money's worth' is used to mean 'equivalent to money' in the sense of being something essentially *material*. In other words any emotional or spiritual reward, however momentous, could not properly be described as 'money's worth'".

'[17] In *R v Burt & Adams Ltd* [1999] 1 AC 247; [1998] 2 All ER 417 (*Adams*) the House of Lords looked at the operation of s 34 of the

Gaming Act 1968 (UK). That section prohibited certain gaming machine operators from allowing certain prizes other than *inter alia* a “non monetary prize” which was defined to mean a “prize which does not consist of or include any money and does not consist of or include any token which can be exchanged for money or money’s worth”. Different opinions were expressed by the Law Lords on the meaning of “money’s worth” in this definition. Lord Nolan said in *Adams* at AC 253; All ER 422 that the ordinary meaning of the words “money’s worth” was something “worth money”. Lord Hoffman referred to the passage of Buckley J in *Secretan* and said in *Adams* at AC 256; All ER 425 that the term “money’s worth” means anything which is “capable of being turned into money”. Lord Hope in *Adams* at AC 263; All ER 431 equated the term “money’s worth” with something capable of being “used like money”. Lord Lloyd concluded in *Adams* at AC 251; All ER 420 that, having regard to the context of the Act, the term should be given a narrow construction and that it meant the “equivalent of money”. *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (No 3) [2009] FCA 450, (2009) 256 ALR 427 at [15]–[17], per Finkelstein J

MONITION

[For 14 Halsbury’s Laws of England (4th Edn) para 1382 see now 34 Halsbury’s Laws of England (5th Edn) (2011) para 1195.]

MONOPOLY

[For 47 Halsbury’s Laws of England (4th Edn) (2001 Reissue) paras 102, 105 see now 18 Halsbury’s Laws of England (5th Edn) (2009) paras 361, 364.]

MONTH

[For 45(2) Halsbury’s Laws of England (4th Edn) (Reissue) paras 207–211 see now 97 Halsbury’s Laws of England (5th Edn) (2015) paras 307–311.]

MOORING (OF VESSEL)

Moored in good safety

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 316 see now 60 Halsbury’s Laws of England (5th Edn) (2011) para 307.]

MORTGAGE

[For 32 Halsbury’s Laws of England (4th Edn) (2005 Reissue) paras 301–302 see now 77 Halsbury’s Laws of England (5th Edn) (2016) paras 101–102.]

[For 41 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 2 see now 91 Halsbury’s Laws of England (5th Edn) (2012) para 2.]

Equitable mortgage

[For 32 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 305 see now 77 Halsbury’s Laws of England (5th Edn) (2016) para 105.]

Legal mortgage

[For 32 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 304 see now 77 Halsbury’s Laws of England (5th Edn) (2016) para 104.]

Puisne mortgage

[For 32 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 317n see now 77 Halsbury’s Laws of England (5th Edn) (2016) para 160n.]

MORTGAGOR

Canada [Whether the applicant was a “mortgager” within the meaning of the Mortgages Act RSO 1990, c M.40, s 1.] ‘14. The Mortgages Act defines a “mortgagor” to include “any person deriving title under the original mortgagor or entitled to redeem a mortgage, according to the person’s estate, interest or right in the mortgaged property”.

‘15. Citi Cards argues that it filed its Writ of Seizure and Sale after the Banks’ mortgages were registered. Consequently, pursuant to section 31 of the Mortgages Act, the Banks are required to send Citi Cards a Notice of Sale Under Mortgage before exercising a power of sale. Section 31 of the Mortgages Act prohibits the Banks from exercising a power of sale unless a notice in the form provided is sent to every person appearing by the parcel register and the index of executions to have an interest in the property.

‘16. Upon receiving a Notice of Sale, Citi Cards would be entitled to redeem Mr Pleasance’s mortgages. The Notice of Sale is equivalent to a mortgage or discharge statement and would satisfy the Sheriff’s requirement for

such a statement. Citi Cards submits that its rights to the Statements should not depend on whether the mortgages are in default or on whether the Banks decide to issue a Notice of Sale.

‘17. I do not agree. It is precisely the mortgagor’s default that entitles the mortgagee to issue a Notice of Sale and it is the Notice of Sale that jeopardizes the judgment creditor’s security, derived from registering a writ of seizure and sale against the property. It is therefore the default that entitles Citi Cards to redeem the mortgage that is in default. Without a default in the mortgage, Citi Cards has no right to redeem the mortgage and, in the absence of such a right, it is not a “mortgagor” as defined by the Mortgages Act.’ *Citi Cards Canada Inc v Pleasance* [2010] OJ No 1175, 2010 ONSC 1124, Ont Superior Court, at paras 14–17, per D G Price J

MULDROCK ERROR

Australia ‘[6] (The references to “*Muldrock*” above and to “*Muldrock* error” in the submissions are references to the imposition of a

sentence which, by reason of what was determined in *Muldrock v R* (2011) 244 CLR 120; 281 ALR 652; [2011] HCA 39 (*Muldrock*), discloses material error (see for example *Achurch v R* (2015) 253 CLR 141; 306 ALR 566; 143 ALD 1; 88 ALJR 490; [2014] HCA 10 at [2] and [7]).)’ *Buttrose v A-G (NSW)* [2015] NSWCA 221, (2015) 324 ALR 562 at [6], per Beazley P and Leeming JA

MURDER

[For 11(1) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 86 see now 25 Halsbury’s Laws of England (5th Edn) (2016) para 99.]

N

NAME

[For 35 Halsbury's Laws of England (4th Edn) (Reissue) paras 1272–1275 see now 80 Halsbury's Laws of England (5th Edn) (2013) para 802; 88 Halsbury's Laws of England (5th Edn) (2012) paras 326–329.]

NATIONAL DEBT

[For 32 Halsbury's Laws of England (4th Edn) (2005 Reissue) paras 148–150 see now 49 Halsbury's Laws of England (5th Edn) (2015) paras 12–114.]

NATIONAL INTEREST

Canada [Immigration and Refugee Protection Act, SC 2001, c 27, s 34. Section 34(2) provides that the criteria for inadmissibility to Canada on security grounds do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.] '55 The meaning of the term "national interest" in s. 34(2) of the *IRPA* was central to the Minister's exercise of discretion in this case. As is plain from the statute, the Minister exercises this discretion by determining whether he or she is satisfied by the applicant that the applicant's presence in Canada would not be detrimental to the national interest. The meaning of "national interest" in the context of this section is accordingly key, as it defines the standard the Minister must apply to assess the effect of the applicant's presence in Canada in order to exercise his or her discretion.

'56 The Minister, in making his decision with respect to the appellant, did not expressly define the term "national interest". The first attempt at expressly defining it was by Mosley J. in the Federal Court, and he also certified a question concerning this definition for the Federal Court of Appeal's consideration. We are therefore left in the position, on this issue, of having no *express* decision of an administrative decision maker to review.

'57 This Court has already encountered and addressed this situation, albeit in a different context, in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654. In that case, Rothstein J. held that a decision maker's decision on the merits may imply a particular interpretation of the statutory provision at issue even if the decision maker has not expressed an opinion on that provision's meaning.

'58 The reasoning from *Alberta Teachers' Association* can be applied to the case at bar. It is evident from the Minister's holding that "[i]t is not in the national interest to admit individuals who have had sustained contact with known terrorist and/or terrorist-connected organizations" that the Minister made a determination of the meaning of "national interest". An interpretative decision as to that term is necessarily implied within his ultimate decision on ministerial relief, although this Court is not in a position to determine with finality the actual reasoning of the Minister. In these circumstances, we may "consider the reasons that could be offered for the [Minister's] decision when conducting a reasonableness review" of that decision (*Alberta Teachers' Association*, at para. 54). Accordingly, I now turn to consider, what appears to have been the ministerial interpretation of "national interest", based on the Minister's "express reasons" and the Guidelines, which inform the scope and context of those reasons. I will then assess whether this implied interpretation, and the Minister's decision as a whole, were reasonable.

...
'62 Taking all the above into account, had the Minister expressly provided a definition of the term "national interest" in support of his decision on the merits, it would have been one which related predominantly to national security and public safety, but did not exclude the other important considerations outlined in the Guidelines or any analogous considerations (see Appendix 1 (the relevant portions of the Guidelines)).

'63 As a result of my comments above on the standard of review, I am of the view that the Minister is entitled to deference as regards this implied interpretation of the term "national interest". As Rothstein J. stated, "[w]here the reviewing court finds that the tribunal has made an implicit decision on a critical issue, the deference due to the tribunal does not disappear" (*Alberta Teachers' Association*, at para. 50).

'64 In my view, the Minister's interpretation of the term "national interest", namely that it is

focused on matters related to national security and public safety, but also encompasses the other important considerations outlined in the Guidelines and any analogous considerations, is reasonable. It is reasonable because, to quote the words of Fish J. from *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, it “accords... with the plain words of the provision, its legislative history, its evident purpose, and its statutory context” (para. 46). That is to say, the interpretation is consistent with Driedger’s modern approach to statutory interpretation:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(*Construction of Statutes* (2nd ed. 1983), at p. 87)

...
 ‘87 In summary, an analysis based on the principles of statutory interpretation reveals that a broad range of factors may be relevant to the determination of what is in the “national interest”, for the purposes of s. 34(2). Even excluding H&C [humanitarian and compassionate] considerations, which are more appropriately considered in the context of a s. 25 application, although the factors the Minister may validly consider are certainly not limitless, there are many of them. Perhaps the best illustration of the wide variety of factors which may validly be considered under s. 34(2) can be seen in the ones set out in the Guidelines (with the exception of the H&C considerations included in the Guidelines). Ultimately, which factors are relevant to the analysis in any given case will depend on the particulars of the application before the Minister (*Soe* [*Soe v Canada* (*Public Safety and Emergency Preparedness*) 2007 FC 461 (CanLII)], at para. 27; *Tameh* [*Tameh v Canada* (*Minister of Public Safety and Emergency Preparedness*) 2008 FC 884, 332 FTR 158], at para. 43).

‘88 This interpretation is compatible with the interpretation of the term “national interest” the Minister might have given in support of his decision on the appellant’s application for relief. It is consistent with that decision. The Minister’s implied interpretation of the term related predominantly to national security and public safety, but did not exclude the other important considerations outlined in the Guidelines or any analogous considerations. In light

of my discussion of the principles of statutory interpretation, this interpretation was eminently reasonable.’ *Agraira v Canada* (*Public Safety and Emergency Preparedness*) 2013 SCC 36, [2013] SCJ No 36 at paras 55–58, 62–64, 87–88, per LeBel J

NATIONALITY

[For 4(2) Halsbury’s Laws of England (4th Edn) (2002 Reissue) para 1 et seq see now 4 Halsbury’s Laws of England (5th Edn) (2011) para 401 et seq.]

NATURAL DISASTER DAMAGE

New Zealand [Earthquake Commission Act 1993, ss 2, 18.] ‘[21] The issue of whether the loss of the use of the house and the resulting consequences are “natural disaster damage” under the ECA is essentially an exercise in statutory interpretation, with that phrase at its core. Under s 5(1) of the Interpretation Act 1999 the meaning of an enactment must be ascertained from its text and in light of its purpose. Text and purpose therefore are the key drivers of statutory interpretation, and the meaning apparent from the text should always be cross-checked against purpose. In determining purpose the Court has regard to both the immediate and general legislative context including the social, commercial and other objectives of the enactment. The legislative history can also assist in discerning purpose.

...
 ‘[26] Natural disaster damage is defined in s 2 of the ECA as follows:

natural disaster damage means, in relation to property, –

- (a) any physical loss or damage to the property occurring as the direct result of a natural disaster; or
- (b) any physical loss or damage to the property occurring (whether accidentally or not) as a direct result of measures taken under proper authority to avoid the spreading of, or otherwise to mitigate the consequences of, any natural disaster, but does not include any physical loss or damage to the property for which compensation is payable under any other enactment.

‘[27] Physical loss or damage is also defined in s 2:

physical loss or damage, in relation to property, includes any physical loss or damage to the property that (in the opinion

of the Commission) is imminent as the direct result of a natural disaster which has occurred.

[28] A "natural disaster" as defined in s 2 includes an earthquake, and it is not in issue that there was a natural disaster here.

[29] It can be seen from the definitions of "natural disaster damage" and "physical loss or damage" that natural disaster damage can be of three different types:

- (a) physical loss or damage to the property occurring as the direct result of a natural disaster;
- (b) physical loss or damage to the property occurring (whether accidentally or not) as a direct result of measures taken under proper authority to avoid the spreading of or otherwise to mitigate the consequences of any natural disaster; or
- (c) physical loss or damage to property that (in the opinion of the Commission) is imminent as the direct result of a natural disaster which has occurred.

...

[32] We repeat the first ECA definition of "natural disaster damage":

- (a) any physical loss or damage to the property occurring as the direct result of a natural disaster;

[33] It is necessary to consider the adjective "physical", the nouns it qualifies of "loss or damage" and the phrase that follows of "to the property".

[34] In relation to the word "physical", Mr Campbell for the appellants described the proceeding as a claim for "physical deprivation loss", which he argued fell within the phrase "physical loss to the property".

[35] The word "physical" indicates something material or tangible as opposed to mental or spiritual, and ordinarily means "of or concerning the body". The "body" in the context of (a) is the "property". The property is not defined, but must be the building or land that has suffered the loss or damage. In this case it would be the structure and materials of the house.

[36] Mr Campbell submitted that to be unable to have access to and enjoyment of a house was an event that was a "physical" loss. However, plainly nothing "physical" of significance has happened to the property. The physical deprivation loss Mr Campbell referred to does not relate to any material loss or damage to the body of the property, but a loss to Ms Kraal, who now cannot occupy the property.

The earthquakes have given rise to a s 124 notice which stops her and her family from doing so. But neither the earthquakes nor the notice have changed the property in any material or tangible way.

[37] Turning to the word "damage", there was little difference between the parties regarding the interpretations that they put forward. Its ordinary meaning is of harm done to something which impairs its value or usefulness. The word often has a connotation of physical harm, but it can mean emotional or reputational or other non-physical harm. In ordinary parlance it would not be said that a s 124 notice prohibiting occupation has caused "damage" to a property.

[38] The word "loss" has a broader meaning than the word "damage". When used as a noun it is not in its dictionary definition normally associated with the word "to" (although it can be), but is often coupled with "of". It carries as a particular meaning the concept of deprivation of a thing. The word "loss" is broad enough to cover conceptually what has happened to Ms Kraal, in the sense that she had suffered a loss, namely the ability to use her property, and other associated losses. However, the definition refers to loss "to the property", and not loss to the insured person.

[39] We see the word "loss" (which, as we will describe has featured since the War Damage Act 1941 in conjunction with "damage") as having a belts and braces purpose. The long title does not refer to "loss" but only "damage", but there will be cases where "loss" is the more natural word to apply, even when the event is of a physical nature. Thus, if a house or land is swept away in a tsunami or lahar flow it is physically "lost". In our view the word "loss" in the context of the definition can be seen as adding, to the concept of damage, the concept of total destruction. Both involve a physical event happening to the building.

[40] "Loss" has a broader meaning than "damage", but the word as used in the definition cannot be read without the qualifying adjective "physical". We see the word "loss" in the definition as not broadening the relevant concept to cover any loss suffered to the insured person's property as a consequence of an earthquake which has a physical effect on the person rather than on the property itself. The word "physical" beforehand and the phrase "to the property" afterwards make the definition more prescriptive than that.

[41] The "loss or damage" must be "to the property". The preposition "to" relates to what is reached, approached or touched. In (a) the

word “to” follows “loss or damage” and relates to the words “the property”. This meaning is emphasised by the adjective “physical” which, as discussed, involves something of or concerning the body. In this definition the body is “the property” or more particularly the materials and structures that constitute the house. Therefore, it is loss or damage that reaches and touches the house and not loss or damage to objects other than the property, such as the insured person or that person’s enjoyment of the property, that is covered. It was open to those who drafted the definition if they wished to cover loss in its broadest sense to use the phrase loss “of” the property, and to avoid prescriptive words such as physical. But they did not do so. They specified “physical” loss “to” the property.

‘[42] Nothing physical of relevance to this claim has happened “to” the property. It has not been hit by a boulder or suffered other injury resulting from destabilisation of the hill. The only reason the house cannot be used is because there are legal prohibitions on its use. Those legal prohibitions in themselves are not physical loss or damage “to” the property.

‘[43] Therefore, the text of (a) of the definition does not support Ms Kraal’s claim. Rather it indicates that a deliberate limit has been placed on the type of loss or damage that falls within the definition: it must be physical and it must be to the property in the sense of being to the materials and structure of the property. It does not extend to an inability to enjoy the property. The plain text of (a) therefore supports the ECA’s definition.

‘[44] The text of (b) uses the same clause initiating words that are in (a), defining natural disaster damage as “any physical loss or damage to the property”. The above analysis applies to those words. However, the definition in (b) adds to the triggering event of “natural disaster”, physical loss or damage to the property that results from measures under proper authority, taken to avoid the spreading of or to mitigate the consequences of natural disaster. Natural disaster remains the trigger, and physical loss or damage to the property remains the loss covered, but the cover for the loss is extended where there has been intervening event between the trigger and the loss. That event is a measure under proper authority taken to mitigate that natural disaster.

‘[45] In our assessment that measure must still cause physical loss or damage to the property. There has been a measure in this case taken under proper authority to mitigate the consequences of the earthquake, namely a s 124 notice prohibiting persons from occupying

houses at risk as a consequence of the earthquake. But that measure has not caused any physical loss or damage to the property. There is no reason why the meaning of “physical loss or damage to the property” should differ between (a) and (b). Thus the claim under (b) fails because there has been no physical effect to the property.

‘[46] The long title records that the ECA is to provide “insurance of residential property against damage caused by certain natural disasters”. The reference is to “damage” rather than “loss”. The appellants’ loss, which is the deprivation of possession and use and economic loss, does not naturally come within these words. In ordinary parlance the property has not suffered damage relevant to this claim caused by earthquake.

...

‘[78] We conclude that the plain meaning, the context, the legislative history, and relevant authorities in New Zealand, Australia and England, all support an interpretation of the ECA that limits the meaning of natural disaster damage to physical damage that arises from a natural disaster, and which is suffered by the land and buildings that are the subject of the claim, or such loss or damage when it results from an authorised measure to mitigate the damage from the disaster, or when such loss or damage is imminent. If the property is a building there must be a physical disturbance to the materials or structure of that building, and the ECA does not extend to a claim for losses arising from an event which has not physically affected the body of the property.’ *Kraal v Earthquake Commission* [2015] NZCA 13, [2015] 2 NZLR 589 at [21], [26]–[29], [32]–[46], [78], per Asher J (footnotes omitted)

NATURE AND SEVERITY OF THE ACTS COMMITTED

Canada [Immigration and Refugee Protection Act, s 115(2)(b). Judicial review of an opinion of the Minister of Citizenship and Immigration that applicant refugee should not be allowed to remain in Canada as he was a member of gang involved in criminal activities; whether “nature and severity of the acts committed” by criminal organization or by applicant personally should be considered.] ‘[Issue No. 3: Did the Minister err in interpreting paragraph 115(2)(b) by considering the “nature and severity of the acts committed” by the criminal organization, as opposed to the applicant personally?

...

'[53] The Minister's opinion, after reviewing the evidence, is set out at paragraph 29 of the opinion:

Following from the evidence noted above, including Mr Nagalingam's membership and involvement in the A K Kannan [Tamil gang], in my view, the nature and severity of the acts committed by the A K Kannan are serious and significant, and as such Mr Nagalingam should not be allowed to remain in Canada. [Emphasis added.]

'[54] The Minister referred to the acts committed by the applicant at paragraph 27:

I note that Mr Nagalingam has relatively few criminal convictions as follows: [mischief under \$ 5,000; failure to comply with recognizance; assault].

'[55] The issue is whether paragraph 115(2)(b) means "the nature and severity of the acts committed" by the criminal organization or by the applicant personally.

'[56] For ease of reference I repeat paragraph 115(2)(b) of the Act:

115. ...

(2) Subsection (1) does not apply in the case of a person

...

(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

...

'[58] In applying the rules of statutory interpretation to determine whether or not there is an apparent discordance between the French and English versions of the paragraph, it is clear that there is an ambiguity in the English version because the English version does not link the "acts committed" either to the individual or to the criminal organization. That is left vague. The French version is clear. The French text reads: "*il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada*" [emphasis added]. The literal translation of the French version is "because of the nature and severity of his past acts".

'[59] The Court is satisfied that the common meaning is the French version. It is plain, not

ambiguous and narrower. Therefore, according to the rules of statutory interpretation with respect to bilingual statutes, paragraph 115(2)(b) means that the Minister must decide whether the applicant should be allowed to remain in Canada on the basis of the nature and severity of his personal acts.

'[60] The second step in the interpretation of paragraph 115(2)(b), as stated by the Supreme Court of Canada in *Medovarski*, above [*Medovarski v Canada (Minister of Citizenship and Immigration)*]; *Esteban v Canada (Minister of Citizenship and Immigration)* [2005] 2 SCR 539], is that the Court must determine if the common meaning is consistent with Parliament's intent. This principle of statutory construction, described by Elmer Driedger in *The Construction of Statutes* (Toronto: Butterworths, 1974) [at page 87] was adopted by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd* [1998] 1 SCR 27, at page 41:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

'[61] Considering the words of the paragraph with the scheme of the Act, the object of the Act and the intent of Parliament, the Court concludes Parliament intended that the Minister consider the nature and severity of the acts committed by the person, as opposed to the criminal organization as a whole. The logical reason to examine the nature and gravity of the personal acts committed by the refugee is that the refugee should not be refouled only because he is a member of a criminal organization unless the acts in which he was involved warrant removal. As will be discussed below, the Minister can look at the acts committed by the criminal organization if it is established that the refugee was complicit in those acts, i.e. there are reasonable grounds for believing that the refugee was personally and knowingly involved in these crimes.

...

'[65] Therefore, the proper interpretation of paragraph 115(2)(b) is one that requires the Minister to consider the nature and severity of the acts committed personally by the applicant, and by the A K Kannan gang if the applicant was a personal and knowing participant in such acts, i.e. complicit.' *Nagalingam v Canada (Minister of Citizenship and Immigration)*

[2008] 1 FCR 87, 2007 FC 229, [2007] FCJ No 295 at [53]–[56], [58]–[61], [65], per Kelen J (revsd on the facts but not on this point, *Nagalingam v Canada (Minister of Citizenship and Immigration)* [2008] FCJ No 670, 2008 FCA 153, 165 ACWS (3d) 889: see below)

...
[74] Consequently, I endorse the ruling of Justice Kelen that “the logical reason to examine the nature and gravity of the personal acts committed by the refugee is that the refugee should not be *refouled* only because he is a member of a criminal organization unless the acts in which he was involved warrant removal” (Emphasis added) (at paragraph 61 of Reasons for Judgment). The high threshold lies in the nature and severity of the acts committed.

[75] Therefore, I propose to answer the second certified question as follows:

The exception of paragraph 115(2)(b) regarding organized criminality will apply to a Convention refugee or a protected person if, in the opinion of the Minister, that person should not be allowed to remain in Canada on the basis of the nature and substantial gravity of acts committed (in the context of organized criminality) personally or through complicity, as defined by our domestic laws, but established on a standard of reasonable grounds.’

Nagalingam v Canada (Minister of Citizenship and Immigration) [2008] FCJ No 670, 2008 FCA 153, 165 ACWS (3d) 889 at [74]–[75], per Trudel JA

NAVIGABLE RIVER

New Zealand [Coal Mines Act Amendment Act 1903, s 14.] [60] Section 14 of the CMAAA materially provides:

14. **Bed of river deemed vested in Crown** — (1) Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown, and, without limiting in any way the rights of the Crown thereto, all minerals, including coal, within such bed shall be the absolute property of the Crown.
(2) For the purpose of this section—
“Bed” means the space of land

which waters of the river cover at its fullest flow without overflowing its banks:

“Navigable river” means a river continuously or periodically of sufficient width and depth to be susceptible of actual or future beneficial use to the residents, actual or future, on its banks, or for the public for the purposes of navigation by boats, barges, punts or rafts ...

[61] Section 206 of the Coal Mines Act 1925 amended the definition of “navigable river” to read:

- (2) ... a river of sufficient width and depth (whether at or at all times so or not) to be used for the purpose of navigation by boats, barges, punts or rafts.

The same definition was re-enacted as s 261 of the Coal Mines Act 1979, and its effect is preserved by s 351 of the Resource Management Act 1991.

...
[86] In summary, I am satisfied that determination of the meaning of the phrase “navigable river” in s 14 requires a factual inquiry into whether the river as a whole is navigable. Its general characteristic is decisive and does not allow for Mr Millard’s piecemeal approach: navigability is not to be assessed either according to a moving scale from the mouth of the river to the point where continuous navigability actually ceases or by reference above that point to a segment defined by its abutment to the riparian land in question.

[87] The terms of the statutory definition found in s 14 are unique to New Zealand, and do not attempt to replicate existing common law. The word “navigation” in this context means, in my judgment, the carriage by water transport of people or goods from one point to another. A “navigable river” is one capable of navigation. While its common law meaning of a public highway is preserved by the express reference to public use, the meaning of “navigable river” is significantly extended relevantly to this case.’ *Paki v Attorney-General* [2009] 1 NZLR 72 at [60]–[61], [86]–[87], per Harrison J

New Zealand [Coal Mines Amendment Act 1903, s 14.] [72] The definition in s 14(2) provides that a river, to be navigable, must be “continuously or periodically of sufficient width

and depth to be susceptible of *actual* or *future* beneficial use to the residents, actual or future, on its banks, or for the public for the purposes of navigation by boats, barges, punts or rafts” (emphasis added). “Actual” and “future” connotes a split in both uses and categories of users: the people present or future who live along the banks of the river and carry out activities there, or those members of the public who wish to navigate it.

[73] It will also be noted that the s 14(2) definition specifically refers to the river being “continuously or periodically” of sufficient width and depth. This could have a temporal meaning, in that some rivers are seasonably “full” and passable. Or it could have a spatial meaning, in that some stretches of the river are permanently passable but some are not. For example, the interruption of a river by falls, impassable gorges, or dams. The qualifier that a river only needs to be “periodically” of sufficient width and depth to be navigable demonstrates that interruptions to a continuous river journey were contemplated.

[74] On a purely textual analysis, we think s 14 must contemplate that occasional natural obstacles, such as those in the upper reaches of the Waikato River, do not preclude the river being classified as navigable. Section 14 could be approached broadly in this way, as allowing for the hydro-electric developments that were clearly in parliamentary contemplation, or narrowly, which would not allow for the breaking up of passage by obstacles. Even on the text alone, we incline to the broader view. The provision was prospective and did not rest on a static view of the river. Parliament had in mind future changes which would themselves change the character of the river in places.

[81] We think that the appropriateness of the broader textual view we have identified (at [74] above) is put beyond doubt by the developmental and legislative context which we set out earlier in this judgment. What has happened to the Waikato River is exactly what Parliament had in contemplation at the time of the passage of the CMAA 1903. It was a prospective view that extensive development was likely to take place, and that securing the bed of the river to the Crown was essential to the development of New Zealand.

[82] We agree with Harrison J that the divisibility argument run by the representatives is quite inimical to the purpose of the CMAA 1903, as seen in the larger legislative context in which it ought properly to be seen. We consider the question of legislative purpose to be of

overwhelming importance in this case.

[83] The only real argument to be made against this proposition is that the effect of the CMAA 1903 was confiscatory, in that it took away existing common law rights. Boast has trenchantly described s 14 as “one of the most expropriatory enactments in New Zealand legal history and a startling example of statutory overkill”: [Richard Boast and others (eds) *Māori Land Law* (2nd ed, LexisNexis, Wellington, 2004)] at 266. Normally, if there was ambiguity, one would read such legislation down. That said, the legislative purpose is paramount. There is no doubt that Parliament can legislate in an expropriatory fashion if it wishes to, even though New Zealand law does not have a constitutional “takings” provision such as is found in the United States Constitution. It is worth observing that the confiscation effected by the CMAA 1903 was not discriminatory. It applied to Māori and Pakeha equally and, where applicable, it overrode the common law rights of all New Zealanders.

[84] In the result, we think Harrison J was right to hold that, in 1903 and now, the Waikato River was, and is, navigable within the meaning of s 14 of the CMAA 1903.’ *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 at [72]–[74], [81]–[84], per Hammond J

NECESSARIES

Of ship

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

Of child

[For 5(3) Halsbury’s Laws of England (4th Edn) (Reissue) paras 18–19 see now 9 Halsbury’s Laws of England (5th Edn) (2012) paras 18–19.]

[For 41 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 37 see now 91 Halsbury’s Laws of England (5th Edn) (2012) para 38.]

Of wife

[For 29(3) Halsbury’s Laws of England (4th Edn) (Reissue) para 212 see now 72 Halsbury’s Laws of England (5th Edn) (2015) para 262.]

NECESSARY

In various statutes etc

[Data Protection Act 1998, Sch 2, para 6: disclosure of personal data only if the processing is 'necessary' for specified purposes.] '[18] It is obvious that condition 6 requires three questions to be answered: (i) Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests? (ii) Is the processing involved necessary for the purposes of those interests? (iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?'

'[19] It is not obvious why any further exegesis of those questions is required. However, in *Corporate Officer of the House of Commons v Information Comr* (26 February 2008, unreported), the Information Tribunal accepted that "'necessary' ... carries with it connotations from the [European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998)], including the proposition that a pressing social need is involved and that the measure employed is proportionate to the legitimate aim being pursued" (para 59). By the time the case reached the Divisional Court:

"It was common ground that 'necessary' within para 6 of Sch 2 to the [Data Protection Act] should reflect the meaning attributed to it by the European Court of Human Rights when justifying an interference with a recognised right, namely that there should be a pressing social need and that the interference was both proportionate as to means and fairly balanced as to ends ..." (See [2009] 3 All ER 403 at [43].)

... [25] I agree with Mrs Wolffe to this extent: the word "necessary" has to be considered in relation to the processing to which it relates. If that processing would involve an interference with the data subject's right to respect for his private life, then *Rechnungshof v Österreichischer Rundfunk* [Joined cases C-465/00, C-138/01 and C-139/01 [2003] ECR I-4989, ECJ] is clear authority for the proposition that the requirements of art8(2) of the convention must be fulfilled. However, that was a case about art 7(e), where there is no express counterbalancing of the necessary processing against the rights and interests of the data

subject. In a case such as this, where that balance is built into art 7(f) and condition 6, it may not matter so much where the requirements of art 8(2) are considered, as long as the overall result is compliant with them.

'[26] In this particular case, however, as the processing requested would not enable Mr Irvine or anyone else to discover the identity of the data subjects, it is quite difficult to see why there is any interference with their right to respect for their private lives. It is enough to apply art 7(f) and condition 6 in their own terms.

'[27] I disagree with Mrs Wolffe, however, about the meaning of "necessary". It might be thought that, if there is no interference with art 8 rights involved, then all that has to be asked is whether the requester is pursuing a legitimate interest in seeking the information (which is not at issue in this case) and whether he needs that information in order to pursue it. It is well established in community law that, at least in the context of justification rather than derogation, "necessary" means "reasonably" rather than absolutely or strictly necessary (see, for example, *R v Secretary of State for Employment, ex p Seymour-Smith* (No 2) [2000] 1 All ER 857, [2000] ICR 244; *Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] 3 All ER 1287, [2012] ICR 704). The proposition advanced by Advocate General Poiares Maduro in *Huber v Germany* case [Case C-524/06 [2009] All ER (EC) 239, [2008] ECR I-9705] is uncontroversial: necessity is well established in community law as part of the proportionality test. A measure which interferes with a right protected by community law must be the least restrictive for the achievement of a legitimate aim. Indeed, in ordinary language we would understand that a measure would not be necessary if the legitimate aim could be achieved by something less. Thus, for example, if Mr Irvine had asked for the names and addresses of the employees concerned, not only would art 8 have clearly been engaged, but the commissioner would have had to ask himself whether his legitimate interests could have been served by a lesser degree of disclosure.' *South Lanarkshire Council v Scottish Information Comr* [2013] UKSC 55, [2013] 4 All ER 629 at [18]–[19], [25]–[27], per Lady Hale DP

'[160] Article 3(1) of the Enforcement Directive [European Parliament and Council Directive 2004/48/EC (on the enforcement of intellectual property rights) (OJ 2004 L157 p 45)] states that "Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of...

intellectual property rights". Article 52(1) of the Charter states "... limitations may be made only if they are necessary ...".

'[161] Counsel for the ISPs submitted that these provisions meant that Richemont had to show that the orders sought were necessary to ensure the enforcement of the Trade Marks. She further submitted that, although this did not mean that a blocking injunction must be the measure of last resort, it did mean that Richemont had to show that blocking was the least onerous measure that could achieve an equivalent level of protection.

'[162] I did not understand counsel for the ISPs to be submitting that it was incumbent on Richemont to show that the orders sought are necessary to ensure the enforcement of the Trade Marks in the sense that they are indispensable for that purpose, but if that was her submission I would reject it. Article 3(1) of the Enforcement Directive is directed to the Member States. It requires Member States to make available to rightholders the range of remedies which is necessary to combat infringement of intellectual property rights. This includes injunctions in accordance with the third sentence of art 11. As discussed above, the UK complies with this by virtue of s 37(1) of the 1981 Act [the Senior Courts Act 1981]. Article 3(2) goes on to require that such remedies shall be proportionate. As for art 52(1), what this means is that the rights protected by the Charter can only be restricted where this is necessary to protect other rights protected by the Charter. Where two rights, or sets of rights, are in conflict, then the conflict must be resolved by applying the principle of proportionality to each and striking a balance between them. For both reasons, it must be shown that the orders are proportionate. As I shall discuss below, I accept that, when assessing whether the orders are proportionate, the court is required to consider whether alternative measures are available which are less onerous. Accordingly, I shall carry out that exercise in the context of assessing the proportionality of the orders.' *Cartier International AG v British Sky Broadcasting Ltd* [2014] EWHC 3354 (Ch), [2015] 1 All ER 949 at [160]–[162], per Arnold J

Australia [Corporations Act 2001 (Cth), s 477(2)(m): approval of litigation funding agreement if 'necessary' to winding up.] '[99] Each party accepted that the relevant question was whether the primary judge erred in concluding that the entry into the funding agreement was "necessary for winding up the

affairs of the company and distributing its property" under s 477(2)(m) of the Act.

'[100] Each party also accepted that the word "necessary" in s 477(2)(m) is not synonymous with "essential" or "indispensable" and is thus not confined to matters without which winding up and distribution cannot occur.

...

'[124] There was little dispute as to the principles which grounded the exercise by liquidators of the powers conferred under s 477(2)(m). Both parties accepted that the word "necessary" was to be given a broad meaning and empowered the liquidators to do anything expedient, with reference to, or conducive to, the beneficial completion of the winding up of the affairs of the corporation and the distribution of its assets.' *Fortress Credit Corp (Australia) II Pty Ltd v Fletcher* [2015] NSWCA 85, (2015) 318 ALR 597 at [99]–[100], [124], per Bathurst CJ

New Zealand [Official Information Act 1982, s 9.] '[141] The requirement in s 9(2) of the Act that withholding information must be "necessary" to protect or avoid the interests identified in paras (a)–(k) of s 9(1) and (2) of the Act involves a higher threshold than the "would be likely" requirement found in s 6 of the Act. When the adjective "necessary" in s 9(2) is given its natural and ordinary meaning, a decision-maker would have to be satisfied withholding the information requested is "essential" to protect or avoid the consequences enumerated in s 9(2)(a)–(k) of the Act.' *Kelsey v Minister of Trade* [2015] NZHC 2497, [2016] 2 NZLR 218 at [141], per Collins J

NECESSITY

Agency of

[For 2(1) Halsbury's Laws of England (4th Edn) (Reissue) para 39 see now 1 Halsbury's Laws of England (5th Edn) (2008) para 24.]

NEEDS

[Education and Inspections Act 2006, s 6A: requirement to seek proposals for the establishment of an academy where local authority thinks a new school needs to be established in its area. Meaning of 'needs'.] '[64] As a matter of the ordinary use of words, the idea that there is a "need" to establish a new school imports a stronger sense of a compelling requirement for a new school to be established than simply

thinking that it would be beneficial for a new school to be established. That impression is strongly reinforced by the scheme of Pt 2 of the 2006 Act (as amended).

[65] In my judgment, it is implicit in the scheme of Pt 2 that there is a distinction between the concept of a “need” to establish a new school (under s 6A) and a more general assessment by a local authority whether it might be beneficial for a new school to be established. If a local authority thinks there is a “need” to establish a new school, the obligation under s 6A to seek proposals for the establishment of an Academy is triggered. But the Act contemplates that a local authority may act to foster or approve proposals for establishment of a new school in other circumstances, where in a wider and more general sense it thinks it may be beneficial to do so.

[66] Under s 7, a local authority may (with the consent of the Secretary of State) invite proposals for the establishment of new schools of various types, including an Academy. This power exists alongside the obligation in s 6A, and is not swallowed up by it. It would make no sense of the scheme in Pt 2 of the 2006 Act to say that every time a local authority thought it might be beneficial for a new school to be established in its area it should be taken to think there was a “need” for a new school, since that would suggest that there would be no practical scope for the operation of s 7. In order to act properly pursuant to s 7, a local authority has to think that it may be beneficial for a new school to be established, in a sense falling short of thinking that there is a “need” to establish a new school (in which case s 6A would apply).

[67] Similarly, where a proposal is made under s 10 or s 11 to establish a new school, para 8 of Sch 2 requires the local authority to consider whether the proposal should be approved (and in some cases, under para 10 of Sch 2 it is for the adjudicator to consider this question). A local authority or the adjudicator could only properly approve a proposal if they considered it to be in some way beneficial in the public interest. There is no indication that the test governing approval of proposals under ss 10 and 11 is so narrow as to turn on a question of need, rather than a more general assessment of what would be beneficial in the public interest. Again, s 6A does not swallow up these provisions.

[68] It will be a matter of fact and degree, for the assessment of the local authority, whether factors relevant under ss 13 and 14 of the 1996 Act are of such weight and of such a pressing nature that they lead to the conclusion

on the part of the local authority that there is a “need” to establish a new school in its area, for the purposes of s 6A. A local authority is entitled to take a practical approach, looking to see the extent to which there is a requirement for educational provision to ensure that children in its area have proper access to education. In the present case, for example, the council was entitled to have in mind that the demand for Catholic school places was being met, and had been for many years, by parents sending their children to Catholic schools in neighbouring areas (just as a local authority would be entitled to have in mind, say, any pattern of parents sending their children to private schools). Section 6A is concerned with what a local authority “think”, which indicates that the assessment of “need” is a matter of evaluative judgment for the authority. Further, in assessing whether there is a “need” for a new school, the local authority may be expected to look at the whole picture of educational provision in its area, and the availability or otherwise of school places at existing schools will be likely to be a very important factor which the local authority may properly take into account.

[69] I also accept the submission by Mr Lewis QC for the council that s 6A is concerned with whether a local authority thinks that there is a current need to establish a new school. That is the trigger for its obligation to invite proposals for the establishment of an Academy. Section 6A does not impose such an obligation where a local authority merely thinks that there may be a need for a new school at some point in the future (but not yet).

...
[73]... In my view, a local authority is entitled, when making an assessment under s 6A whether there is a “need” for a new school, to have regard to the overall impact on educational provision in its area. The test for the obligation in s 6A (whether a local authority “think a new school needs to be established in their area”) involves a very general judgment, in relation to which a wide range of factors are potentially relevant. The range of potentially relevant factors to which a local authority may have regard, if it thinks them relevant in the particular circumstances of the case before it, include the full range of matters relevant to provision of education in its area under ss 13 and 14 of the 1996 Act: see [63], above’. *R (on the application of British Humanist Association) v Richmond upon Thames London Borough Council* [2012] EWHC 3622 (Admin) [2013] 2 All ER 146 at [64]–[69], [73], per Sales J

NEGLIGENCE

[For 33 Halsbury's Laws of England (4th Edn) (Reissue) para 601 see now 78 Halsbury's Laws of England (5th Edn) (2010) para 1, and for 45(2) Halsbury's Laws of England (4th Edn) (Reissue) para 394 see now 97 Halsbury's Laws of England (5th Edn) (2015) para 497.]

Contributory negligence

[For 33 Halsbury's Laws of England (4th Edn) (Reissue) para 675 see now 78 Halsbury's Laws of England (5th Edn) (2010) para 75.]

Criminal negligence

[For 11(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 14 see now 25 Halsbury's Laws of England (5th Edn) (2016) para 18.]

NEGOTIATE IN GOOD FAITH

Australia [Native Title Act 1993 (Cth), s 31(1)(b).] '[6] Registered native title claimants or holders have the benefit of a negotiation procedure set out in ss 29–35 of the Act. It commences with the issuing of a notice, in this instance by the state, in a manner specified in s 29, of an intention to do a future act.

'[7] Section 31(1)(b) then obliges the negotiation parties as described in s 30A (in this case the state, PKKP, WGAC and FMG) to negotiate in good faith with a view to obtaining the agreement of each of the native title parties to the doing of the act (possibly with conditions).

'[8] By s 35(1), if no agreement is reached and at least 6 months have passed since the "notification day" described in s 29, any negotiation party may apply to the tribunal [the National Native Title Tribunal] for a determination under s 38 in relation to the Act.

'[9] Significantly to this and all such negotiations, there is nothing to prevent the negotiation parties continuing to negotiate after an application under s 35 is lodged. Indeed the Act expressly contemplates that negotiations may continue: s 35(3).

'[10] The tribunal however, must not make a determination if satisfied by a negotiation party that any other negotiation party (other than a native title party) did not negotiate in good faith — s 36(2) of the Act.

...

'[19] The expression "negotiate in good

faith" is to be construed in its natural and ordinary meaning and in the context of the Act as a whole: *Strickland v Minister for Lands for Western Australia* (1998) 85 FCR 303 at 319 (*Strickland*). Accordingly, the act of lodging an application under s 35, taken alone, cannot be relied upon in order to establish bad faith in the negotiating process: *Strickland* at 322. If negotiations reach a standoff, notwithstanding attempts in good faith to negotiate within the relevant 6-month period, there are no further obligations after the completion of the 6-month period on a party which wishes to lodge a notice under s 35 of the Act. There is no need, for example, to give further warning of the intention to do so.

'[20] It has been repeatedly recognised that the requirement for good faith is directed to the quality of a party's conduct. It is to be assessed by reference to what a party has done or failed to do in the course of negotiations and is directed to and is concerned with a party's state of mind as manifested by its conduct in the negotiations: see, for example, *Brownley v Western Australia (No 1)* (1999) 95 FCR 152; [1999] FCA 1139 at [24]–[25] (*Brownley*) per Lee J, *Strickland* at 319–20 and *Re Western Australia v Thomas (on behalf of the Waljen People/Anaconda Nickel Ltd)* [1998] NNTTA 8 at [7]–[18] (*Thomas*).' *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, (2009) 255 ALR 229 at [6]–[10], [19]–[20], per Spender, Sundberg and McKerracher JJ

NEW EVIDENCE

Canada [Meaning of 'new evidence' in Immigration and Refugee Protection Act, SC 2001, c 27, s 113(a).] '[23] Paragraph 113(a) of the IRPA states as follows:

113. Consideration of an application for protection shall be as follows:

(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

'[24] Mr Elezi submits that because the three parts of paragraph 113(a) are separated by the word "or," they should be considered three distinct situations in which an applicant can be considered to present "new" evidence. In other

words, he argues the test under paragraph 113(a) is disjunctive. Applying that notion to this case, he submits the 20 new documents fit within the first branch of paragraph 113(a) —“new evidence that arose after the rejection.” Thus, according to Mr Elezi’s submissions, it does not matter whether the evidence was reasonably available at his hearing, or whether he could have presented it earlier.

‘[25] To support this proposition, Mr Elezi relies on the case of *Mendez v Canada (Minister of Citizenship and Immigration)* (2005) 42 Imm LR (3d) 130 (FC), in which Justice Douglas Campbell allowed a Mexican claimant’s application for judicial review. The new evidence in *Mendez* was documentation from a similarly situated applicant, whose refugee claim had succeeded (the Flores evidence). Mr Mendez tried to submit the Flores evidence in his PRRA application to prove that, contrary to the Board’s conclusion, health care professionals in Mexico discriminated against homosexual men with HIV/AIDS. Justice Campbell found that one letter within the package of evidence was dated after the Board’s decision in Mr Mendez’s case. As such, it was an error to treat that letter the same way as the rest of the Flores evidence. He wrote, at paragraphs 17–18:

As I expressed during the hearing of the present application, in my opinion, the PRRA Officer made an error in the application of s 113(a) with regard to the letter signed by Mr Flores. Section 113(a) requires a careful determination on the admissibility of evidence on three available grounds. In my opinion, precision is required in making a finding under this provision since important ramifications follow on the determination of the risk to be experienced by an individual applicant. In my opinion, the PRRA Officer failed to meet this expectation.

Mr Flores’ letter of March 17, 2004 clearly post-dates the Refugee Board’s decision in the present case. It appears that the PRRA Officer failed to understand this fact by lumping it in with the tendered evidence which pre-dates the Refugee Board’s decision. I find that, as a result of this mistake, the PRRA Officer failed to understand, and consequently reach a clear decision on the Applicant’s rectification argument of risk.

‘[26] I am prepared to accept that paragraph 113(a) refers to three distinct possibilities

and that its three parts must be read disjunctively. If the use of the word “or” is to be given meaning, the three parts of paragraph 113(a) must clearly be seen as three separate alternatives. While the first part refers to evidence that postdates the Board’s decision, the second and third parts obviously relate to evidence that predates its decision. Only evidence that existed before the Board’s negative decision requires an explanation before it can be admitted with a PRRA application. As for evidence that arises after the Board’s decision, there is no need for an explanation. The mere fact that it did not exist at the time the decision was reached is sufficient to establish that it could not have been presented earlier to the Board.

‘[27] That being said, a piece of evidence will not fall within the first category and be characterized as “new” just because it is dated after the Board’s decision. If that were the case, a PRRA application could easily be turned into an appeal of the Board’s decision. A failed refugee applicant could easily muster “new” affidavits and documentary evidence to counter the Board’s findings and bolster his story. This is precisely why the case law has insisted that new evidence relate to new developments, either in country conditions or in the applicant’s personal situation, instead of focusing on the date the evidence was produced: see, for example, *Perez v Canada (Minister of Citizenship and Immigration)* (2006) 59 Imm LR (3d) 156 (FC); *Yousef v Canada (Minister of Citizenship and Immigration)* 2006 FC 864; *Aivani v Canada (Minister of Citizenship and Immigration)* 2006 FC 1231.

‘[28] Justice Mosley heard the exact same argument that Mr Elezi’s counsel makes now in the case *Raza v Canada (Minister of Citizenship and Immigration)* 2006 FC 1385. Relying on *Mendez*, above, the applicant in *Raza* had submitted that paragraph 113(a) provided for the admissibility of three distinct types of new evidence, and that only the second and third types of new evidence called for an explanation why they were not presented to the Board. As for the first type, evidence that arose after the Board’s rejection, the applicant argued the only requirement was that it be created after the date of the Board’s decision.

‘[29] Justice Mosley gave short shrift to that argument. He wrote, at paragraphs 22–23:

It must be recalled that the role of the PRRA officer is not to revisit the Board’s factual and credibility conclusions but to consider the present situation. In assessing

“new information” it is not just the date of the document that is important, but whether the information is significant or significantly different than the information previously provided: *Selliah*, above at para 38. Where “recent” information (i.e. information that post-dates the original decision) merely echoes information previously submitted, it is unlikely to result in a finding that country conditions have changed. The question is whether there is anything of “substance” that is new: *Yousef*, above at para 27.

In the present case, though the evidence of the applicant post-dates the refugee determination in time with respect to the date it was written, nothing in the letter, affidavits or articles is substantially different than the information that was before the Board. As noted by the Officer with respect to the letter and affidavits: they “refer only to the applicants’ circumstances which were considered by the Board”, “no new risk developments are contained”, and they contain “essentially a repetition of the same information”. In those circumstances, it was not patently unreasonable of the officer to question why they had not been present before. With respect to the articles in particular, the Officer noted that they were “generalized” and did not “address the material elements of the present application”.

‘[30] I fully agree with Mr Justice Mosley’s conclusions and I adopt them. The mere fact that a piece of evidence was created after the Board’s rejection of a refugee claim will not, in and of itself, suffice to characterize that evidence as “new” for the purposes of paragraph 113(a). There are other factors to take into consideration when assessing whether the evidence sought to be introduced arose after the Board’s decision. One should not forget that this provision, like the rest of the IRPA, must be construed and applied in a manner that “ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*,” and that “complies with international human rights instruments to which Canada is signatory” (paragraphs 3(3)(d) and (f) of the IRPA).’ *Elezi v Canada (Minister of Citizenship and Immigration)* [2008] 1 FCR 365, 2007 FC 240, [2007] FCJ No 357, 310 FTR 59, 62 Imm LR (3d) 66 at [23]–[30], per de Montigny J

NEW OR NEWLY DISCOVERED FACT

[Compensation is payable under the Criminal Justice Act 1988, s 133 when a person has been

convicted of a criminal offence and subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice.] ‘[59] Mr Adams’s appeal raises a second issue. Were the facts that led to the quashing of his conviction “newly discovered” despite the fact that they were contained in documents disclosed to his legal representatives before his trial or available on the Holmes database? The phrase “newly discovered” raises a further difficult problem of interpretation, for it does not indicate to whom the discovery must be new.

‘[60] Ireland has given effect to art 14(6) [of the International Covenant on Civil and Political Rights 1966] by s 9 of the Criminal Procedure Act 1993. Section 9(6) of that Act provides:

“... ‘newly-discovered fact’ means—(a) where a conviction was quashed by the Court on an application under section 2 or a convicted person was pardoned as a result of a petition under section 7, or has been acquitted in any re-trial, a fact which was discovered by him or came to his notice after the relevant appeal proceedings had been finally determined or a fact the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings ...”

I would adopt this generous interpretation of ‘newly discovered fact’.

‘[61] Section 133(1), following the almost identical wording of art 14(6), ends with the proviso “unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted”.

‘[62] This proviso is significant in more than one way. First, the use of the word “non-disclosure” would seem to equate the new “discovery” with “disclosure”. The latter word has a broad ambit and, in context, suggests to me the bringing of a fact into the public domain and, in particular, the disclosure of that fact to the court. Secondly, I read the provision as excluding a right to compensation where the person convicted has deliberately prevented the disclosure of the relevant fact, or where the non-discovery of that fact is otherwise attributable to his own fault.

‘[63] We are envisaging a situation where a claimant has been convicted, and may well have served a lengthy term of imprisonment, in

circumstances where it has now “been discovered” that a fact existed which either demonstrates that he was innocent or, at least, undermines the case that the prosecution brought against him. If he was aware of this fact but did not draw it to the attention of his lawyers, and he did not deliberately conceal it (which would bring the fact within the proviso), this will either be because the significance of the fact was not reasonably apparent or because it was not apparent to him. Many who are brought before the criminal courts are illiterate, ill-educated, suffering from one or another form of mental illness or of limited intellectual ability. A person who has been wrongly convicted should not be penalised should this be attributable to any of these matters. It is for those reasons that I would adopt the same interpretation of “newly discovered fact” as the Irish legislature.’ *R (on the application of Adams) v Secretary of State for Justice; Re MacDermott* [2011] UKSC 18, [2011] 3 All ER 261 at [59]–[63], per Lord Phillips P

NEXT FRIEND

See LITIGATION FRIEND

[The next friend of a child or a patient is now termed a litigation friend: see 10 Halsbury’s Laws of England (5th Edn) (2012) paras 1314–1320; 30(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 634.]

NEXT OF KIN

[For 50 Halsbury’s Laws of England (4th Edn) (2005 Reissue) paras 344–345 see now 102 Halsbury’s Laws of England (5th Edn) (2010) paras 344–345.]

NORMALLY

[Under the Animals Act 1971, s 2(2), where damage is caused by an animal which does not belong to a dangerous species, a keeper of the animal is liable for the damage if (a) the damage is of a kind which the animal is likely to cause or which, if caused by the animal, is likely to be severe, and (b) the likelihood of the damage or of its being severe is due to characteristics of the animal which are not normally found in animals of the same species or are not normally so found except at particular times or in particular circumstances, and (c) those characteristics were known to that keeper.] ‘[41] The meaning of s 2(2)(b) has been authoritatively explained

by the House of Lords in *Mirvahedy v Henley* [2003] UKHL 16, [2003] 2 All ER 401, [2003] 2 AC 491. The claimant suffered injury when the car he was driving collided with the defendants’ horse which had panicked and escaped with others from its field. It was not clear what had frightened the horses. The House held by a majority of three to two that the defendants were liable under s 2(2). To bolt was a characteristic of horses which was normal “in the particular circumstances”, these being some sort of fright or other external stimulus. The main issue concerned the true meaning of the second limb of sub-s (2)(b). The majority adopted that favoured by the Court of Appeal in *Cummings v Grainger* [1977] 1 All ER 104, sub nom *Cummings v Granger* [1977] QB 397. Thus the fact that an animal’s behaviour, although not normal behaviour generally for animals of the species, is nevertheless normal behaviour for the species in the particular circumstances does not take the case outside s 2(2)(b).

‘[42] Lord Nicholls of Birkenhead noted of the *Cummings v Grainger* interpretation that:

“... it is not easy to conceive of circumstances where dangerous behaviour which is characteristic of a species will not satisfy requirement (b). A normal but dangerous characteristic of a species will usually be identifiable by reference to particular times or particular circumstances. Thus the *Cummings* interpretation means that requirement (b) will be met in most cases where damage was caused by dangerous behaviour as described in requirement (a). Requirement (b) will be satisfied whenever the animal’s conduct was *not* characteristic of the species in the particular circumstances. Requirement (b) will also be satisfied when the animal’s behaviour was characteristic of the species in those circumstances.” (See [2003] 2 All ER 401 at [43].)

‘[43] The question of what is meant by “normally” was not in issue in *Mirvahedy v Henley* (or any other case that has been cited to us). There are passages in the opinions of their Lordships which, it might be said, suggest that they considered that “normally” means “usually”, rather than “conforming to type” or “naturally”. The clearest is at para [3], where Lord Nicholls said that the behaviour of the horse in that case was “usual in horses when sufficiently alarmed by a threat”. He also said (at [23]) that the horse “was not behaving

differently from the way *any* normal horse would have behaved in the circumstances" (my emphasis). But since the meaning of the word "normally" was not in issue, these statements do not provide a secure basis for deciding precisely what it means. In any event, it is plain that, if it is usual for horses to bolt when sufficiently alarmed, it is also natural and conforming to type for horses to bolt in such circumstances. But it does not necessarily follow that, if it is unusual for horses to bolt when sufficiently alarmed, it is abnormal for them to bolt in such circumstances.

[44] The *Oxford English Dictionary* provides a definition of "normal" as "being 'according to or squaring with a norm; constituting, conforming to, not deviating from a type or standard; regular, usual 1828'. A 'norm' is defined as a 'rule or authoritative standard'. 'Abnormal' is defined as 'Deviating from the ... type; contrary to rule or system ... unusual [1835 ...]'. Depending on the context, therefore, 'normal' can mean 'conforming to a type' or 'usual'. The latter meaning connotes a greater degree of regularity or frequency of occurrence than the former. But even the former must connote some frequency of occurrence. If a characteristic is rarely found in animals of the same species, it may be difficult to say that the characteristic conforms to the type of animal in question.

[45] In some contexts, it is clear that the word "normally" means "usually". If I say: "I normally travel to work on the No 18 bus," I am saying that I usually travel to work on that bus. I may occasionally travel to work by different means, but that is an exception to my usual practice. In other contexts, however, the position is different. It is a proper use of language to say "horses will most often turn and flee when faced with a frightening stimulus, but it also normal for them to rear in such circumstances". It is normal for horses to rear when frightened in such circumstances, because it is natural for them to do so, although rearing may be a less usual response than turning and fleeing. Another way of making the same point is to say that it is not abnormal (even if it is unusual) for horses to rear when frightened.

[46] It seems to me that the core meaning of "normal" is "conforming to type". If a characteristic of an animal is usual, then it will certainly be normal. The best evidence that a characteristic conforms to the type of animals of a species is that the characteristic is usually found in those animals.

[47] I can find nothing in the context of sub-s (2)(b) to suggest that Parliament did not

intend "normally" to bear this core meaning. It is difficult to see why Parliament should have intended to exclude from the ambit of sub-s (2)(b) cases where the relevant characteristic is natural, although unusual, in the animal which has caused the damage. There is no need for such a narrow interpretation because a claim will not succeed unless the knowledge requirement in sub-s (c) is also satisfied. To adopt the language of Lord Walker of Gestingthorpe in *Mirvahedy v Henley* [2003] 2 All ER 401 at [157], [2003] 2 AC 491, if s 2(2)(b) is interpreted in this way, there is nothing unjust or unreasonable, as between the keeper (who can decide whether "to run the unavoidable risks involved in keeping horses" and whether or not to insure against those risks) and the victim of the horse's behaviour, in requiring the keeper to bear the loss. *Welsh v Stokes* [2007] EWCA Civ 796, [2008] 1 All ER 921 at [41]–[47], per Dyson LJ

NON EST FACTUM

[For 13 Halsbury's Laws of England (4th Edn) (2007 Reissue) para 69 see now 32 Halsbury's Laws of England (5th Edn) (2012) para 269.]

NON-COMPLIANCE WITH A LAWFUL ORDER OF A COURT

[The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 5(1) (enacted in Human Rights Act 1998, Sch 1, Pt I, art 5(1)) provides that no one may be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court. Whether breach of bail conditions was non-compliance with a lawful order of a court.] [31] It is true that the words "non-compliance with the lawful order of a court" could be interpreted as applicable to the failure to comply with the conditions of the Court of Appeal's order granting bail. However, so to read paragraph (b) is to attribute to a grant of bail an authority to detain the person granted bail when there is no underlying legal basis for his detention. It is to treat a grant of bail as authority to detain, when in my judgment it is, as I have said, the opposite. In my judgment, the words "non-compliance with the lawful order of a court" refer to breach of an obligation or prohibition imposed by a lawful order of a court. The obvious case is breach of an injunction. A

failure or refusal to comply with the conditions of bail, at least in civil proceedings, is not non-compliance with an order of a court for the purposes of art 5.’ *Stellato v Ministry of Justice* [2010] EWCA Civ 1435, [2011] 3 All ER 251 at [31], per Stanley Burnton LJ

NON-CONTENTIOUS

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

NON-JUSTICIABLE

‘[79] “Non-justiciability” is a treacherous word, partly because of its lack of definition, and partly because it is commonly used as a portmanteau term encompassing a number of different legal principles with different incidents. Strictly speaking, as this court observed in *Shergill v Khaira* [2014] UKSC 33, [2014] 3 All ER 243, [2014] 3 WLR 1 (at [41]), it should be reserved for cases where an issue is said to be inherently unsuitable for judicial determination by reason only of its subject matter. This may result in a court declining to determine an issue notwithstanding its relevance to the dispute between the parties, for example because there are no juridical standards by which to determine it, as in *Buttes Gas and Oil Co v Hammer (Nos 2 & 3)* [1981] 3 All ER 616, [1982] AC 888; or because its determination is not within the constitutional competence of the courts, for example because it would trespass on Parliamentary privilege, as in *Prebble v Television New Zealand Ltd* [1994] 3 All ER 407, [1995] 1 AC 321. These are mandatory rules of public policy, originating in the law’s recognition of the separation of powers between different organs of the state. They define the limits of the court’s jurisdiction or juridical competence. But there are other principles, also originating in the separation of powers and described as principles of non-justiciability, which do not go to the court’s jurisdiction or competence but to the existence or scope of legal rights. Thus in *R (on the application of Campaign for Nuclear Disarmament) v Prime Minister of the United Kingdom* [2002] EWHC 2777 (Admin), [2003] 3 LRC 335, the court proceeded on the footing that it had both jurisdiction and competence to determine whether a resolution of the United Nations Security Council authorised military operations against Iraq, but declined to do so because, among other reasons, there were no relevant “rights, interests or duties under domestic law”:

paras [14]–[15], [36]. I venture to suggest that if domestic law rights, interests or duties had been engaged, the court would not have regarded the issues as non-justiciable.’ *Mohammed v Ministry of Defence; Rahmatullah v Ministry of Defence; Iraqi Civilians v Ministry of Defence* [2017] UKSC 1, [2017] 3 All ER 179 at [79], per Lord Sumption

NOTARY (PUBLIC)

[For 33 Halsbury’s Laws of England (4th Edn) (Reissue) para 701 see now 66 Halsbury’s Laws of England (5th Edn) (2015) para 992.]

NOTICE

Of intended prosecution

[For 40(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 728 see now 90 Halsbury’s Laws of England (5th Edn) (2010) para 785.]

NOTORIETY

[For 12(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 657 see now 32 Halsbury’s Laws of England (5th Edn) (2012) para 57.]

NOVATION

[For 9(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 1036 see now 22 Halsbury’s Laws of England (5th Edn) (2012) para 598; and for 44(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 896 see now 95 Halsbury’s Laws of England (5th Edn) (2017) para 588.]

NUISANCE

[For 34 Halsbury’s Laws of England (4th Edn) (Reissue) paras 1–5, 7–9 see now 78 Halsbury’s Laws of England (5th Edn) (2010) paras 101–105, 107–109.]

Private nuisance

[For 34 Halsbury’s Laws of England (4th Edn) (Reissue) para 7 see now 78 Halsbury’s Laws of England (5th Edn) (2010) para 107.]

Public nuisance

[For 34 Halsbury’s Laws of England (4th Edn) (Reissue) paras 5–6 see now 78 Halsbury’s

Laws of England (5th Edn) (2010) paras 105–106.]

Statutory nuisance

[For 38 Halsbury's Laws of England (4th Edn) (2006 Reissue) paras 416–417 see now 78 Halsbury's Laws of England (5th Edn) (2010) paras 158–159, and for 34 Halsbury's Laws of England (4th Edn) (Reissue) para 4 see now 78 Halsbury's Laws of England (5th Edn) (2010) para 104.]

To highway

[For 21 Halsbury's Laws of England (4th Edn) (2004 Reissue) para 322 see now 55 Halsbury's Laws of England (5th Edn) (2012) para 325.]

NULLITY

[For 29(3) Halsbury's Laws of England (4th Edn) (Reissue) para 369 see now 72 Halsbury's Laws of England (5th Edn) (2015) paras 375–376.]

NURSERY GROUNDS

[For 1(2) Halsbury's Laws of England (4th Edn) (2007 Reissue) para 102 see now 1 Halsbury's Laws of England (5th Edn) (2008) para 324.]

NURSING HOME

[Note that the Income and Corporation Taxes Act 1988, s 298(5) has been repealed.]

O

OATH

[For 17(1) Halsbury's Laws of England (4th Edn) (Reissue) paras 1002, 1004–1005 see now 12 Halsbury's Laws of England (5th Edn) (2015) paras 824, 826–827.]

OBJECTIVE MEDICAL EVIDENCE

In the courts, this sometimes means unbiased. In social insurance, social security and other systems, the phrase is commonly used unlawfully to reject a medical opinion because it depends on symptoms or other facts described by the patient to the physician, and which the physician cannot corroborate. Sometimes, the phrase means the same thing as 'scientific proof'. (*Professor T G Ison*, 15 *Medico-legal Journal of Ireland* pp 15–23)

OBJECTS (OF A COMPANY)

[For the Companies Act 1985, ss 2(1)(c), 4 see now the Companies Act 2006, s 31.]

OBLIGATION

[For 13 Halsbury's Laws of England (4th Edn) (2007 Reissue) para 91 see now 32 Halsbury's Laws of England (5th Edn) (2012) para 291.]

OBLIGEE—OBLIGOR

[For 13 Halsbury's Laws of England (4th Edn) (2007 Reissue) para 89 see now 32 Halsbury's Laws of England (5th Edn) (2012) para 289.]

OBLITERATION

[For 50 Halsbury's Laws of England (4th Edn) (2005 Reissue) para 393 see now 102 Halsbury's Laws of England (5th Edn) (2010) para 735.]

OBSTRUCT

In Malicious Damage Act

[For 11(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 344 see now 25 Halsbury's Laws of England (5th Edn) (2016) para 402.]

OBSTRUCTION (OF HIGHWAY)

[For 34 Halsbury's Laws of England (4th Edn) (Reissue) para 651 see now 78 Halsbury's Laws of England (5th Edn) (2010) para 51.]

OBTAINS PROPERTY

See also **BENEFIT**

[Proceeds of Crime Act 2002, ss 329, 340.] '[6] Section 329 of the 2002 Act reads: "(1) A person commits an offence if he—(a) acquires criminal property; (b) uses criminal property; (c) has possession of criminal property."

'[7] Relevant definitions are to be found in s 340:

"(3) Property is criminal property if—(a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly); and (b) the alleged offender knows or suspects that it constitutes or represents such a benefit ...

(5) A person benefits from conduct if he obtains property as a result of or in connection with the conduct ...

(8) If a person benefits from conduct his benefit is the property obtained as a result of or in connection with the conduct ...

(10) The following rules apply in relation to property— (a) property is obtained by a person if he obtains an interest in it ... (d) references to an interest, in relation to property other than land, include references to a right (including a right to possession)."

'[8] The essential submissions made in the skeleton argument for the applicant were that the person who stole the motorcycle in the course of the burglary did not obtain an "interest" in it within the meaning of s 340(10)(a), since "interest" must mean a lawful interest, and did not therefore obtain property within the meaning of that provision; by working through the earlier provisions of s 340, it followed that the motorcycle in this case was not "criminal property"; and the

applicant could not therefore have been guilty of acquiring criminal property even if he was the thief or a handler of the motorcycle.

[9] Those arguments were met by written submissions from Mr Perry QC, for the Crown, contending that a thief does obtain an "interest", within the meaning of s 340(10), in the property he steals, because he obtains a right to possession of that property. Mr Perry relied on *Costello v Chief Constable of Derbyshire Constabulary* [2001] EWCA Civ 381, [2001] 3 All ER 150, [2001] 1 WLR 1437. In that case the claimant was found to be in possession of a motor car which was to his knowledge stolen. The police seized the car from him pursuant to s 19 of the Police and Criminal Evidence Act 1984 and retained it pursuant to s 22 of the 1984 Act since the owner was unknown. The claimant brought an action against the chief constable for delivery up and damages. The Court of Appeal held that the statutory provisions vested in the police no title to the property seized but only a temporary right to retain it for specified purposes; and that when that right expired, the police were obliged to return the car to the claimant since he had a possessory title in it even though it was stolen. Lightman J, with whom the other members of the court agreed, expressed his conclusion on that issue as follows (at [31]):

"In my view on a review of the authorities, (save so far as legislation otherwise provides) as a matter of principle and authority possession means the same thing and is entitled to the same legal protection whether or not it has been obtained lawfully or by theft or by other unlawful means. It vests in the possessor a possessory title which is good against the world save as against anyone setting up or claiming under a better title. In the case of a theft the title is frail, and of likely limited value (see eg *Rowland v Divall* [1923] 2 KB 500, [1923] All ER Rep 270), but none the less remains a title to which the law affords protection ... This conclusion is in accord with that long ago reached by the courts that even a thief is entitled to the protection of the criminal law against the theft from him of that which he has himself stolen (see eg Smith and Hogan *Criminal Law* (9th edn, 1999) p 522."

[10] Mr Perry submitted that, applying that principle to the facts of the present case, the applicant clearly acquired criminal property and was properly convicted of an offence contrary

to s 329 of the 2002 Act. The motorcycle was stolen in the course of a burglary. The thief obtained an interest in it, namely a right to possession. It followed that the motorcycle was property obtained by him as a result of criminal conduct and constituted his benefit from such conduct. It was therefore criminal property.

...

[12] ... In our judgment there is no answer to Mr Perry's submissions. The stolen motorcycle was property obtained by the thief, within the meaning of s 340(10)(a), since the thief obtained a right to possession of it and, by s 340(10)(d), an interest includes a right to possession; and it was self-evidently obtained as a result of or in connection with criminal conduct. It therefore constituted the thief's benefit from criminal conduct. It follows that the first part of the definition of criminal property, in s 340(3)(a), was satisfied. The second part, in s 340(3)(b), depended on whether the applicant knew or suspected that it constituted or represented such a benefit. That was an issue that the recorder properly left to the jury and that the jury decided against the applicant. The recorder, who did not have the benefit of Mr Perry's argument, based his rejection of the submission of no case on a construction of s 340(10) that Mr Perry has not sought to uphold; but his instincts were sound and his conclusion was correct. His directions to the jury captured the substance of the matter accurately and no complaint has been made about them.

[13] A question was raised as to whether s 340(10) is an exhaustive definition of when a person "obtains property" as a result of or in connection with criminal conduct. It may be arguable that, as a matter of simple language, a thief or handler "obtains" stolen property even if he does not obtain an interest in it or come within any of the other specific provisions of s 340(10). However, in the light of the clear conclusion we have reached on the application of s 340(10) in this case, that is not a question that we need decide. *R v Rose*; *R v Whitwam* [2008] EWCA Crim 239, [2008] 3 All ER 315 at [6]–[10], [12]–[13], per Richards LJ

[For the purposes of the Criminal Justice Act 1988 s 71(4) (repealed: see now the Proceeds of Crime Act 2002)] 'D ordinarily obtains property if in law he owns it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else. He ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally

subject. Mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property. It may be otherwise with money launderers': *R v May* [2008] UKHL 28, [2008] 4 All ER 97 at [48], per Lord Bingham of Cornhill

[Under the Criminal Justice Act 1988 s 71(4) (repealed: see now the Proceeds of Crime Act 2002), a person benefits from an offence if he obtains property as a result of or in connection with its commission.] '[11] The appellant's contention before the House and, it seems, below is that "obtains" in the context of a benefit from a relevant offence means that at some point the defendant has come into possession or in some way controlled the property in question in connection with the offence. He has had his hands on it. The appellant treats "obtains" as equivalent to "receives" but does not contend that it is necessary to retain the property. He criticises the gloss put on the section by the Court of Appeal in this case. The CPS by contrast supports the Court of Appeal's interpretation.

'[12] The leading judgment in the Court of Appeal was given by Laws LJ. He turned to consider the cases on "benefit" at para [28] of his judgment, correctly observing (at [36]):

"It is in my judgment plain that the essence of what is meant by 'benefit' in s 71(4) is given by the verb 'obtain'. And whether in any given case a person has obtained any particular property must involve issues of fact ..."

Having reviewed several authorities, including the Court of Appeal decision in *R v May* [2005] EWCA Crim 97, [2005] 3 All ER 523, [2005] 1 WLR 2902, he was prepared to hold ([2005] 4 All ER 391 at [37]) that the observations of Buxton J in *R v Gokal* (7 May 1997, unreported) were out of line with the general run of authority. Then he said (at [38]):

"What remains to be said about the meaning of the word 'obtain' in s 71(4)? Clearly it does not mean 'retain' or 'keep'. But no less clearly, in my judgment, it contemplates that the defendant in question should have been instrumental in getting the property out of the crime. His acts must have been a cause of that being done. Not necessarily the only cause: there may, plainly, be other actors playing their parts. All that is required is that the defendant's

acts should have contributed, to a non-trivial (that is, not *de minimis*) extent, to the getting of the property. This is no more than an instance of the common law's conventional approach to questions of causation."

Laws LJ did not believe that there was a separate requirement that the defendant should be shown to have control over the property, although in reality, if he had been instrumental in getting it, he would no doubt, in some sense (and at some stage), have had control over it.

'[13] In its opinion in *R v May* [2008] UKHL 28, [2008] 4 All ER 97 the committee endeavoured to explore the meaning of s 71(4). It refers, without repetition, to what it there said. ... The focus must be and remain on the language of the subsection. The committee regards the meaning of the subsection as in substance the same as the equivalent provisions of the drug trafficking legislation. There is a real danger in judicial exegesis of an expression with a plain English meaning, since the exegesis may be substituted for the language of the legislation. It is, however, relevant to remember that the object of the legislation is to deprive the defendant of the product of his crime or its equivalent, not to operate by way of fine. The rationale of the confiscation regime is that the defendant is deprived of what he has gained or its equivalent. He cannot, and should not, be deprived of what he has never obtained or its equivalent, because that is a fine. This must ordinarily mean that he has obtained property so as to own it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else.

'[14] The committee does not, with respect, find the formulation of Laws LJ in his para [38], quoted above, to be helpful or entirely accurate. A person's acts may contribute significantly to property (as defined in the 1988 Act) being obtained without his obtaining it. But under s 71(4) a person benefits from an offence if he obtains property as a result of or in connection with its commission, and his benefit is the value of the property so obtained, which must be read as meaning "obtained by him". While the committee would not adopt the appellant's submission *ipsissimis verbis* (the defendant need not have had his hands on the property) it accepts the broad thrust of the appellant's criticism of the Court of Appeal's formulation. ...' *Jennings v Crown Prosecution Service* [2008] UKHL 29, [2008] 4 All ER 113 at [11]–[14], per Lord Bingham of Cornhill

OCCUPANCY

[For 35 Halsbury's Laws of England (4th Edn) (Reissue) para 1236 see now 80 Halsbury's Laws of England (5th Edn) (2013) para 821.]

OCCUPATION (CALLING)

[Council Directive (EC) 2000/78, art 3, which provides that the Directive applies 'to all persons, as regards both the public and private sectors, including public bodies, in relation to: (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion ...'. Whether voluntary activity was employment or occupation.] '[5] The appellant claims that on 21 May 2007 she was asked to cease to act as a volunteer in circumstances amounting to discrimination against her on the grounds of disability. The [Citizens Advice Bureau] denies this claim, and there has been no adjudication upon its substance. The employment tribunal, Employment Appeal Tribunal (the EAT) ([2010] IRLR 101) and Court of Appeal ([2011] EWCA Civ 28, [2011] IRLR 335) have held that the employment tribunal had no jurisdiction to hear her case, on the ground that she is, as a volunteer, outside the scope of the protection against discrimination on the grounds of disability intended to be provided under (at the relevant time) the Disability Discrimination Act 1995 and Council Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L303 p 16) (the Framework Directive).

...
 '[15] The appellant focuses on the Directive's references to "occupation" in art 3(1)(a). This, she submits, is wide enough to cover her voluntary activity. She also argues that the reference to "working conditions" in art 3(1)(c) is wide enough to embrace both self-employment and occupation. There is no single definition of "worker" under European law: see *Sala v Freistaat Bayern* Case C-85/96 [1998] ECR I-2691. But the Directive was intended to afford under art 13 TEC [Treaty establishing the European Community] protection against discrimination on grounds paralleling that already provided on the ground of sex by Directives made under art 141 TEC (now art 157 TFEU [Treaty on the Functioning of the European Union]). ...

'[20] The concept of "occupation" has not however been examined in European law in the present or any other material context. The appellant submits that it embraces her position as a volunteer. She does not contend that all volunteers can or should be said to be in or have an "occupation". "Occupation" is a protean word, which can, depending on context, cover a wide variety of activities associated with work or leisure. Volunteers also come in many forms, including the cheerful guide at the London Olympics, the charity shop attendant, the intern hoping to learn and impress and the present appellant who provided specialist legal services. The intern might well fall within art 3(1)(b), but, for like reasons to those which I have pointed out at [8], above, the appellant did not. Hence, her invocation of art 3(1)(a).

'[21] Before the Court of Appeal (see [2011] IRLR 335 at [49]), the appellant advanced as a working definition of "occupation" that "Occupation is the carrying out of a real and genuine activity which is more than marginal in its impact upon the person or entity for whom such activity is carried out and which is not carried out for remuneration or under any contract". Before the Supreme Court, she submitted in her case that "a pursuit or activity on which a person is habitually engaged can constitute an occupation, and to be occupied simply means to be busy or engaged on a pursuit or an activity" and that the scope of the Directive—

"includes persons who have an occupation which is not remunerated, so long as that activity is not merely 'marginal' or simply the following of a hobby or lending of an occasional kindly hand, and/or (b) comes within the scope of the policy of the EU and UK legislation as something which, if excluded from protection, would create an unacceptable lacuna in the protection intended for workers".

'[22] The Equality and Human Rights Commission adopted an analysis of the concept of occupation modelled on the analogy of remunerated work: the more obviously voluntary work is a substitute for or supplementary to paid work or creates opportunities for a business to develop and grow, the more its economic value and the more likely it should be seen as functionally isomorphic with or analogous to employment or self-employment.

'[23] Both the appellant and the Equality and Human Rights Commission ultimately argued for a multi-factorial assessment. They submitted that the factors pointing to a conclusion that the

appellant had or was in an “occupation” included the training requirements, the regulation of her activity by the non-binding agreement and its general supervision by the CAB, her expertise, the purpose of her activity (to give free high quality legal advice) and its key role in the operations of the CAB, the number of hours and days she gave, the potential advantages of her activity in equipping her for remunerative employment and the fact that she was providing her services alongside and, save for her unremunerated volunteer status, in large measure indistinguishably from others who were providing services on an employed basis.

“[27] The Commission clearly did not have in mind voluntary activities as falling within the scope of the reformulated art 3 [replaced by European Parliament and Council Directive (EC) 2002/73 (OJ 2002 L269, p 15)], and the same must apply to the (for all material purposes) identically worded art 3 of the parallel Framework Directive. Finally, Directive (EEC) 76/207 was replaced in its entirety by European Parliament and Council Directive (EC) 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L204, p 23), art 14 of which prohibited discrimination on the grounds of sex in identical terms to the reformulated art 3 which had been inserted into its predecessor Directive (EEC) 76/207 by Directive (EC) 2002/73.

“[29] Secondly, it is an important strand of the case advanced by the appellant and the Equality and Human Rights Commission that the concept of “occupation” must be understood as operating alongside and at the same level as “employment” and “self-employment”; and that, accordingly, it must envisage voluntary work. But the reference to occupation must be viewed in context. It is part of a clause, art 3(1)(a) of the Framework Directive, dealing with “conditions for access” to employment, self-employment or occupation “whatever the branch of activity and at all levels of the professional hierarchy, including promotion”. There are many areas in which a professional qualification of some nature or other is either required or advantageous, or a restrictive condition requires to be satisfied, if a worker is to undertake particular work or to advance in a particular sphere, whether as an employee or on a self-employed basis. They range from, for example, qualification as a doctor or lawyer to

possession of a heavy goods vehicle licence. In *Hashwani v Jivraj* [2011] UKSC 40 at [49], [2012] 1 All ER 629 at [49], [2011] 1 WLR 1872, Lord Clarke accepted a submission that—

“the expression ‘access... to self-employment or to occupation’ means what it says and is concerned with preventing discrimination from qualifying or setting up as a solicitor, plumber, greengrocer or arbitrator. It is not concerned with discrimination by a customer who prefers to contract with one of their competitors once they have set up in business. That would not be denying them ‘access... to self-employment or to occupation’.”

“[30] That analysis remains in my view correct. The reference to “access... to occupation” contemplates—as in the present case *Burton J* ([2010] IRLR 101 at [33]) and *Elias LJ* ([2011] IRLR 335 at [61]–[62]) also thought—access to a sector of the market, rather than to particular employment or self-employment; in that sense, it covers at a higher level the latter two concepts. The word “occupational” in recital 23 is also used in an umbrella sense, as covering differences in treatment justified in relation to either employment or self-employment. Once the word “occupation” is understood in this sense, there is no imperative, and it would indeed be contradictory, to treat the concept of “occupation” as operating at the same level as “employment” and “self-employment”, or as envisaging voluntary activity. It is true that there is, on this basis, a degree of overlap with art 3(1)(d), dealing with membership of and involvement in an organisation of workers or employers or whose members carry on a particular profession, but this clause by no means covers the whole area of qualifications for or restrictions of access to employment or self-employment.

“[34] A third point, linked with the second, is that, if there had been any intention that the Framework Directive should apply to voluntary activity, one would have expected the concept of “occupation” to have been carried through expressly into art 3(1)(c), dealing with “employment and working conditions, including dismissals and pay”. Similarly, a number of the Directive’s further recitals focus on employment without reference to occupation or to any other term apt in context to cover voluntary activity: see eg recitals (7), (11) and (17). It is true that art 3(1)(c) also omits any reference to “self-employment”, but the Directive may well

not have envisaged that there could be discrimination in relation to "working conditions, including dismissals and pay" with regard to a self-employed person. The omission of any reference to voluntary workers, if they were intended to be protected against "dismissal" on discriminatory grounds, is however quite striking. ...

'[35] Fourthly, the phrase "employment and occupation" is carried through into art 1 of the Framework Directive from the title to the Directive and then from various recitals, starting with recital 4 which refers to Convention No 111 of the International Labour Organisation (the ILO) prohibiting discrimination in that context. The preamble to Convention No 111 refers in turn to a meeting of the General Conference of the ILO in Geneva at its 42nd Session on 4 June 1958. That meeting addressed such discrimination and it led to Report IV(1). An appendix to the report discussed "the internationally accepted meanings of certain terms", including "employment and occupation", and the need to refer to "occupation" at all, in the following terms:

"It has been argued that there is an overlap in this title in that 'occupation' is only a specific aspect of 'employment'. However, it is clear that the intention of the [UN] Subcommittee was to direct special attention to an important aspect of the subject, namely discrimination affecting the individual's free choice of occupation. For this reason there appears to be value in retaining the words 'and occupation' and the Conference Committee rejected an amendment to delete these words.

Considerable attention to terminological concepts such as 'employment' and 'occupation' has been given by successive International Conferences of Labour Statisticians and the summary of their more recent conclusions on these points may be of guidance to governments.

At the Eighth International Conference of Labour Statisticians it was decided that 'persons in employment' included all persons above a specified age who were 'at work' and that the phrase 'at work' included not only persons whose status was that of employee but also those whose status was that of 'worker on own account', 'employer' or 'unpaid family worker'.

The meaning attached by the Seventh International Conference of Labour Statisticians to the word 'occupation' was 'the

trade, profession or type of work performed by the individual, irrespective of the branch of economic activity to which he is attached or of his industrial status'.

It will be seen, therefore, that at the international level both words have a comprehensive meaning and that they apply to all persons at work. It appears in connection with this subject that this would coincide with the original views of the [UN] Subcommittee when the ILO was invited to deal with the subject."

... '[37] Fifthly, the Commission's original proposal and the annexed impact assessment (COM (1999) 565 final) which led ultimately to the Framework Directive were focused exclusively on situations of employment or self-employment, and did not consider or address voluntary activity in any shape or form. ...

... '[39] Sixthly, however, the European Parliament did during the consultation process which preceded the making of the Framework Directive propose amendments to art 3(1)(a), to make it refer to—

"(a) conditions for access to employment, *unpaid and voluntary work, official duties, self-employment and occupation, including selection criteria and recruitment conditions, finding of employment by public and private employment agencies and authorities*, whatever the sector or branch of activity and at all levels of the professional hierarchy, including promotion" (added words italicised). (See OJ 2001 C178 p 261.) ...

... '[41] In the event, however, the Council, while substantially accepting (with a qualification and some verbal reformulation) the amendment to the opening words and while accepting the addition to art 3(1)(b), notably did not accept the addition to cover "unpaid or voluntary work". ...

'[42] Seventhly, and linking with the sixth point, the Commission has kept the implementation in national legal systems of the Framework Directive under review, but never suggested that the United Kingdom or any member state has failed properly to implement this by failing to include voluntary activity. ...

'[43] Eighthly, as I have indicated, neither the appellant nor the Equality and Human Rights Commission suggests that all voluntary activity is covered by the Framework Directive.

A multi-factorial test would lead to uncertainty and disputes, and, had some but not all voluntary activity been intended to be covered, the directive would surely have given some indication as to where the line should be drawn. The bare term “occupation” was not only used for a different purpose, as I have indicated; it would have been inadequate for the purpose of distinguishing between voluntary activities within and outside the grasp of the Directive.

...
 ‘[45] All these considerations, and particularly the first seven, combine in my opinion to lead to a conclusion that the Framework Directive does not cover voluntary activity.’ *X v Mid Sussex Citizens Advice Bureau* [2012] UKSC 59, [2013] 1 All ER 1038 at [5], [15], [20]–[23], [27], [29]–[30], [34]–[35], [37], [39], [41]–[43], [45], per Lord Mance SCJ

[Note: the Disability Discrimination Act 1995 was repealed by the Equality Act 2010, s 211(2), Sch 27 Pt 1 with savings for specified purposes and transitory provisions made by the Equality Act 2010 (Commencement No 4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010, SI 2010/2317.]

OCCUPATION (OF PROPERTY)

[A college, which made exempt supplies for value added tax (VAT) purposes and was unable to recover input tax on goods and services supplied to it, gave notice of election to waive exemption under the Value Added Tax Act 1994, Sch 10 para 2 which applies to buildings and land. It built a new library and granted a lease of the library, giving exclusive possession, to a company in which the college held all the shares and members of the college formed the board of directors, intending that the effect would be that the lease to the company would be a taxable supply and the college would be entitled to recover all the input tax it had paid in relation to building the library. The college also entered into an agreement with the company by which it sold all the books, fixtures, fittings and equipment in the library to the company, and the company agreed in return for a fee to provide the college with services including the provision of books on hire to the college for the use of senior and junior members. The Value Added Tax Act 1994, Sch 10 para 2(3AA) provides that where an election to waive exemption had been made in relation to any land ‘a supply shall not be taken by virtue of that election to be a taxable supply

if—(a) the grant giving rise to the supply was made by a person (“the grantor”) who was a developer of the land; and (b) at the time of the grant ... it was the intention or expectation of ... the grantor ... that the land would become exempt land’. Paragraph 3A(7) provides that for the purposes of para 2(3AA) land is exempt land if the grantor is in occupation of the land. The Revenue and Customs Commissioners considered that the college, as the developer, had remained in occupation of the library, that the library was therefore exempt land and accordingly the grant of the lease had not been a taxable supply. The Value Added Tax and Duties Tribunal dismissed the college’s appeal. The Court of Appeal allowed the college’s appeal, referring to authority of the Court of Justice of the European Communities in relation to Sch 9 to the 1994 Act (which implemented European law relating to letting or leasing of immovable property) that ‘occupation’ meant the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right. The commissioners appealed to the House of Lords, contending that cases on the meaning of ‘occupy’ for the purposes of Sch 9 had no application to the meaning of ‘occupation’ in Sch 10 para 3A(7) and that as an anti-avoidance provision para 3A(7) should be given a wide meaning and be interpreted to mean any physical presence on the land by which the grantor continued to use it.

‘[6] These are very detailed provisions but the issue to which they give rise in this case is relatively straightforward. The college, as grantor of the lease, was the developer of the land. If, since the grant of the lease, it has been “in occupation” of the library within the meaning of para 3A(7), the library is “exempt land” as defined in that paragraph and the grant of the lease is not a taxable supply. So the question is whether the college is “in occupation” of the library, either alone or together with the company.

...
 ‘[9] The question, therefore, is whether the college is in occupation of the library. For this purpose one must, I think, begin by considering what the statute means by “occupation”. It has often been remarked that this is a word which can mean different things in different contexts: see, for example, Viscount Cave in *Madrasa Anjuman Islamia of Kholwad v Municipal Council of Johannesburg* [1922] 1 AC 500 at 504 (“a word of uncertain meaning”) and Lord Mustill in *Southern Water Authority v Nature Conservancy Council* [1992] 3 All ER

481 at 487–488, [1992] 1 WLR 775 at 781. I start, therefore, with the context in which the word is used.

‘[10] Paragraph 2 of Sch 10 operates as an exception to the general provision in Group 1, para 1 of Sch 9 which provides that “The grant of any interest in or right over land or of any licence to occupy land” shall be an exempt supply. The election under para 2(1) of Sch 10 has effect only if the grant would otherwise have fallen within para 1 of Group 1. This context suggests that a “licence to occupy” in Sch 9 and “occupation” in Sch 10 refer to the same concept.

‘[11] On the question of what amounts to a licence to occupy within Sch 9, we have the recent guidance of the Court of Justice in *Sinclair Collis Ltd v Customs and Excise Comrs* Case C-275/01 [2003] STC 898, [2003] ECR I-5965. The question in this case was whether the grant of a right to maintain a cigarette vending machine in a public house was a “letting of immovable property” within art 13B(b) of the Sixth Directive [EC Council Directive 77/388 of 17 May 1977 on the harmonisation of the laws of the member states relating to turnover taxes—common system of value added tax: uniform basis of assessment (OJ 1977 L145, p 1)]. This concept had been transposed in Sch 9 to include a “licence to occupy land”. The Court of Justice decided that it was not. It stated the principle (see [2003] STC 898, [2003] ECR I-5965, para 25 of the judgment):

“25... . The fundamental characteristic of a letting of immoveable property for the purposes of art 13B(b) of the Sixth Directive lies in conferring on the person concerned, for an agreed period and for payment, the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right ...”

‘[12] In formulating the test in this way, the Court of Justice was echoing the opinions expressed by Lord Nicholls of Birkenhead, Lord Millett and Lord Scott of Foscote when the case was before the House of Lords: see [2001] UKHL 30, [2001] STC 989. Lord Nicholls said (at [35]) that the licence was “more naturally to be regarded as a licence to use land rather than a licence to occupy land.” Lord Scott (at [77]) gave the example of a right to use a safe deposit box in a bank. The bank remained in occupation of the whole of its premises, including the space taken up by the box:

“[77] ... The customer has no more than a right to put things in the box and is not, in any meaningful sense, in occupation of the space taken up by the box.”

‘[13] The same distinction between occupying land and merely using it had previously been made by Advocate General Jacobs in *Swedish State v Stockholm Lindöpark AB; Stockholm Lindöpark AB v Swedish State* Case C-150/99 [2001] STC 103, [2001] ECR I-493. Lindöpark owned golf courses and provided golfing facilities for the staff and clients of companies who joined and paid a fee. The question was whether this was a letting of the golf course within the meaning of art 13B(b). The Advocate General thought it was not (see [2001] STC 103, [2001] ECR I-493, paras 34–35 of the opinion):

“34... . Where... an individual pays an entrance fee to gain transient access, amongst other individuals, to a public swimming pool, it would be stretching the concept beyond any reasonable limit to regard such a transaction as leasing or letting.

35... . If a person or entity were to pay for the exclusive use of a course for a specified period—say, in order to organise a tournament or championship—with a concomitant right to charge entrance fees for players and/or spectators, that would appear to partake fairly clearly of the nature of a lease or let. The same would not apply, however, to the casual golfer or group of golfers coming to play a round ... A golfer may be thought of not as occupying the course in any sense but as traversing it ...”

‘[14] The Court of Justice agreed. More recently, in *Belgian State v Temco Europe SA* Case C-284/03 [2005] STC 1451, [2004] ECR I-11237 it summed up these cases (para 20 of the judgment) by saying that it was necessary to distinguish the “relatively passive” activity of letting immoveable property from transactions which—

“have as their subject matter something which is best understood as the provision of a service rather than simply the making available of property ...”

‘[15] The Commissioners say that these cases on the meaning of “occupy” for the purposes of Sch 9 have no application to the meaning of “occupation” in para 3A(7) of Sch 10. The latter is an anti-avoidance provision which should be

given a wide meaning. The policy of the 1997 amendments was that exempt suppliers should not be able to create a taxable supply of the land by the grant of a lease and still use it for the purposes of making exempt supplies. "Occupation" should therefore be interpreted to mean any physical presence on the land by which the grantor continues to use it.

[16] I do not agree. In choosing the concept of occupation, Parliament must have been aware that it came with a well-understood meaning. The Commissioners say that it was only after 1997 that the concept was clarified in cases like *Lindöpark* and *Sinclair Collis*. But I do not think that there was ever a time when a mere physical presence on land for the purpose of making use of it, like playing a round of golf, would have been regarded as occupation. Furthermore, other parts of Sch 10 show the Parliament was well aware that "occupation" of land and "use" of land are different concepts. For example, in para 5(5), (which was in the original 1994 Act), the definition of a developer of a building or work includes a person who constructs it—

"with a view to granting an interest in, right over or licence to occupy it (or any part of it) or to occupying or using it (or any part of it) for his own purposes."

[17] The question is therefore whether the college has, as the Court of Justice said in the *Sinclair Collis* case (see [2003] STC 898, [2003] ECR I-5965, para 25 of the judgment), "the right to occupy property as if that person were the owner and to exclude any other person from enjoyment of such a right." For this purpose it is necessary to examine the arrangements under which its members are able to use the library. This appears from the lease, four agreements made between the college and the company on 2 July 2001 and the unchallenged evidence of the college bursar, Mr du Quesnay, who is also a director of the company.

[23] Despite the close links between the college and the company, the Commissioners do not suggest that the separate personality of the company should be ignored or that the agreements should not be taken at face value. On that basis, it seems to me clear that the college is entitled to the provision of services for its members but cannot be said to be in occupation of the library. There is nothing in the arrangements, whether in law or in practice, which contradicts or displaces the right of

exclusive occupation granted to the company by the lease. The practical physical control of the library premises is in the hands of the librarian and her staff, who act on behalf of the company. It is they who have the right to admit or exclude persons from the library and they do not share this right with the college. The college is contractually entitled to have its members in good standing admitted and provided with books and other services, but these rights cannot be characterised as rights of occupation any more than the rights of the Swedish golfers or their companies to the use of the course. The services provided by the company to the college are by no means "relatively passive": acquiring and cataloguing the books, maintaining them upon the shelves and assisting the users are activities which require the full time services of the librarian, her two assistants and a graduate trainee. In my opinion it is impossible to say that the college either had in law or exercised in practice "the right to occupy [the] property as if [it] were the owner and to exclude any other person from enjoyment of such a right". The essence of the right conferred on the college is the right to the use of the books. The right to enter on the premises for the purpose of taking them out or consulting them is only ancillary to this primary right.

[27] In my opinion a decision as to whether acts attributable to a body like the school or college amount to occupation of premises is a question of degree, sensitive to the particular constellation of facts. An appellate court must pay considerable respect to the opinion of the fact-finding body: compare *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700, [2000] 1 WLR 2416. I would therefore not question the decision of the tribunal in the *Brambletye School Trust* case [*Brambletye School Trust Ltd v Customs and Excise Comrs* (2002) VAT Decision 17688]. In this case, the tribunal did not really consider whether the facts amounted to occupation by the college rather than (or in addition to) occupation by the company because they simply lumped the two bodies together. The Court of Appeal (see [2006] STC 1010), however, did consider this question and came to the conclusion that occupation by the college had not been established. I would not have disturbed this judgment, even if I had been inclined myself to take a different view. In fact, however, I am on complete agreement with the judgment of Chadwick LJ, whose reasoning is largely reflected in this opinion. I would therefore dismiss the appeal.' *Revenue and Customs*

Comrs v Newnham College, Cambridge [2008] UKHL 23, [2008] 2 All ER 863 at [6], [9]–[17], [23], [27], per Lord Hoffmann

‘[29] The question is whether the college remained in “occupation” of the library for the purposes of para 3A(7) of Sch 10 to the Value Added Tax Act 1994 after granting the lease to the company. If it did, the land is exempt land for the purposes of para 2(3AA) and the grant of the lease is not to be taken as a taxable supply notwithstanding the college’s election under para 2(1) of the schedule that its grant of the land to the company was to be a taxable supply. As Lord Hoffmann has explained, the Commissioners have not argued that the transaction was a sham or that the college was abusing the legislative provisions which allow taxpayers who make exempt supplies to opt for taxation in relation to any land. The Commissioners do not seek to uphold the reasoning of the Value Added Tax and Duties Tribunal (the tribunal) (see (2005) VAT Decision 18936) in so far as it may have been influenced by the fact the college was plainly seeking to avoid tax. Their case is that the exemption was designed to prevent tax avoidance, that it must be strictly construed, and that the disqualification from the exemption which it creates applies here. The scheme that was entered into, which was specific to the use by an academic institution of land for academic purposes, failed to satisfy the conditions of the exemption.

‘[30] Although the legislative provisions are rather complicated, the issue in the end turns on the meaning that is to be given in this context to the words “in occupation of the land” in para 3A(7). Mr Pleming QC, for the Commissioners, submitted that they meant that a grantor who was intended or expected at the time of the grant to be physically present on the land was to be taken to be in occupation of it. This reading of the words gave effect to the central policy objective of the value added tax (VAT) system that persons making exempt supplies should not recover VAT incurred by them in the course of their businesses. The college was in occupation of the land by means of the physical presence in the library of its fellows, students, staff and other persons authorised by the college to be there. This was part of the package of the exempt services that were provided to them by the college. The fact that they were there in the enjoyment of those services was sufficient. It would be wrong in this context to confine the concept of occupation to the meaning that would be given to it in other contexts, such in the phrase “licence to occupy” as used in item 1

of Group 1 in Sch 9 to describe exempt supplies in relation to land.

‘[31] I do not think that there is much doubt about what the word “occupation” means, although it may be more difficult to apply its ordinary meaning to the facts in some contexts than it is in others. In its ordinary meaning it requires more than just a right to use the land or to enjoy the facilities that are to be found there. Physical presence is an essential element. But there is more to it than that. It requires actual possession of the land, and the possession must have some degree of permanence. In the Court of Appeal (Sir Andrew Morritt C, Chadwick and Lloyd LJ) (see [2006] EWCA Civ 285 at [36], [2006] STC 1010 at [36]) Chadwick LJ drew on the guidance that the House derived from decisions of the Court of Justice of the European Communities about the meaning to be given to the concept in the context of the Council Directive (EC) 77/388 of 17 May 1977 on the harmonisation of the laws of the member states relating to turnover taxes—common system of value added tax: uniform basis of assessment (OJ 1977 L 145 p 1) (the Sixth Directive) in *Customs and Excise Comrs v Sinclair Collis Ltd* [2001] UKHL 30, [2001] STC 989. He said that to be in “occupation” of land for the purposes of para 3A(7) requires more than a right to use that land. He then added this important sentence (at [36]):

“It requires some degree of control over the user by others—that is to say, some degree of control over what those who are not also in occupation of the land can do on the land.”

‘[32] The sentence which I have quoted directs attention to what I would regard as the central issue in this case. The question is not whether the college is in control of the company. It is whether the college is to any degree in control of the use of the land. This is not an insignificant test. Paragraph 3A(13) of Sch 10 provides that, for the purposes of the paragraph, a person is to be taken to be in occupation of any land whether he occupies it alone or together with one or more other persons and whether he occupies all of that land or only part of it. Its effect is to remove the requirement of exclusive occupation which is usually inherent in a grant of an interest in or a right over land or a licence to occupy. The usual requirement of exclusive occupation would be too easy for tax avoidance. So occupation by the college to any extent will be sufficient to disqualify the scheme from the exemption.

[33] The college and the company both, to some degree, have a presence on the land. The land is the building that contains the library. The college, through its members, goes to the library to make use of its services. The company, through the librarian and other members of the staff seconded to it by the college, provides the services that are available there. The lease gives the company the exclusive right to occupy the land, and the college sold all its books and other library assets to the company. The company entered into a back-to-back agreement to provide those books on hire to the college or other persons or authorities nominated by it, along with other incidental services. The arrangements that it entered into between the company and the college for the use of the library must be seen as a whole. The question which they give rise to is this. Was there a sufficient element of control by the college over access to and use of the land to show that, to some degree at least, the college was in occupation of it?

[34] As Lord Russell of Killowen observed in *Westminster City Council v Southern Railway Co* [1936] 2 All ER 322 at 326, [1936] AC 511 at 529, in every case where there may be a rival occupancy in some person who to some extent may be thought to have occupancy rights over the premises, the question is one of fact. The issue there was whether the railway company or the various companies to whom they were let out were in rateable occupation of bookstalls and other tenements within the area of a railway station. Here too the question is essentially one of fact, once the right test has been identified. And, in contrast to the rating cases, exclusive occupation is not required. Mr Fleming, very properly, did not seek to rely on the decision of the tribunal on the facts, although it was in the Commissioners' favour. This was because the tribunal may have been unduly influenced by its view that the scheme was an abuse. The Court of Appeal also held that its reasons were unsatisfactory, so it formed its own judgment on the issue. I would be reluctant to interfere with that decision as our function is to deal with issues of law, not issues of fact. But, like Lord Hoffmann, I agree with it.

[35] The Commissioners submit that, if control is an element of "occupation" for the purposes of para 3A(7), a sufficient degree of control was retained by the college by means of the individual members of the college who use the library for study or research and by its librarian and other members of the library staff who run the library. But, as Chadwick LJ pointed out ([2006] STC 1010 at [37]), the

members of the college have no control over access to and use of the library by others. The library is under the day-to-day control of the librarian and her staff, and admission of others is at her discretion and under her control. The college bursar described how the system works in practice in his witness statement. Only persons authorised by her can use the proximity cards that open the doors of the library during staff hours. She can add or remove names from the library's database. Users who are in breach of the rules of the library may be removed by the library staff, and their authorisation to use it may be withdrawn by the librarian. Members of the college who are present in the library every day have no control over these arrangements.

[36] The contractual position between the college and the company as to the librarian and her staff provides the answer to the question whether the college is in control of these arrangements. Under the secondment agreement the library staff were retained in the employment of the college. This was to maintain their existing employment status, including their membership of the pension scheme. But, as the bursar explained, they are for all practical purposes under the control and direction of the company. The contractual change which this brought about was described in a letter which the college wrote to the librarian when, on the date when the various agreements were entered into, she was invited to accept secondment to the company. She was told that she would resume her duties as librarian for the college on the termination of the secondment, but that during the secondment she was to act as librarian for the company.

[37] The effect of this arrangement was that during the period of the secondment her duties as librarian were to be carried out under the direction of the board of directors of the company. She was to be answerable to the company, and not the college, for the way she controlled access to the library. The Commissioners say that the college retained ultimate control because the librarian and the staff are their employees and because the books were hired back to the college. But access to the books is controlled by the librarian, and the secondment agreement places the day-to-day control over her activities and those of her staff in the hands of the company. The fact that the company is controlled by the college does not permit one to ignore the effect of this agreement. The college and the company are separate entities. I would give all the weight that is due to this concept, which lies at the heart of the entire arrangement. In my opinion the

college is not to any degree in occupation of the library.’ *Revenue and Customs Comrs v Newnham College, Cambridge* [2008] UKHL 23, [2008] 2 All ER 863 at [29]–[37], per Lord Hope of Craighead

Australia [Aboriginal Land Rights Act 1983 (NSW), s 36(1): exclusions from the definition of ‘claimable Crown lands’.] [144] For Crown lands to be “claimable Crown lands” under the Aboriginal Land Rights Act 1983 (NSW) (the Land Rights Act), the Crown lands must not be “lawfully used or occupied” within the meaning of s 36(1)(b) of that Act. Two parcels of Crown land in Berrima, New South Wales (“the claimed land”), which remain dedicated for “gaol purposes”, ceased to be proclaimed or operate as a gaol, with no new use identified. Was the claimed land “occupied” within the meaning of s 36(1)(b) of the Land Rights Act because it was secured, serviced by utilities, guarded by an on-site security guard and maintained intermittently by community service order (“CSO”) workers, pending a decision on its future use? That question should be answered “no” and the appeal should be allowed with costs.

...
[146] These reasons will show that this last question turns, in this case, on whether “occupied” in the phrase “lawfully used or occupied” in s 36(1)(b) of the Land Rights Act should be understood, in the context of that Act and, in particular, against its important beneficial and remedial purposes, as “occupied” pursuant to the purpose for which the land is dedicated; or simply as “occupied” in the sense that there is possession of, and a presence on, the land. These reasons will also show that only the former view is consistent with the text, context and purpose of the Land Rights Act.

...
[184] It has been observed that “occupied” is a “protean” word, capable of different meanings depending on the context in which it is used. That is not a novel proposition. In 1888, Pollock and Wright recognised that “in order to ascertain whether acts of alleged occupation ... are effective as regards a given thing” it may be relevant to consider “(a) of what kinds of physical control and use the thing in question is practically capable[;] (b) with what intention the acts in question were done[;] (c) whether the knowledge or intention of any other person was material to their effect, and if so, what that person did know and intend”. For example, in relation to proposition (a), “[c]onduct which would be almost evidence of abandonment with

regard to one kind of land may with regard to another be as good evidence of use and occupation as can be expected”. Thus, within s 36(1)(b), the meaning of “occupied” is informed, in accordance with ordinary principles of statutory construction, by the text, context and purpose of the legislation.

[185] As seen earlier, the express legislative purposes of the Land Rights Act include providing land rights for Aboriginal persons in New South Wales, in acknowledgement of the importance of land for Aboriginal people and that land traditionally owned and occupied by Aboriginal people had “been progressively reduced without compensation”. The purposes of the Act also include that there is to be a significant pool of land that is claimable for the purpose of compensating Aboriginal persons who were dispossessed and that the claims process in the Land Rights Act, which allows for Aboriginal Land Councils to claim that pool of land, is to be the “primary mechanism” for giving effect to the beneficial and remedial purposes of the Land Rights Act. Hence, although Crown land is *ipso facto* in one sense lawfully occupied, a more nuanced understanding of “occupation” better accords with the purpose of the Land Rights Act as informed by both its terms and its important legislative history.

[186] The question then is whether “lawful” occupation under the Land Rights Act is satisfied by an assertion of rights as fee simple owner or whether, as NSWALC contended, the occupation of the land is required to be judged against the dedication—here, gaol purposes. The answer is the latter.’ *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50, (2016) 339 ALR 367 at [144]. [146], [184]–[186], per Nettle and Gordon JJ

Reasonable for him to continue to occupy

[Under the Housing Act 1996, s 175(3) a person is not to be treated as having accommodation unless it is accommodation which it would be ‘reasonable for him to continue to occupy’. The local council notified an applicant for housing assistance of its decision that he was not homeless because he was entitled to occupy accommodation at his family home in Uganda, which it had concluded was reasonable for him and his family to occupy since he had not identified any problem with living in it. The applicant requested a review of the decision, reiterating that he lived in England and not Uganda. One question which arose was whether

the inclusion of the words 'to continue' in s 175(3) has the effect that the subsection can only apply if the person is in actual occupation of the relevant accommodation.] '[37] On the assumption that the council was entitled to decide that the property in Kampala was available to Mr Maloba, did it follow that he was not to be treated as homeless or threatened with homelessness within the meaning of s 175, regardless of whether it was reasonable to expect him to occupy it?

'[38] On first impression, it would be surprising if the answer were yes. This would seem to go against the grain of Parliament's intention in providing that a person is not to be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy. However, in *Begum's* case [*Begum v Tower Hamlets London Borough Council* [2000] 1 WLR 306, CA] a majority of the court considered that the inclusion of the words "to continue" in s 175(3) had the effect that the subsection could only apply if the person was in actual occupation of the relevant accommodation. On this reading, if at the time of the council's decision a person was in occupation of accommodation which it would not be reasonable for him to continue to occupy, the fact that he was living there would not prevent him from being homeless within the meaning of the Act; but the opposite would apply if he had left the property, so long as it remained available for his occupation. In the latter case, in order to qualify for help under the Act he would have to take up the accommodation which it would not be reasonable for him to continue to occupy, whereupon he would become statutorily homeless.

'[39] In reaching this conclusion Sedley LJ referred ([2000] 1 WLR 306 at 325–326) to the history of the legislation, which led him to the view that s 175(3) stood apart from s 175(1) and (2), and that they could not be read together. He considered that the theoretical possibility of an applicant being required to move into accommodation available to him, but which was unfit, could properly be regarded as unreal, since no responsible local authority would ever contemplate expecting an applicant to act in that way.

'[40] Auld LJ took a different approach. He interpreted the words 'to continue to occupy' in s 175(3) as follows (at 319):

continuance stemming from one of the entitlements to occupy specified in section 175(1)."

'[41] On the facts of *Begum's* case, the difference between Auld and Sedley LJ on this point made no difference to the outcome. The appeal was originally heard by them as a two-judge court, but it was adjourned for further argument before a three-judge court on an unrelated point. On the adjourned hearing, presided over by Stuart-Smith LJ, the argument was limited to that other point, but in his judgment Stuart-Smith LJ expressed his agreement with Sedley LJ's analysis of s 175. He added that in his view it made no practical difference because no responsible authority would be likely to take the point that an applicant was homeless where the only accommodation available to him was not reasonable for him to occupy.

'[42] Ms Bretherton relied on the opinions of the majority regarding the interpretation of s 175(3) as persuasive but not binding authority. The issue was academic in *Begum's* case, but it is not academic in this case.

'[43] In my view the grammatical argument which found favour with the majority is outweighed by other factors which support Auld LJ's approach. These relate to the coherence of the statute and the reasonableness of the result.

...

'[46] The construction preferred by the majority in *Begum's* case leads to this paradox: a person who has left accommodation in circumstances which did not make him homeless intentionally under the provisions of s 191 and s 177, because it was unreasonable to expect him to remain there, is nevertheless not homeless at all if he is able to return to the property which he reasonably left. This would produce statutory incoherence and cannot have been Parliament's intention.

...

'[49] Linked with the question of coherence is the question of reasonableness. In general terms, the provision of ss 175, 177, and 191 point towards a policy that in deciding whether a person is homeless or, if homeless, has become homeless intentionally, no regard should be had to property available or previously available to the applicant if it would not be reasonable to expect the applicant to occupy it or to have occupied it for a continuing period.

'[50] As Sedley LJ noted, the provision now contained in s 175(3) was introduced by the

"In my view, it is plain that Parliament was not using continued occupation in the sense of continuance of an actual occupation at the time of the application, but of

Housing and Planning Act 1986 by amendment to the Housing (Homeless Persons) Act 1977 following the decision in *Puhlhofer v Hillingdon London BC* [1986] 1 All ER 467, [1986] AC 484 (together with the provision now contained in s 177(2)).

...
 '[56] I do not believe that Parliament can have positively intended by the language used in the amendments to create a distinction between a person with unfit accommodation available to him who was living in it and one who was not—a distinction so unreasonable that the majority in *Begum's* case did not consider that any responsible authority could properly take the point. It is impossible to see any policy reason for such a distinction. Indeed, if there were a policy reason and Parliament positively intended to create such a distinction, then a responsible council could not be criticised for following it.

'[57] There remains the question whether the language used by Parliament nevertheless has the unavoidable effect for which the council contends. I would reach that result only if the words used were incapable of any other construction. In my view they are not. Good sense can be made of s 175(3) by construing the words "reasonable for him to continue to occupy" as synonymous with "reasonable for him to occupy for a continuing period", i.e. for the future, whether or not he is in occupation at the moment of the application or the decision.

'[58] This construction also "produces symmetry between the key concept of homelessness... and intentional homelessness", to which Lord Hoffmann referred in *Awuia v Brent London BC* [1995] 3 All ER 493 at 497, [1996] AC 55 at 67–68. He observed that if accommodation is so bad that leaving it for that reason would not make one intentionally homeless, then one is in law already homeless. Logic and justice suggests that the same should apply if a person has for the same reason not occupied accommodation which is physically available to him.' *Maloba v Waltham Forest London Borough Council* [2007] EWCA Civ 1281, [2008] 2 All ER 701 at [37]–[43], [46], [49]–[50], [56]–[58], per Toulson LJ

OFFENCE

Canada [Income Tax Act, RSC 1985, c 1 (5th Supp.), s 163.2: assessment of penalty.] '2 The Tax Court set aside a penalty assessed against the respondent, Ms. Guindon, under section 163.2 of the *Income Tax Act*, R.S.C. 1985 c.

1 (5th Supp.). The Tax Court found that section 163.2 of the Act creates an 'offence' within the meaning of section 11 of the Charter. Therefore, in the section 163.2 proceedings against Ms. Guindon, she was entitled to the rights guaranteed by section 11. In this case, Ms. Guindon was not given these rights. Therefore, the Tax Court set aside the assessment.

...
 '37 In my view, the assessment of a penalty under section 163.2 is not the equivalent of being "charged with a [criminal] offence". Accordingly, none of the section 11 rights apply in section 163.2 proceedings. In this regard, I disagree with the Tax Court's conclusion on this question of law.

'38 The *Income Tax Act* contains a complex web of provisions constituting a discrete regulatory and administrative field of endeavour with unique characteristics. Justice Wilson of the Supreme Court of Canada described it in this way:

A chief source of revenue for the federal government is the collection of income tax. The legislative scheme which has been put in place to regulate the collection of tax is the *Income Tax Act*. The Act requires taxpayers to file annual returns and estimate their tax payable as a result of calculations made in these returns. In essence, the system is a self-reporting and self-assessing one which depends upon the honesty and integrity of the taxpayers for its success.

(*R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627.)

'39 The provision of accurate information that permits the proper calculation of tax is another aspect of self-compliance. This is achieved through tax returns, reports, certificates, forms and other information supplied. Timely elections, designations, reports and payments also allow for the efficient administration of the tax system.

'40 Conduct that is antithetical to the proper functioning of this system must be deterred. Compliance and order within this self-assessment system must be maintained. This is done—in this administrative field of endeavour as in many others—through the imposition of administratively simple sanction[s] or, as the Act calls them, penalties. Given the complexity and breadth of the discrete regulatory and administrative field of endeavour set up by the Act, the sanctions must be administratively simple.

⁴¹ Seen in this way, penalties under the Act are not about condemning morally blameworthy conduct or inviting societal condemnation of the conduct. They are not among the “most serious offences known to our law”: *Wigglesworth*, *supra*, at page 558. Rather, the penalties are about ensuring that this discrete regulatory and administrative field of endeavour works properly.

⁴² In my view, section 163.2 is mainly directed to ensuring the accuracy of information, honesty and integrity within the administrative system of self-assessment and reporting under the Act. The imposition of a section 163.2 penalty by way of assessment and the subsequent procedures for challenging the assessment are proceedings of an administrative nature aimed at redressing conduct antithetical to the proper functioning of the administrative system of self-assessment and reporting under the Act. Put another way, proceedings under section 163.2 aim at maintaining discipline, compliance or order within a discrete regulatory and administrative field of endeavour. They do not aim at redressing a public wrong done to society at large.’ *R v Guindon* 2013 FCA 153, [2013] F.C.J. No 673, 360 DLR (4th) 515 at paras 2, 37–42, per Noël, Gauthier, and Stratas JJA

Motoring offence

[For 40(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 680 see now 90 Halsbury’s Laws of England (5th Edn) (2011) para 815.]

Political offence

[For 17(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 1174 see now 47 Halsbury’s Laws of England (5th Edn) (2014) para 633.]

OFFENCES REFERRED TO IN ARTICLE 4

Australia [Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, art 5.] ‘[44] Before noting the content of Art 5.2, it is necessary to determine the meaning of the words in the chapeau to Art 5.1, “the offences referred to in article 4”. On one view, those offences are offences which that state is required to establish “under its criminal law”. However, the conditions of jurisdiction referred to in paras (b) and (c) apply in their terms to offences which are not

committed in the territory of the forum state. Those paragraphs would be otiose unless the offences referred to are offences either under the criminal law of the forum state or under analogous provisions enacted by another state. That broader meaning is also necessary in order to make sense of Art 5.2 which, by reference to extradition, appears to envisage an offence under a law of another state. (The language, referring “to any of the States mentioned in paragraph 1 of this article” is confusing: it is theoretically possible, but implausible, that Art 4 requires each state to make it an offence for a foreign government to commit acts of torture within its territory.)’ *Li v Zhou* [2014] NSWCA 176, (2014) 310 ALR 66 at [44], per Basten JA

OFFENSIVE

Australia [Criminal Code (Cth), s 471.12: offence of using postal service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.] ‘[43] In this case the legislative history supports the following conclusions:

- the term “offensive” in s 471.12 has an ancestry traceable to the Post Office (Protection) Act 1884 (UK);
- the textual setting in which the term “offensive” has been used in successive statutes and regulations relating to postal services has changed from time to time;
- the scope of the offence created by s 471.12, in its application to offensive conduct, does not reflect the culmination of a logical progression of regulation or what the Commonwealth called metaphorically a “regulatory trajectory”;
- it is not a purpose of the term “offensive” in s 471.12 to proscribe uses of postal or similar services which convey insults or slights or which are likely to engender hurt feelings;
- as a corollary of the preceding conclusion it is not a purpose of the offence created by s 471.12 to secure civility or courtesy in communications which use postal or similar services;
- the meanings of “offensive” as used in s 471.12 are in the higher ranges of seriousness.

... ‘[56] The ordinary meaning of the word “offensive” unconstrained by epithets such as “grossly” is:

- causing offence or displeasure;

- irritating, highly annoying;
- repugnant to the moral sense, good taste or the like, insulting.

The *New Shorter Oxford English Dictionary* also adds the terms “disgusting” and “nauseous”.

[57] Within the bounds of its ordinary meaning the term “offensive” used objectively, as it is in s 471.12, covers a range of imputed reactions by one person to the conduct of another. It may describe conduct which would cause transient displeasure or irritation and also conduct which would engender much more intense responses. In the Court of Criminal Appeal Bathurst CJ and Allsop P, as discussed earlier in these reasons, construed it as confined to conduct at a threshold defined by the words “calculated or likely to arouse significant anger, significant resentment, outrage, disgust, or hatred in the mind of a reasonable person in all the circumstances”.

[58] On the construction of “offensive” adopted by the Court of Criminal Appeal, conduct which a reasonable person would regard in all the circumstances as offensive within the ordinary meaning of that term would not necessarily be offensive for the purposes of s 471.12. There is no novelty in that approach. Kerr J in *Ball* [*Ball v McIntyre* (1966) 9 FLR 237] referred to conduct which was hurtful or blameworthy or improper but not “offensive” within the meaning of s 17(d) of the Police Offences Ordinance 1930–1961 (ACT). The construction adopted by Bathurst CJ and Allsop P in this case set a higher threshold even than that adopted in *Ball v McIntyre*, which had followed the formulation by O’Byrne J in *Worcester* [*Worcester v Smith* [1951] VLR 316; [1951] ALR 660]. In the latter case, which concerned the offence of behaving in an “offensive manner” in a public place contrary to s 25 of the Police Offences Act 1928 (Vic), O’Byrne J said [[1951] VLR 316 at 318; [1951] ALR 660 at 662]:

Behaviour, to be “offensive” within the meaning of that section, must, in my opinion, be such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a reasonable person.

[59] The approach of the Court of Criminal Appeal to the construction of s 471.12, in its application to offensive conduct, was orthodox. The level of offensiveness defined by the court accorded with the principle of legality in its application to freedom of expression. It

accorded with the need to construe a criterion of serious criminal liability relatively narrowly and clearly where the narrow construction was reasonably open. It also accorded with the observations made in *Bradley* [*Bradley v Commonwealth* (1973) 128 CLR 557; 1 ALR 241; [1973] HCA 34] concerning the importance of postal and other services to freedom in the dissemination of information and opinion. In my respectful opinion however, the formulation of the purposes of the provision, expressed in largely metaphorical terms by reference to its application to postal and similar services, was not of assistance in the construction or application of s 471.12 nor in the resolution of the constitutional question. That question, which now falls for determination, is whether s 471.12, construed as the Court of Criminal Appeal construed it, in its application to offensive uses of postal or similar services, impermissibly burdens the freedom of political communication protected by the Constitution.

...
[333] It follows from the earlier discussion, concerning a contextual construction of s 471.12, that there is no barrier presented to reading it down to apply to a narrower category of offensive communications than would be the case if attention were directed only to the wider meaning of the word “offensive”. Contextual considerations and legislative history of the offence are consistent with such an approach. It is unlikely that parliament intended to prohibit all communications which happen to contain matter which may cause some offence. As Gleeson CJ observed in *Coleman* [*Coleman v Power* (2004) 220 CLR 1; 209 ALR 182; [2004] HCA 39 at [32]] legislation concerned with the regulation of communications usually attempts to strike a balance between competing interests. Section 471.12 may be taken to do so by prohibiting communications which are offensive to a higher degree.’ *Monis v R* (*Matter No S172/2012*) [2013] HCA 4, (2013) 295 ALR 259 at [43], [56]–[59], per French CJ and at [333], per Crennan, Kiefel and Bell JJ

OFFER

[For 9(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 632 see now 22 Halsbury’s Laws of England (5th Edn) (2012) para 234.]

Of shares to public

[For 7(1) Halsbury’s Laws of England (4th Edn) (2004 Reissue) paras 538, 678 see now 15A

Halsbury's Laws of England (5th Edn) (2016) paras 1255, 1282.]

OFFICER

[For the Companies Act 1985, s 744 see now the Companies Act 2006, s 1173(1).]

OFFICIAL

Australia '[24] The result is that s 47(1) [of the Designs Act 1906 (Cth)] should be read so that the publication of a design at either: (1) an official exhibition; or (2) an officially recognised international exhibition is not a novelty-destroying prior publication.

'[25] I do not, however, accept that an official exhibition includes an exhibition organised by a private person or body, such as a private trade association. First, it does not conform with the meaning of Art 11(1) [of the Paris Convention for the Protection of Industrial Property]. Second, it lacks any limiting principle. If "official" is taken to implicate any body having officers (as Mr McGowan would have it), an exhibition organised by a large private corporation, which of course has officers, might qualify. So also might exhibitions organised by small corporations or neighbourhood associations. At a minimum, the approach proposed by Mr McGowan would entangle the courts in difficult issues of fact while robbing designers and exhibitors of certainty as to whether a particular exhibition did or did not qualify for s 47(1) protection. The net effect would be to encourage litigation without concomitantly encouraging designers to Ex or test their designs.

'[26] The only suggestion that "official" is not intended to refer to the involvement of a government is in Phillips, *Protecting Designs: Law on Litigation* (1994). There (at 287) the author suggests with regard to s 47 that "arguably an exhibition organised by [a] relevant trade or industry association will come within [the] ambit" of those terms. The history to which I have referred does not bear this out. The use of the word "official" is designed, in my opinion, to draw a distinction between public and privately organised exhibitions. It refers to an exhibition that is organised by a government: see *Oxford English Dictionary* definition of "official" at [4a]. The "government" may be federal or state or a local government authority.

'[27] In the instant case, the fair was organised by an industry association, the FIAA,

and not by a government authority. Accordingly, it cannot qualify as an official exhibition for the purposes of s 47(1).' *Chiropedic Bedding Pty Ltd v Radburg Pty Ltd* [2007] FCA 1869, (2007) 243 ALR 334, (2007) 74 IPR 398, BC200710390 at [25]–[27], per Finkelstein J

OFFICIAL RECEIVER

[For 3(2) Halsbury's Laws of England (4th Edn) (2002 Reissue) para 31 see now 5 Halsbury's Laws of England (5th Edn) (2013) para 35.]

OFFICIALLY RECOGNISED

Australia [Designs Act 1906 (Cth), s 47(1).] '[28] This still leaves open the possibility that the fair was an "officially recognised international exhibition." "Officially recognised" can be defined in opposition to "official," which effectively means "officially organised". An exhibition will be "officially recognised" if it is recognised by the federal or state government or any local government authority. Two obvious indicia of governmental recognition are: (1) the provision of public funds to fund the exhibition, particularly if given upon terms and conditions; and (2) the open participation of one or more ranking government officials at the opening, closing, or other formal ceremony or proceeding of the exhibition. While there will be other indicia of government recognition, it is neither necessary nor possible to provide an exhaustive list. The best indicia is that which may be readily ascertained ex ante from public information and thus provide prospective exhibitors with sufficient certainty as to whether an exhibition could qualify for protection under s 47(1).

'[29] In the present case, the fair was funded by a \$200,000 grant from the Victorian government upon various conditions, including that the exhibition be opened to the general public for at least 1 day and that no goods be sold to the public. The fair was opened by the Minister for Small Business. On these facts, it is clear that the fair was an officially recognised exhibition.' *Chiropedic Bedding Pty Ltd v Radburg Pty Ltd* [2007] FCA 1869, (2007) 243 ALR 334, (2007) 74 IPR 398, BC200710390 at [28]–[29], per Finkelstein J

OFFSPRING

[For 50 Halsbury's Laws of England (4th Edn) (2005 Reissue) para 624 see now 102

Halsbury's Laws of England (5th Edn) (2010) para 336.]

OPEN COUNTRY

[For 34 Halsbury's Laws of England (4th Edn) (Reissue) para 250 see now 78 Halsbury's Laws of England (5th Edn) (2010) para 582.]

OPERATE

Australia [Managed investment scheme under the Corporations Act 2001 (Cth) s 601ED.] '[43] Were the arrangements between the group members, MB and the litigation funder a managed investment scheme, it is not clear who would be the operator of the scheme. In *Australian Securities and Investments Commission v Pegasus Leveraged Options Group Pty Ltd* (2002) 41 ACSR 561; [2002] NSWSC 310 at [55] Davies AJ said: "The word 'operate' is an ordinary word of the English language and, in the context, should be given its meaning in ordinary parlance. The term is not used to refer to ownership or proprietorship but rather to the acts which constitute the management of or the carrying out of the activities which constitute the managed investment scheme. The *Oxford English Dictionary* gives these relevant meanings: ... To effect or produce by action or the exertion of force or influence; to bring about, accomplish, work ... To cause or actuate the working of; to work (a machine, etc) ... To direct the working of; to manage, conduct, work (a railway, business, etc); to carry out or through, direct to an end (a principle, an undertaking, etc)".' *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (No 3) [2009] FCA 450, (2009) 256 ALR 427 at [43], per Finkelstein J

To be operated in Australia

Australia [Franchising Code of Conduct cl 5(3): the code does not apply to a franchise agreement: (a) if the franchisor: (i) is resident, domiciled or incorporated outside Australia; and (ii) grants only one franchise or master franchise to be operated in Australia.] '[152] Clause 5(3)(a)(ii) might be construed as operating *only* where the franchisor grants the one franchise to be operated in Australia, in the sense that the franchise is to be *for the whole* of Australia. This would require a strained reading of the words "to be operated in Australia". The clause could readily have been drafted in

different terms to achieve this outcome more clearly if this was the intended result. The alternative construction is that favoured by the trial judge. This would construe cl 5(3)(a)(ii) as applicable where it is clear from the attendant circumstances that, at the time the franchise agreement is made, the franchisor intended to grant only one franchise to be operated *in* Australia, in the sense of within Australia. That is, the clause would capture a franchise, even for part of Australia, provided that the franchisor intended only to grant the one franchise to be operated in Australia. We too prefer this construction because, while faithful to the language of the provision, it accords the clause as a whole an operation that apparently serves a rational end. It was presumably thought that, in the circumstances in which cl 5(3)(a) would apply, the franchisee's business operation was likely to be more substantial and less in need of protection than in other cases.' *Rafferty v Madgwicks* [2012] FCAFC 37, (2012) 287 ALR 437 at [152], per Kenny, Stone and Logan JJ

OPPORTUNITY

Opportunities for casino gambling

New Zealand '[1] This appeal concerns the meaning of the term "opportunities for casino gambling" which appears in ss 11, 12 and 139(2)(d) of the Gambling Act 2003 (the 2003 Act). This has particular importance for the appellants (to which we will refer collectively as "Skycity") because the prohibition in s 11 of the 2003 Act of any increase in gambling opportunities significantly affects Skycity's casino business. Skycity says that the phrase "opportunities for casino gambling" relates only to the number of casino games and/or the number of player positions associated with casino games in a particular casino. The Gambling Commission, which is the body charged with the regulating of casinos under the 2003 Act, contends that "opportunities for casino gambling" has a much broader meaning. The issue for determination is whether the narrow interpretation suggested by Skycity is correct.

...

'[76] Having carefully evaluated all of the arguments put to us by Skycity, we are unable to conclude that Parliament's intention in outlawing any increase in the opportunities for casino gambling can be read down as meaning simply a freezing of the maximum number of persons

permitted to gamble in a casino at any one time (and the maximum number of gaming tables). The term “opportunities” is vague, but it strains the language of the provision too far to say that a change such as the speeding up of a game so that many more hands per hour occur than previously did is not, in conceptual terms, a[n] increase in the opportunities for gambling. We do not underestimate the difficulties which the Commission will face in assessing such matters, when it has no statistical base from which to make the assessment, nor do we underestimate the degree to which this involves what Skycity called “micro-management” by the Commission. On the other hand, if the legislature had intended only to prevent any increase in the maximum number of persons gambling in a casino at any one time, it is hard to see what role could have been envisaged for the Commission, other than a purely arithmetic one: s 12(1) would be redundant, because no “decisions” by the Commission would be required.

‘[77] Ultimately, we are unable to accept Skycity’s contention that matters other than the maximum number of persons permitted to gamble at any one time in a casino (and the maximum number of table games) should be excluded from consideration. We would not go as far as Cooper J in saying that anything could be relevant to an inquiry as to whether there has been an increase in the opportunities for casino gambling.’ *Skycity Auckland Ltd v Gambling Commission* [2007] NZCA 407, [2008] 2 NZLR 182 at [1], [76]–[77], per O’Regan J

OPPRESSIVE

New Zealand [Credit Contracts and Consumer Finance Act 2003.] ‘[45] In this case there was nothing at all out of the ordinary about the terms of the loans themselves or of the securities over the home and the apartment. In particular, the rates of interest appear to have reflected market conditions. Instead, the case raises, apparently for the first time, the question of whether a credit contract can be found to be oppressive if the lender had no knowledge of matters external to it which might otherwise lead the court to the view that there was oppression. In no case of which we are aware under the CCCF Act or its predecessor, the Credit Contracts Act 1981, has it been contended that the lender was unaware of a circumstance material to the existence of oppression. In cases in which it is said that the terms of the credit contract itself (or of a collateral or linked contract or arrangement) are

oppressive or that the lender itself has acted oppressively, it is unlikely that the lender will be able to deny knowledge of the factor or factors which are complained of. In contrast, in the present case, the oppression is said to arise from a combination of the personal situation of the Bartles and the arrangements they entered into with Blue Chip over the purchase of the apartment. For its part, GE says that it had only limited knowledge of the former and none of the latter.

‘[46] A credit contract or other transaction to which Part 5 of the Act applies may be reopened as oppressive when it might not necessarily have been set aside as unconscionable by a court of equity. For example, in equity it is necessary to show that the borrower was under a special disability or disadvantage. As Arnold J remarked, the scope of oppression under the Act is broader than the equitable doctrine of unconscionability. That follows from the fact that the definition of “oppressive” is wider than unconscionable conduct and includes a “breach of reasonable standards of commercial practice”. The Court of Appeal has correctly said in *Greenbank New Zealand Ltd v Haas* [[2000] 3 NZLR 341, CA, at [24]] that the various words which together form the definition of the term “oppressive” all contain different shades of meaning but they all contain the underlying idea that the transaction or some term of it is in contravention of reasonable standards of commercial practice. That sets an objective standard. A contract or course of conduct may therefore, as Arnold J also said, be treated as oppressive even though the party whose conduct is said to be oppressive may be (subjectively) blameless because the party is simply following industry practice. Where that practice is in breach of reasonable standards, compliance with it will not immunise a lender. It is for the courts rather than the industry to set the standard. But that assumes a situation in which the lender knows of the matter found to give rise to oppression or knows something which should have put it on inquiry.

‘[47] It would be an entirely different thing to impugn a credit contract as oppressive by reference to matters which were unknown to the lender or to an agent representing it in the transaction or in respect of which neither it nor its agent was put on inquiry as a result of something known. A lender cannot properly be said to have entered into a credit contract in breach of reasonable standards of commercial practice if what it did was in accordance with those standards in light of the facts of which it (or its agent) knew or ought to have known.

None of the Australian cases on which the respondents relied goes any further. In fact, as Finn J commented in another case, *Australian Competition and Consumer Commission v Radio Rentals Ltd* [[2005] FCA 1133, (2005) 146 FCR 292 at [21]], dealing with the prohibition on unconscionable conduct under the Trade Practices Act, the lender must “at least be aware of circumstances that would cause him or her or a reasonable person in his or her position to suspect from what is evident that that state of affairs may exist”. In our view, a credit contract should not be seen as oppressive unless the lender has a basis for knowing that to be so. If such a basis exists, however, the lender’s failure to appreciate that the credit contract is oppressive will not excuse it and the contract may be reopened.

‘[48] Even when a lender has knowledge of circumstances which might otherwise cause it to suspect something about the borrower or the borrowing which might make the borrowing highly improvident, it will ordinarily be excused from making inquiry if it is also aware that the borrower is being advised about the transaction by an independent lawyer. The lender is entitled to assume that a lawyer instructed by the borrower will not have accepted that instruction if any conflict of interest exists and so will give dispassionate advice on whether and on what terms the borrower should proceed with the transaction, including the borrowing. The lender is also entitled to assume that the advice given to the borrower by the lawyer is competent advice and that the borrower has chosen to enter into the transaction on a fully informed basis, and so that all risks associated with it have been pointed out.

‘[50] In other than such unusual cases the presence and role of an independent solicitor for the borrower will discharge the lender from the need to make inquiry. As a consequence, unless the lender or its agent already has knowledge of circumstances which render the lending in breach of reasonable standards of commercial practice the credit contract on which the borrower had independent legal advice should not be treated as oppressive under Part 5.’ *GE Custodians v Bartle* [2010] NZSC 146, [2011] 2 NZLR 31 at [45]–[48], [50], per Blanchard J

OPTION

[For 9(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 640 see now 22 Halsbury’s Laws of England (5th Edn) (2012) para 241.]

ORDER

In Supreme Court Act

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

Any other orders that the court considers necessary

Australia [Workplace Relations Act 1996 (Cth), s 494(5).] ‘[52] The grant of power in s 494(5) was a very wide one. The court was given a power to make “any other orders that the court considers necessary” to remedy the effects of a contravention. A grant of power in wide terms does not render the grant of power ambiguous. Were it not for the structural considerations relied upon by the TWU, there would be no doubt, in our view, that taking the ordinary and natural meaning of the words used in s 494(5) of the WR Act, the terms of the grant of power were wide enough to include an order for compensation. The matters relied on by the TWU do not provide a reason to depart from that construction of s 494(5).’ *Transport Workers Union of Australia v Qantas Airways Ltd* (ACN 009 661 901) [2012] FCAFC 10, (2012) 287 ALR 236 at [52], per Gray J

Order made by the court at trial

Australia [Sentencing Act 1989 (NSW), s 13A.] ‘[20] As a result of changes made by the 1997 Act [Sentencing Legislation Further Amendment Act 1997 (NSW)], an eligibility requirement of service of at least 20 years of the sentence was imposed upon those the subject of a “non-release recommendation”: s 13A(3)(b). This expression was now defined in s 13A(1) as meaning: “a recommendation or observation, or an expression of opinion, by the original sentencing court that (or to the effect that) the person should never be released from imprisonment”. When considering an application in such cases the Supreme Court, if it were to accede to the application, had to be satisfied that there existed “special reasons” to justify the making of a determination: s 13A(3A).

‘[21] In *Baker* [v R (2004) 223 CLR 513 at 532 [43], 210 ALR 1 at 14, [2004] HCA 45], this selection by the 1997 Act of a “non-release recommendation” was characterised as the creation of a criterion as the “trigger” for a particular legislative consequence. The relevant consequence concerned satisfaction of the eligibility requirement for application to the

Supreme Court for determination of a minimum term and an additional term.

‘[22] It is against that background that there falls to be considered the submission by the appellants that the remarks made by Newman J acquired with the enactment of the 1997 Act the character of an “order” within the definition of “sentence” in the Criminal Appeal Act. Of that submission, Spigelman CJ referred to the characterisation in *Baker* of the inclusion of non-release recommendations as a criterion for the operation of the 1997 Act. His Honour held that this was inconsistent with the proposition that the legal consequence of a non-release recommendation now could be said to arise from anything done “by” the court of trial within the meaning of the definition of “sentence” in s 2(1) of the Criminal Appeal Act. His Honour added that at the time Newman J made his recommendation it had no legal effect and that its subsequent legal effect was not something occasioned by anything done “by” the court of trial. We agree.

‘[23] The same conclusion applies to the further change to the legislation made subsequently to the decision in *Baker*. Apparently for more abundant caution, it was provided by the Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Act 2005 (NSW) (the 2005 Amendment) that the definition of existing life sentence:

... includes any such recommendation, observation or expression of opinion that (before, on or after the date of assent to the [2005 Amendment]) has been quashed, set aside or called into question ...

...
‘[24] The effect of the 2005 Amendment was to continue the adoption of non-release recommendations as a criterion for the operation of the amended Supreme Court review structure, notwithstanding curial disapproval or criticism of a particular recommendation. This did not have the consequence that the recommendation in question in this case had now acquired the character of an order by the court of trial.

‘[25] It follows that leave to pursue out of time a sentencing appeal under s 5(1)(c) of the Criminal Appeal Act with respect to the recommendation made by Newman J was correctly refused and on a fundamental basis. This is that the recommendation never was and did not subsequently acquire the character of an “order made by the court of trial”, with the result that the Court of Criminal Appeal lacked

jurisdiction to entertain the proposed appeal.’
Elliott v R (No S215 of 2007) [2007] HCA 51, (2007) 239 ALR 651, BC200709514 at [20]–[25], per Gummow, Hayne, Heydon, Crennan and Kiefel JJ

ORDER IN COUNCIL

[For 44(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 1500 see now 96 Halsbury’s Laws of England (5th Edn) (2012) para 1031.]

ORDER OF COUNCIL

[For 44(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 1500 see now 96 Halsbury’s Laws of England (5th Edn) (2012) para 1031.]

ORDINARILY RESIDENT

See also RESIDE

[National Health Service Act 2006, s 175, under which regulations could provide for charges to be made in respect of non-residents for health services.] ‘[60] ... In an observation in *Ex p Shah* endorsed by Lord Scarman ([1983] 1 All ER 226 at 234, [1983] 2 AC 309 at 342), Lord Denning MR said in the Court of Appeal ([1982] 1 All ER 698 at 704, [1982] QB 688 at 720) that “[t]he words ‘ordinarily resident’ mean that the person must be habitually and normally resident here”.

‘[61] The words are to be given their ordinary meaning. Asylum seekers are clearly resident here but is the manner in which they have acquired and enjoy that residence ordinary or extraordinary? Normal or abnormal? Were they detained, then no one would suggest they were ordinarily resident in the place of their detention. While they are here under sufferance pending investigation of their claim they are not, in my judgment, ordinarily resident here. Residence by grace and favour is not ordinary. The words must take some flavour from the purpose of the statute under consideration and, as I have set out above, the purpose of the 2006 NHS Act is to provide a service for the people of England and that does not include those who ought not to be here. Failed asylum seekers ought not to be here. They should never have come here in the first place and after their claims have finally been dismissed they are only here until arrangements can be made to secure their return, even if, in some cases, like the

unfortunate YA, that return may be a long way off.' *R (on the application of YA) v Secretary of State for Health* [2009] EWCA Civ 225, [2010] 1 All ER 87 at [60]–[61], per Ward LJ

Ordinarily resident in New Zealand

New Zealand [New Zealand Superannuation and Retirement Act 2001, s 8.] '[1] The respondent, Mrs Greenfield, is a New Zealand missionary who with her husband has lived in Singapore since 1993. Her 2012 application for New Zealand superannuation was declined by the appellant, the Chief Executive of the Ministry of Social Development (the Chief Executive), on the ground that in terms of s 8(a) of the New Zealand Superannuation and Retirement Act 2001 (the Act) she was not "ordinarily resident" in New Zealand.

'[23] The principal issue in this appeal is the meaning of the expression "ordinarily resident in New Zealand" as it appears in s 8(a) of the Act. The answers to both questions of law before this Court depend on the meaning to be given to that expression in that provision.

'[24] The relevant principles of statutory interpretation guiding the Court in ascertaining the meaning of the expression are well-established. The focus is on the text of the provision interpreted in light of its purpose. In determining purpose, the Court must have regard to both the immediate and the general legislative context. The wider objectives of the enactment may also be relevant.

'[25] Unlike the expression "domicile", the expression "ordinarily resident" does not have a fixed meaning. This means that, in the absence of any statutory definition in the Act, the starting point will be, as both the Authority and Collins J recognised, the meaning of the expression ascertained from dictionary definitions.

'[26] The New Zealand Oxford Dictionary gives the following relevant definitions:

"ordinarily" — normally; customarily, usually
 "resident" — a permanent inhabitant

'[27] When the two definitions are read together, the expression refers simply to the place where a person usually lives. The concept of permanence is reinforced by the definition of "reside" which includes "to dwell permanently".

'[28] Questions whether absences, temporary, lengthy or indefinite, and whether

intentions, subjectively or objectively ascertained, are relevant and, if so, to what extent, are not answered by the text of the expression. They need to be considered therefore in the light of the purpose of the provision.

'[29] The purpose of the requirement that an applicant for New Zealand superannuation be "ordinarily resident in New Zealand" on the date of their application is to provide a degree of connection between the applicant and New Zealand. Parliament has decided that only applicants with the requisite degree of connection should be entitled to apply for New Zealand superannuation.

'[30] It is not uncommon for statutes to use expressions such as "ordinarily resident" to provide a connection of this nature. The Court must then inquire what degree of connection was envisaged by Parliament when enacting the particular provision.

'[32] Adopting a practical approach here, we are satisfied that in order to implement the purpose of the Act by requiring a close and clear connection between an applicant and New Zealand, the expression "ordinarily resident" should be interpreted to cover the following further elements:

- (a) Physical presence here other than casually or as a traveller;
- (b) Voluntary presence;
- (c) Some intention to remain in the country for a settled purpose;
- (d) Continuing residence despite any temporary absences; and
- (e) Residence in New Zealand rather than anywhere else. The Act is not one which permits residence in two countries simultaneously.

'[33] We also consider that "ordinarily" means something more than "residence", indicating the place where a person regularly or customarily lives, as distinct from temporary residence in a place for holiday or business purposes.

'[34] Finally, whether a particular applicant is within the expression as we have interpreted it will be a question of fact in each case. In other words, an objective determination will be required based on an assessment of all the relevant factors in the particular case.

'[35] This means that we do not agree with Collins J that an applicant's subjective intentions will necessarily be determinative.

'[36] As already noted, the question of fact will be determined in the first instance by the Chief Executive and then, in the event of appeals, by a Benefits Review Committee and the Authority.

...
 '[43] For the reasons we have given, an applicant for New Zealand superannuation must establish to the satisfaction of the Chief Executive on the date of his or her application that he or she usually physically lives in New Zealand, intends to remain here for a settled purpose and that any absences from New Zealand are truly temporary.' *Chief Executive of the Ministry of Social Development v Greenfield* [2014] NZCA 611, [2015] 3 NZLR 177 at [1], [23]–[30], [32]–[36], [43], per White J (footnotes omitted)

New Zealand [Protection of Personal and Property Rights Act 1988, s 6: jurisdiction of the court in respect of any person who is ordinarily resident in New Zealand.] '[44] In the absence of any definition of "ordinarily resident" in the PPPRA, the meaning of the expression must be ascertained under s 5 of the Interpretation Act 1999—from the text and in the light of the purpose of the PPPRA.

'[45] The starting point is the meaning given in the dictionary definition. The New Zealand Oxford Dictionary gives the definition referred to in *Greenfield* [*Chief Executive of the Ministry of Social Development v Greenfield* [2014] NZCA 611, [2015] 3 NZLR 177]:

"ordinarily" — normally; customarily, usually

"resident" — a permanent inhabitant.

'[46] As stated in *Greenfield* the Court of Appeal held that when these two definitions were read together the expression refers "simply to the place where a person usually lives".

'[47] The purpose of the expression "ordinarily resident" in the PPPRA is to provide a degree of connection between the applicant and New Zealand. Applicants who are "ordinarily resident" in New Zealand have the requisite degree of connection for orders under Part 1 of the PPPRA to be made. Other applicants do not. The expression was included in the legislation to put a fiscal and administrative barrier in place. While the purpose of the legislation may be paternalistic, the paternalism is subject to restraints. Those who are made subject to orders under Part 1 of the PPPRA are required to have a close and clear connection to New Zealand.

'[48] There are two factual matters which are particularly relevant to establishing Mrs PH's close and clear connection with New Zealand. The first is the factor of her New Zealand citizenship. The second is the basis on which she came to New Zealand. When reaching

agreement that Mrs PH reside in New Zealand for care, I infer that the relevant authorities must have contemplated that some financial and administrative responsibility would or might flow from that decision.

'[49] Applying the "practical approach" enunciated in *Greenfield*, I find that Mrs PH's presence is "other than casually or as a traveller", is a "continuing residence", and is "residence in New Zealand rather than anywhere else". The elements of "voluntary presence" and "intention to remain in the country for a settled purpose" are not apposite because of Mrs PH's total incapacity.

'[50] In terms of the *Vale* [*R v Waltham Forest London Borough Council, ex p Vale* (unreported, 11 February 1985)] tests, as modified in *Cornwall Council* [*R (on the application of Cornwall Council) v Secretary of State for Health* [2015] UKSC 46, [2016] 1 All ER 962], Mrs PH's physical presence in New Zealand (for a period of seven months in hospital care) and the purpose of her presence (for the assessment, treatment and care of dementia) are sufficiently settled to amount to ordinary residence.

'[51] In summary, Mrs PH is resident in New Zealand for a settled purpose and as part of the regular order of her life for the time being. There is a sufficient degree of continuity to be properly determined as settled.' *Worrall v PH* [2017] NZFC 1000, [2017] NZFLR 198 at [44]–[51], per Judge A M Manuel

ORIGINATING PROCESS

Australia '[12] Order 8 r 4 [of the Federal Court Rules] deals with leave to serve a document issued by the court, other than an originating process. The applicant relied on it in the alternative to O 8 r 3. It is not relevant because the applicant's application [for information discovery] under O 15A r 6 is an originating process. That term is defined in O 8 r 1 as follows:

"In this Order, unless the contrary intention appears:

originating process means an application commencing a proceeding, and includes a cross-claim in the proceeding against a person who was not previously a party to the proceeding".

'[13] There is a similar definition of "originating process" in O 1 r 4. The word, "proceeding", is defined in s 4 of the Federal Court Act 1976 (Cth) as follows:

“proceeding means a proceeding in a court, whether between parties or not, and includes an incidental proceeding in the course of, or in connexion with, a proceeding, and also includes an appeal”.

‘[14] An application under O 15A r 6 is a proceeding in the court, and the application itself commences the proceeding. I follow the decision of French J (as his Honour then was) on this point in *Carnegie Corporation Ltd v Pursuit Dynamics Plc* (2007) 162 FCR 375; [2007] FCA 1010 at [48]–[53] (*Carnegie Corporation*).’ *Gearhart United Pty Ltd (ACN 007 968 701) v Omni Oil Technologies (Asia) Sdn Bhd* [2010] FCA 401, (2010) 267 ALR 630 at [12]–[14], per Besanko J

ORNAMENTS

[For 14 Halsbury’s Laws of England (4th Edn) para 961 see now 34 Halsbury’s Laws of England (5th Edn) (2011) para 756.]

OUTGOINGS

[Note that 42 Halsbury’s Laws of England (4th Edn) (Reissue) para 125 is not reproduced in 23 Halsbury’s Laws of England (5th Edn) (2013).]

OUTRAGE

[For 11(2) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 764 see now 26 Halsbury’s Laws of England (5th Edn) (2016) para 826.]

OVERBREADTH

Canada [Canadian Charter of Rights and Freedoms, s 7; Criminal Code, RSC 1985, c C-46, s 83.01(1)(b)(i)(A).] ‘35 It is a principle of fundamental justice that criminal laws not be overbroad. Pursuant to s. 7 of the Charter, laws that restrict the liberty of those to whom they apply must do so in accordance with principles of fundamental justice. Criminal laws that restrict liberty more than is necessary to accomplish their goal violate principles of fundamental justice. Such laws are overbroad. The appellants Nadarajah and Sriskandarajah say that the combined effect of the definition of terrorist activity (s. 83.01(1)) and of the provision prohibiting participation in terrorist activity (s. 83.18) results in overbreadth, by criminalizing conduct that creates no risk of

harm and is only tenuously connected to Parliament’s objective of preventing terrorist activity.

‘36 I will first review the legal test for overbreadth. I will then apply this test to the definition of terrorist activity and the prohibition of participation in terrorist activity.

‘37 In *R. v. Heywood*, [1994] 3 S.C.R. 761, this Court explained that a law is overbroad if the state, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective. In determining overbreadth, a measure of deference must be paid to the means selected by the legislator.

‘38 The appellants argue that the law is overbroad because it is grossly disproportionate to the objective it seeks to achieve. The appellants conflate overbreadth and gross disproportionality. *Heywood* suggested that gross disproportionality was a concept subsumed by overbreadth: “The effect of overbreadth is that in some applications the law is arbitrary or disproportionate” (*Heywood*, at p. 793). However, gross disproportionality seemed to be recognized as a distinct breach of principles of fundamental justice in the marihuana case *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571. Some confusion arises from the fact that *Malmo-Levine*’s companion case *R. v. Clay*, 2003 SCC 75, [2003] 3 S.C.R. 735, could be read as suggesting that gross disproportionality is simply the standard by which overbreadth is measured. Indeed, this Court wrote in *Clay* that “[o]verbreadth... addresses the potential infringement of fundamental justice where the adverse effect of a legislative measure on the individuals subject to its strictures is grossly disproportionate to the state interest the legislation seeks to protect” (para. 38 (emphasis in original)).

‘39 The authorities continue to suggest that overbreadth and gross [disproportionality] are—at least analytically—distinct. Indeed, Professor Hogg refers to gross disproportionality as the “sister” doctrine of overbreadth (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at p. 47–58). Further, in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, this Court considered overbreadth and gross disproportionality under separate headings (paras. 133–35).

‘40 For the purposes of this appeal, I need not decide whether overbreadth and gross disproportionality are distinct constitutional doctrines. Certainly, these concepts are interrelated, although they may simply offer different lenses through which to consider a single breach

of the principles of fundamental justice. Overbreadth occurs when the means selected by the legislator are broader than necessary to achieve the state objective, and gross disproportionality occurs when state actions or legislative responses to a problem are “so extreme as to be disproportionate to any legitimate government interest”: *Canada (Attorney General) v. PHS Community Services Society*, at para. 133 (emphasis deleted); see also *Malmo-Levine*, at para. 143. ...

...
 ‘64 For the foregoing reasons, I conclude that s. 83.18 does not violate s. 7 of the Charter.’ *R v Khawaja* 2012 SCC 69, [2012] 3 SCR 555 at paras 35–40, 64, per McLachlin CJ

OWNER

[For 35 Halsbury’s Laws of England (4th Edn) (Reissue) para 1227–1228 see now 80 Halsbury’s Laws of England (5th Edn) (2013) paras 812–813.]

Australia [Whether a warehouse licensee was the ‘owner’ of goods within the Customs Act 1901 (Cth), s 4(1), which provides that ‘Owner in respect of goods includes any person (other than an officer of Customs) being or holding himself or herself out to be the owner, importer, exporter, consignee, agent, or person possessed of, or beneficially interested in, or having any control of, or power of disposition over the goods’.] ‘[1] The principal question in this proceeding is whether a warehouse licensee from whose warehouse dutiable goods were stolen while under control of Customs may defend a demand made under s 35A of the Customs Act 1901 (Cth) (the Act) to pay an amount equal to the duty which would have been payable had the goods been entered for home consumption on the date of the demand, on the ground that the warehouse licensee was entitled to a remission of duty under s 163 of the Act, either because it was an owner within the definition of s 4(1) of the Act who was liable to pay duty in respect of the goods under s 153 or otherwise.

...
 ‘[160] In my view, although Coyne, as a warehouse licensee had, within the meaning of s 35A of the Act, possession, custody or control of goods subject to the control of Customs which were entered for warehousing, it neither is nor was an owner within the terms of s 4(1) liable to pay duty under s 153. Nor is it entitled to a remission of duty under s 163 of the Act.

‘[161] The possession, custody or control of a warehouse licensee pre-requisite for liability under s 35A, is, when read literally and in isolation, within the definition of an owner under s 4(1), the status of which founds liability to pay duty under s 153. The relevant provisions are, however, interrelated constituents of an integrated statutory regime for the imposition and recovery of duty on imported goods. They should be construed together in the context of the legislative duty scheme as a whole, and in accordance with the established statutory goals.

...
 ‘[163] The Act imposes the liability to pay duty on imported goods on the “owner”, a term broadly defined in s 4(1) to include not only the importer, but a wide range of persons holding a specified status or relationship to the goods. Liability under s 153 has been held to attach to, and subsist concurrently in, each successive such owner until the duty is paid, either at the rate applicable on the date of importation or at the rate in force at the date of their entry for home consumption. The Act allows for the rebate, refund and remission of duty in specified circumstances, including where the goods are damaged or lost, deteriorate or are stolen while under the control of Customs.

‘[164] Upon importation, the owner must enter the goods for transshipment, for home consumption or for warehousing in a licensed warehouse. Warehousing permits the owner to postpone the payment of duty while the goods are secured from entry for home consumption in a licensed warehouse. During warehousing, the goods are dutiable but the remedy to enforce the obligation is suspended. The goods remain under the control of Customs and the owner’s access is accordingly limited. The warehouse operator is expressly obliged to keep the goods safely and to secure them from delivery for home consumption unless they have been entered for home consumption and an authority to deal with them is in force.

‘[165] By s 35A, the Act renders liable to pay an amount equivalent to duty, a person with possession, custody or control of the goods who fails to keep them safely or to satisfactorily account for them. It was not disputed that a warehouse licensee would have possession, custody or control in the relevant sense, although the application of s 35A is not limited to warehouse licensees. In [*Collector of Customs (NSW) v Southern Shipping Co Ltd* (1962) 107 CLR 279] for example, a carrier of the goods was held to have the requisite possession, custody or control.

‘[166] The extended definition of “owner” in

s 4(1) of the Act gives meaning to the term where it is used in the Act, "except where otherwise clearly intended". Its width, as the authorities recognise, serves the goal of protection of the revenue. The definition may not apply in all contexts of the Act, (as, for example, in ss 167 and 183, where the term "owner" is apparently used in a narrower and more conventional sense). Moreover, the fact that the description of a person who is not expressly designated an "owner" literally satisfies an isolated element of the definition of that term does not necessarily bring the person within the definition. It does not follow, in my view, that because the possession, custody or control of dutiable goods prerequisite for a person's liability under s 35A of the Act broadly corresponds to an element of the definition of an "owner" of goods under s 4(1), that the person is ipso facto an owner liable to pay duty under s 153 of the Act.

[167] The term "owner" used in other sections of the Act, including s 153, is not employed in s 35A. Section 35A merely sets out the circumstances which will render a person liable. The actual "possession, custody or control" specified in s 35A appears narrower than the corresponding element in the definition in s 4(1). Unlike the definition of "owner", s 35A does not refer to holding out. The words "possession" and "control" are coloured and qualified by their use in a composite phrase with "custody" and "entrusted with" in the context of the additional requirements to keep safely or account satisfactorily for the goods, which suggests the safeguarding, custodial or bailment functions traditionally characteristic of the warehouse licensee in customs legislation.' *Pearce (a collector under the Customs Act 1901) v Coyne's Freight Management Group Pty Ltd (ACN 005 283 821)* [2010] FCA 320, (2010) 267 ALR 430 at [1], [160]–[161], [163]–[167], per Dodds-Streeton J

Australia [Integrated Planning Act 1997 (Qld).] '[27] Schedule 10 to the IPA contains the dictionary for the Act. It provides:

owner, of land, means the person for the time being entitled to receive the rent for the land or would be entitled to receive the rent for it if it were let to a tenant at a rent.

'[28] Section 3.4.4(1) required QCM as the applicant for development approval to give notice of its application "to the owners of all land adjoining the land" the subject of the application. There is a separate definition of

"owner" for this section. It appears in s 3.4.4(5)(h). It is relevantly identical:

... the person for the time being entitled to receive the rent for the land or would be entitled to receive the rent for it if it were let to a tenant at a rent.

'[29] QCM did not give notice of the application to the native title claimants nor did it have their consent to its application.

'[30] Put very shortly the applicants submit that certain provisions of the Racial Discrimination Act 1975 (Cth) (the RDA), and/or the NTA [Native Title Act 1993 (Cth)] have the effect of deeming those applicants who were native title claimants owners of the land as defined by, or for the purposes of, the IPA.

...
'[41] The relevant provisions of the IPA are concerned with ensuring that notice is given to owners of land that might be affected by the development for which permission is requested, and it is the consent of owners which must accompany the application. Ownership of land, obviously, can and does change over time. The IPA is concerned with the state of ownership when an application is made. Notice must be given to owners not to those who might or might not become owners in the future. Consent is required from those who are owners, not some indeterminate class of persons, who, depending on time and circumstance, may become owners

'[42] Moreover the applicants made no attempt to prove before the primary judge what their rights in respect of the land might be. Their claim is wide in its ambit but no evidence was adduced to show what rights or interests they may actually be able to establish. That course was open to them, even on a provisional or interlocutory basis.

'[43] Not all native title rights extend to the exclusive possession of land. Those are a feature of some but not all native title rights and interests in relation to land. Toohey J pointed out in *Wik Peoples v Queensland* [(1996) 187 CLR 1 at 126–7; 141 ALR 129 at 185]:

Inconsistency can only be determined... by identifying what native title rights... upon which the appellants rely are asserted in relation to the land contained in the pastoral leases. This cannot be done by some general statement; it must "focus specifically on the traditions, customs and practices of the particular aboriginal group claiming the right"... It is apparent that at one end of the spectrum native title rights

may "approach the rights flowing from full ownership at common law" ... On the other hand they may be an entitlement "to come on to land for ceremonial purposes, all other rights in the land belonging to another group" ...

[44] Native title varies with the laws and customs of the group asserting it. The point was made in the joint judgment in *Ward* [*Western Australia v Ward* (2002) 213 CLR 1; 191 ALR 1; [2002] HCA 28]. Their Honours said:

[17] ... Several points should be made here. First, the rights and interests may be communal, group or individual rights and interests. Secondly, the rights and interests consist "in relation to land or waters". Thirdly, the rights and interests must have three characteristics: (a) they are rights and interests which are "possessed under the traditional laws acknowledged, and the traditional customs observed", by the relevant peoples; (b) by those traditional laws and customs, the peoples "have a connection with" the land ... in question; and (c) the rights and interests must be "recognised by the common law of Australia".

[18] The question in a given case whether (a) is satisfied presents a question of fact. It requires ... the identification of the laws and customs ... (and) the rights and interests in relation to land ... possessed under those laws or customs ... it is important to notice that there are two inquiries required by the statutory definition ...

[45] The applicants made no attempt to provide evidence to satisfy either inquiry. No attempt was made to identify the rights they claim on the land or their customs and laws which might give rise to those rights. They provided no basis for thinking that any native title rights they might establish will include a right to receive rent from the land.

[46] The second answer is that the rights of native title holders do not extend to a right to receive rent from the land. There is a categorical statement to this effect in the joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Ward*. Presumably the reason for that is that native title is inalienable to persons who are not members of the indigenous people who by traditional laws and customs have a relevant connection with the land, as Brennan J explained in *Mabo v Queensland (No 2)* [(1992) 175 CLR 1 at 70; 107 ALR 1 at 51].

[47] The third answer is that s 10 of the RDA has no application whether or not the native title claimants can eventually establish rights which would extend to the receipt of rent. The section requires a comparison to be made between the rights enjoyed by a member of one race and the rights enjoyed by a member of another race. Mason J explained in *Gerhardy* [*v Brown* (1985) 159 CLR 70 at 99; 57 ALR 472 at 493]:

Consequently, s 10 should be read in the light of the Convention (on the elimination of all forms of racial discrimination) as a provision which is directed to lack of enjoyment of a right arising by reason of a law whose purpose or effect is to create racial discrimination.

Where that is so, s 10 confers the right on the person who does not enjoy it pursuant to state law. The purpose of s 10 is to ensure equality of rights where, by reason of state law, there is inequality based on some racial distinction. Section 10 does not apply to those cases of inequality where the rights in question are conferred or withheld on some basis other than race.

[48] The right conferred by s 3.4.4(1) of the IPA is the right to receive notice of an application for development. Section 3.2.1(3) does not itself confer a right but it requires the owner's consent if an application is to be validly made. To that extent it confers a right to refuse consent. These two rights are enjoyed by the owners of land as defined by the IPA, those persons entitled to receive rent for the land. The entitlement is conferred upon freehold and leasehold owners of the land. Owners of other interests in land which do not include that right are not entitled to notice of development applications and their consent is irrelevant. The distinction between those whose consent is needed and those whose consent is unnecessary does not differ according to race. It is determined by proprietary rights.

[49] If, for example, the native title claimants succeeded in establishing native title which gives them a right to exclusive possession of the land and a right to receive rent for it they will be owners for the purposes of the IPA. Section 10 of the RDA will be unnecessary to bring about that result. The IPA does not confer a right on one racial group but not another. The IPA makes no distinction about the source of an entitlement to receive rent from land. If there be such a right, whether derived from native title or the ordinary incidence of

ownership, the IPA will designate the person entitled to rent an owner and confer on the owner the right to notice and to withhold consent to the development application.

‘[50] The applicants’ arguments, if accepted, would equate any native title right with the rights of freeholders and leaseholders with respect to the notice and consent provisions of the IPA. Their argument is that the IPA discriminates against them on the basis of race; their native title rights do not carry the rights conferred on owners of land under the ordinary system of land title. Therefore it is said s 10 operates to confer on them enjoyment of the same right.

‘[51] The argument, if accepted, would result in native title holders with a right to go on land once a year to perform a ceremony having the same rights under the IPA as an ordinary freeholder. But there are many interests in land under ordinary title the owners of which are not given rights by ss 3.2.1(3) or 3.4.4(1) of the IPA. Mortgagees not in possession, and owners of all incorporeal hereditaments are in that category.

‘[52] The distinction made by these sections of the IPA is not based on race but upon different proprietary interests in land. A native title holder entitled, by that right, to receive rent from land is as much protected by the IPA in terms of notice and consent as the registered proprietor of an estate in fee simple. If an ordinary title holder whose rights do not extend to the receipt of rent may be ignored by an applicant for a development permit, s 10 does not oblige an applicant to treat a native title holder not entitled to rent any differently.

‘[53] The IPA does not discriminate between holders of interests in land on the basis of race, or because one holds native title and one holds ordinary title, but on the basis of the incidence of the interest held. If the title held confers a right to receive rent the IPA insists that notice be given to the holders of that title and that they consent to the application, regardless of the type of title held.

‘[54] For these three reasons the applicants have failed to demonstrate that the RDA made them owners of the land.’ *Queensland Construction Materials Pty Ltd (ACN 002 202 548) v Redland City Council* [2010] QCA 182, (2010) 271 ALR 624 at [27]–[30], [41]–[54], per Chesterman JA and Applegarth J

Australia [Admiralty Act 1988 (Cth).] ‘[63] The term “owner” is not defined in the Admiralty Act. However, the notion of “ownership” for the purposes of s 19 of the Act was

considered by Tamberlin and Hely JJ in *Kent v SS “Maria Luisa” (No 2)* (2003) 130 FCR 12; [2003] FCAFC 93 (*Maria Luisa*). Section 19(b) concerning proceedings in rem against a surrogate ship requires the relevant person to be an “owner” of the surrogate ship at the date of commencement of the proceeding. In that case the ship *Maria Luisa* had been arrested. The registered owner of the ship was Everdene Pty Ltd which was the trustee of the *Maria Luisa* Unit Trust. The ship was an asset of the trust. The sole shareholder in the trustee entity was a company called Australian Fishing Enterprises Pty Ltd (AFE). AFE enjoyed the power to cause Everdene to terminate the trust and cause the assets of the trust including the ship to be transferred to it. AFE had not exercised the power. AFE’s interest in the ship remained a contingent defeasible interest under the trust deed. The question was whether that interest elevated AFE to an “owner” for the purposes of s 19 of the Act. At [74], Tamberlin and Hely JJ said this:

[74] The circumstance that AFE may be said in general terms to enjoy “a bundle of rights” which may enable it by a series of discrete actions to obtain ultimately possession of the ship, control its activities, and entitle it to alienate the ship, does not equate to present ownership at a particular point in time. Rather, it indicates the potential to become the owner. The bundling of a series of discrete entitlements which if exercised could lead to ownership does not satisfy the requirements of s 19.

...

‘[67] It follows that in order to be an owner of the ship at the date of commencement of the proceeding, the relevant person must enjoy “present ownership” (*Maria Luisa* at [74]) which includes the right of physical use, a power of management and a right of alienation (*Maria Luisa* at [61]) and the notion of ownership connotes dominance, ultimate control and ultimate title against the world. Ownership involves something greater than a beneficial interest in the ship. A right to a remedial order to perfect the equitable interest must also be present (whether an entitlement to a vesting order or an order for specific performance of a relevant contract). Since the term “owner” is used in the Admiralty Act in a “proprietary sense” (*Cape Moreton [Tisand Pty Ltd v Owners of the Ship MV Cape Moreton]* (2005) 143 FCR 43; 219 ALR 48; [2005] FCAFC 68] at [118]), ownership means actual

ownership which extends to a beneficial interest capable of perfection by remedial order.’ *Brisbane Slipways Operations Pty Ltd (ACN 104 531 991) v Pantaloni* [2010] FCA 654, (2010) 270 ALR 13 at [63], [67], per Greenwood J

New Zealand [Maritime Transport Act 1994, s 222(2); Resource Management Act 1991, s 2. Whether time charterer was ‘owner’.] ‘[9] Section 2 of the RMA [Resource Management Act 1991] defines “owner” as having the same meaning as in s 222(2) of the Maritime Transport Act 1994.

‘[10] Subsection (2)(a) provides (of particular relevance is subpara (iii)):

- (2) In this Part of this Act, Parts 19 to 27, and s 418 of this Act, unless the context otherwise requires, **owner**, —
 - (a) In relation to any ship (except in the circumstances, and to the extent, provided in sections 343 and 370 of this Act), includes—
 - (i) Any person who is the legal or equitable owner, or both, of the ship; and
 - (ii) Any person in possession of the ship; and in Parts 19, 20, and 21 and s 344 of this Act, includes any salvor in possession of the ship, and any servant or agent of any salvor in possession of the ship; and
 - (iii) Any charterer, manager, or operator of the ship, or any other person (other than a pilot) responsible for the navigation or management of the ship ...

... ‘[18] The appellant says that when the purpose of both the RMA and the Maritime Transport Act and the context is taken into account the reasonable interpretation is to read down the meaning of “charterer” as including only those who have a role relating to possessing, managing or operating the vessel”.

... ‘[21] I agree with the approach of the District Court Judge. In my view there is no reason to read down the meaning of “charterer”. Indeed the use of the word “any” before “charterer” in s 222(2)(a)(iii) makes it clear that what is intended is any form of charter. If what was intended was, as the appellant argues, to

limit liability only to those charters where the charterer had responsibility for the management of the ship then as the respondent says, it is difficult to understand why it would be necessary for the word “charterer” to be used at all. The remaining words of the section would adequately cover liability. The appellant did not identify any parliamentary intention to narrow the definition of charterer beyond its “ordinary” meaning. The other obvious point is that if Parliament had intended to give a narrow specific meaning to “charterer” then it could have done so. In doing so it would not have used the word “any”.

‘[22] There is also a policy logic behind this interpretation. It ensures not just those who actually operate the ship take care but also provides an incentive to those who charter a ship to ensure that the owner/operator is operating the ship to the proper standard.

‘[23] The intention of s 222(2) was to expand the ordinary meaning of “owner”. The four categories in s 222(2) of the charterer, the manager, the operator and other persons responsible for navigational management is in addition to liability for the person who is the legal or equitable owner of a ship.’ *Southern Storm (2007) Ltd v Nelson City Council* [2011] 1 NZLR 715 at [9]–[10], [18], [21]–[23], per Ronald Young J

New Zealand [Rating Valuations Act 1998, ss 2(1), 5B(3); whether a lessee was an ‘owner’ for the purposes of amalgamation.] ‘[39] As I have already indicated, the difficulty that has arisen in this case as to the apparent breadth of the definition of “owner” seems to me largely to be the result of the removal of references to “occupiers” from the Act. Until 2002, “occupier” was defined in the RVA (by incorporation of the definition in s 2 of the Rating Powers Act 1988) in the following way:

occupier, in relation to any land, means the owner thereof, except where a person other than the owner has a right to occupy the land by virtue of a tenancy granted for a term of not less than 12 months certain, in which case the term “occupier” means that other person; and includes any person having a right to occupy the land by virtue of a lease, licence, or other authority to which s 4 of this Act applies:

‘[40] Accordingly, in the pre-2002 legislation, although the occupier and owner would often be

the same person, a clear legislative distinction was drawn between an “owner” (as defined) and a person having a (long-term) “right to occupy the land by virtue of a lease, licence, or other authority”. In light of that distinction any argument that because a leasehold occupier could be said to possess an “interest in land” he might also fall within the definition of “owner” would have been absurd and simply did not arise.

[41] The problem now is that this very clear interpretive signal has been removed from the statute. I therefore have considerable sympathy for the conclusion reached by the Tribunal: on its face, the statutory definition of “owner” suggests that Andrew and Margaret Cryer could be said to “own” the land in which they have merely a leasehold interest.

[42] The question therefore becomes whether the standard qualifying words that precede all the definitions in s 2 of the RVA mean that a narrower interpretation of “owner”

should be adopted. This issue—whether “the context ... requires” a different meaning of “owner” from that contained in s 2—does not seem to have been directly argued before or considered by the Tribunal.

...

[47] In the present case, I have already noted that the legislative history supports the narrower interpretation contended for now by the appellant and the Valuer-General. I accept that the policy underlying the 2002 reforms also suggests such an interpretation.

...

[57] I consider that all the above matters in combination are strongly suggestive of an interpretation of the word “owner” in s 5B and r 5.4.1 that is narrower than the s 2 definition would on its face demand. This seems to me to be a case where context does require the statutory definition to be displaced.’ *Franklin District Council v Cryer* [2011] 1 NZLR 529 at [39]–[42], [47], [57], per Ellis J

P

PAID REST BREAKS

New Zealand [Employment Relations Act 2000, s 69ZD.] '[1] This appeal concerns the meaning of the phrase "paid rest breaks" in s 69ZD of the Employment Relations Act 2000 (the ERA). In the Employment Court Judge Corkill found the section required rest breaks to be paid "at the same rate for which the employee would be paid to work".

...
[12] We turn first to consider whether there is a clear meaning for the words of s 69ZD. The text of s 69ZD indicates nothing more than a payment being made for the 10-minute rest break. The word "paid" is not qualified or explained. Theoretically a payment of one cent could meet the requirement as there would be a sum "paid". Obviously that is not the intended meaning. On the other hand the section concerns the "employee's work period". The entitlement for a "paid rest break" arises when an employee has been working for more than a certain period of time. Given that the required "break" is from the employee's "work" and it is to be "paid", a natural inference is that what is to be paid for the break is that which is being paid for the work at the time. The worker is paid through the break as if it had not been taken.

...
[23] We conclude that the Employment Court did not err in its finding. Indeed we agree with Judge Corkill's reasoning. The relevant provisions of Part 6D of the ERA required rest breaks to be paid at the same rate for which the employee would be paid to work.' *Lean Meats Oamaru Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2016] NZCA 495, (2016) 14 NZLR 379 at [1], [12], [23], per Asher J

PAID-UP

[The Companies Act 1985, s 83(2) has been repealed by the Companies Act 2006 and the definition is not reproduced in the 2006 Act. Cf now the following:
(2) A share in a company is deemed paid up

(as to its nominal value or any premium on it) in cash, or allotted for cash, if the consideration received for the allotment or payment up is a cash consideration.

- (3) A 'cash consideration' means—
- (a) cash received by the company,
 - (b) a cheque received by the company in good faith that the directors have no reason for suspecting will not be paid,
 - (c) a release of a liability of the company for a liquidated sum,
 - (d) an undertaking to pay cash to the company at a future date, or
 - (e) payment by any other means giving rise to a present or future entitlement (of the company or a person acting on the company's behalf) to a payment, or credit equivalent to payment, in cash.

(Companies Act 2006, s 583(2), (3).]

PANNAGE

[For 6 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 415 see now 13 Halsbury's Laws of England (5th Edn) (2017) para 309.]

PARAPHERNALIA

[For 29(3) Halsbury's Laws of England (4th Edn) (Reissue) para 194 see now 72 Halsbury's Laws of England (5th Edn) (2009) para 246. Note that this paragraph is not reproduced in 72 Halsbury's Laws (5th Edn) (2015).]

PARENT

'[1] The issue which I have to determine is whether the respondent is a parent under Sch 1 to the Children Act 1989 (the 1989 Act) so that the court has jurisdiction to make an order against her for financial relief. ...

'[3] The respondent contends that she is not a parent for the purposes of Sch 1 because it is confined to those who have the status of parent or are within the extended definition contained within para 16. The applicant contends that Sch 1 is not confined to those who have the status of parent but permits the application of a fact-sensitive, welfare informed, approach to the determination of who is a parent within the scope of Sch 1. On the application of such an approach, the applicant submits that the respondent is a parent.

...
[5] The applicant and the respondent, who

are both female, began a relationship in 1994. They lived together from 1994 until 2007. They have not entered into a civil partnership. The applicant became pregnant by artificial insemination from an unknown donor through an authorised clinic. This followed a joint application by the applicant and the respondent for the applicant to receive treatment by way of artificial insemination. A child was born to the applicant in 2000 as a result of this treatment.

‘[6] Following the end of the relationship and their separation, the respondent issued an application for residence and contact. On 14 January 2009 the court made a shared residence order. ...

‘[9] It can be seen that substantive orders [under the Children Act 1989, s 15, Sch 1] can only be made against a “parent”. Paragraph 16 defines parent for the purposes of the Schedule (save for paras 2 and 15):

“ ‘parent’ includes—(a) any party to a marriage (whether or not subsisting) in relation to whom the child concerned is a child of the family, and (b) any civil partner in a civil partnership (whether or not subsisting) in relation to whom the child concerned is a child of the family ...”

Paragraph 2 gives the court power, in certain circumstances, to make an order for financial relief against a parent on an application by a child who has reached the age of 18. Accordingly, the court cannot make an order under para 2 against a party to a marriage or a civil partner in a civil partnership in relation to whom the child has been a child of the family but only against a parent.

‘[11] There is no definition of the word “parent” in the 1989 Act other than that contained in Sch 1. It is though, of course, a word that appears in other provisions including, for example, s 1(3)(f) of the welfare checklist which requires the court to have regard to “how capable each of his parents ... is of meeting his needs” and s 10(4)(a) which gives “any parent” the right to apply for any s 8 order.

‘[54] It is clear to me that the respondent is a parent of the child in this case in the third way identified by Baroness Hale in *Re G (children) (residence: same-sex partner)* [[2006] UKHL 43, [2006] 4 All ER 241, [2006] 1 WLR 2305], namely as a social and psychological parent. She is a social and psychological parent as a result of her relationship with the child and the

child’s relationship with her. However, as Baroness Hale also notes, there is a difference between a “natural” parent, as defined by her, and a legal parent.

‘[55] The question I have to answer is whether, as a matter of statutory interpretation, a parent against whom an order for financial provision for a child can be made under Sch 1 is:

- (a) confined to legal parents—ie biological parents and those who have become a parent by operation of law such as by adoption, under the 1990 Act or under the [Human Fertilisation and Embryology Act 2008]—and those otherwise included by para 16; or,
- (b) whether it extends, as submitted by Mr Goldrein, to include any person who has acquired parental responsibility (by virtue of an order) or who is a social and psychological parent, a “natural parent” as described by Baroness Hale in *Re G (children) (residence: same-sex partner)*.

‘[56] There are clearly advantages to each outcome. As Mr Goldrein submits, a broader interpretation would enable the court to require those who objectively should contribute financially for a child to contribute. On the other hand, as Mr Hyde submits, this would create considerable uncertainty because the boundaries of such a determination would be unclear and essentially discretionary.

‘[57] I have come to the clear conclusion that those against whom orders can be made under Sch 1 are confined to those who are a parent in the legal meaning of that word. I have come to that conclusion because in my view, as a matter of statutory interpretation, Sch 1 is confined to those who have the status of parent (as expressly extended by para 16). It is not in my view a discretionary welfare informed decision, as submitted by Mr Goldrein, but a matter of status. ...

‘[67] In conclusion, in my view, the word “parent” in Sch 1 means legal parent. As I have just said, it is also my view that it is for the legislature to determine who should be liable to financial claims for the benefit of children and in particular the extent to which it includes those who are not the legal parents of children but are either to be treated as parents or are otherwise to be made liable. It is not for the courts to determine, by reference to an essentially discretionary test, that a person should in the circumstances of the particular case be treated as a parent and thereby potentially have the financial obligations

imposed by Sch 1.’ *T v B* [2010] EWHC 1444 (Fam), [2011] 1 All ER 77 at [1], [3], [5]–[6], [9], [11], [54]–[57], [67], per Moylan J

Australia [Australian Citizenship Act 2007 (Cth), s 16.] ‘[24] The minister’s contention in both appeals was that “parent” in s 16(2)(a) of the Citizenship Act meant only biological parent, although the minister acknowledged in argument that, in the special case of artificial conception, parenthood might not be biological parenthood. Counsel for the minister defined biological parent during oral submissions as “a person who supplied the biological material, either the sperm or the ovum that produces the child”.

‘[127] There is nothing in the legislative object, the legislative text, or the legislative structure of the Citizenship Act that requires the court to conclude that, in the specific context of s 16(2), the word “parent” only can mean biological parent. Indeed, these considerations indicate that the better view is that the word “parent” in s 16(2) has the meaning it bears in ordinary contemporary English usage. Indeed, legislative history confirms that this approach is most in keeping with the development of citizenship legislation over time and with the spirit and intent of the current Citizenship Act. No sound reason has been advanced to warrant a more limited reading of the word.

‘[128] The word “parent” is an everyday word in the English language, expressive both of status and relationship to another. Today, as the Citizenship Act itself recognises, not all parents become parents in the same way: see, for example, s 8 of the Citizenship Act; *H v J* (2006) 205 FLR 464 at 466; [2006] FamCA 1398, citing *Re Patrick* (2002) 28 Fam LR 579; 168 FLR 6; [2002] FamCA 193 at [323] and [325] per Guest J. This is not to say that parents do not share common characteristics; everyday use of the word indicates that they do.

‘[129] Being a parent within the ordinary meaning of the word may depend on various factors, including social, legal and biological. Once, in the case of an illegitimate child, biological connection was not enough; today, biological connection in specific instances may not be enough: s 8 of the Citizenship Act referring to ss 60H and 60HB of the Family Law Act, in turn picking up prescribed state and territory laws such as the Status of Children Act. Perhaps in the typical case, almost all the relevant considerations, whether biological, legal, or social, will point to the same persons as being the “parents” of a person. Typically,

parentage is not just a matter of biology but of intense commitment to another, expressed by acknowledging that other person as one’s own and treating him or her as one’s own.

‘[130] The ordinary meaning of the word “parent” is, however, clearly a question of fact, as is the question whether a particular person qualifies as a parent within that ordinary meaning. Applying s 16(2)(a), the tribunal is bound to determine whether or not, at the time of the applicant’s birth, he or she had a citizen parent. In deciding whether a person can be properly described as the applicant’s parent, the tribunal is obliged to consider the evidence before it, including evidence as to the supposed parent’s conduct before and at the time of birth and evidence as to the conduct of any other person who may be supposed to have had some relevant knowledge. Evidence as to conduct after the birth may be relevant as confirming that parentage at the time of birth. For example, evidence that a person acknowledged the applicant as his own before and at the time of birth and, thereafter, treated the applicant as his own, may justify a finding that that person was a parent of the applicant within the ordinary meaning of the word “parent” at the time of the birth. In the case of Ms McMullen, this was in substance the conclusion reached by the tribunal with regard to Mr McMullen. The minister has not shown any relevant error in the tribunal’s finding that Mr McMullen could qualify as Ms McMullen’s Australian citizen parent for the purpose of s 16(2)(a) of the Citizenship Act.

‘[131] We can discern no relevant justification for holding, as the tribunal did in *NWH*’s case, that a person can only be a “parent” within the meaning of s 16(2) where it can be established that he or she has a relevant genetic link to the applicant. If the minister’s argument in this case were accepted, a person could be treated as a citizen from birth and believe himself to be a citizen, only to find years later, based on DNA test undertaken for other reasons, that under the law he is not and never was a citizen: see Citizenship Act, ss 16(2)(a), 17(1A), 19A. As a practical matter, we do not consider that parliament would have intended the likely unfortunate results of the minister’s construction: see [79]. The practical effect of this construction would be to accord the science of genetics a status that parliament has not given it.’ *H v Minister for Immigration and Citizenship* (NSD 1320 of 2009) [2010] FCAFC 119, (2010) 272 ALR 605 at [24], [127]–[131], per Moore, Kenny and Tracey JJ

PARISH

[For 14 Halsbury's Laws of England (4th Edn) paras 534–535 see now 34 Halsbury's Laws of England (5th Edn) (2011) paras 262–263.]

[Note that the Pastoral Measure 1983 is repealed as from 1 July 2012 by the Mission and Pastoral Measure 2011, s 111, Sch 9.]

'Parish' means, except in sections 21(2)(g) [interested parties for purposes of draft proposals relating to pastoral church buildings scheme] and 62(4) [service of draft pastoral (church buildings disposal) scheme], a parish constituted for ecclesiastical purposes, and does not include a conventional district. (Mission and Pastoral Measure 2011, s 105(1))

PARISH COUNCIL

[For 29(1) Halsbury's Laws of England (4th Edn) (Reissue) para 35 see now 69 Halsbury's Laws of England (5th Edn) (2009) para 33.]

PARISH MEETING

[For 29(1) Halsbury's Laws of England (4th Edn) (Reissue) para 37 see now 69 Halsbury's Laws of England (5th Edn) (2009) para 34.]

PARLIAMENT

[For 34 Halsbury's Laws of England (4th Edn) (Reissue) paras 501, 527–528, 533, 533A see now 78 Halsbury's Laws of England (5th Edn) (2010) paras 801, 828–829, 834–835.]

PAROCHIAL CHURCH COUNCIL

[For 14 Halsbury's Laws of England (4th Edn) para 569 see now 34 Halsbury's Laws of England (5th Edn) (2011) para 300.]

PARSONAGE HOUSE

[Note that the Pastoral Measure 1983 is repealed as from 1 July 2012 by the Mission and Pastoral Measure 2011, s 111, Sch 9. The definition of 'parsonage house', in the same terms as before, is now contained in the 2011 Measure, s 106(1).]

PART 36 OFFER

[CPR Pt 36.] '[10] The issue in the present case is whether the offer paragraph creates a time-limited offer. By a time-limited offer, I

mean one which the offeror has stated must be accepted within a specified time and so that, if not accepted within the stated period, it comes to an end. In the present case, the offer paragraph states that "the offer will be open for 21 days" from the date of the offer letter. It is clear, I think, that viewed apart from Pt 36, the offer paragraph would be a time-limited offer. What else, it might be asked, could those words mean?

'[13] At this point, I identify an issue which is of importance in construing the offer paragraph. It is whether a time-limited offer is capable of constituting a Pt 36 offer. ...

'[27] In my judgment, a time-limited offer, as I have described it, is not capable of being a Pt 36 offer. I consider that the structure of Pt 36 in general and the provisions of r 36.2(2) and r 36.14(6) in particular, establish that an offer must be capable of acceptance unless and until withdrawn by service of a notice within r 36.9(2), although an offer may also be changed; but if its terms are less advantageous, the costs sanctions under r 36.14(6) do not apply.' *C v D* [2010] EWHC 2940 (Ch), [2011] 2 All ER 404 at [10], [13], [27], per Warren J

PART OF THE EXTERIOR OF THE FRONT HALL

[Landlord and Tenant Act 1985, s 11(1A). Repairing covenant implied into a subtenancy of a residential flat.] '[14] In a case such as this, where the "dwelling-house" in question forms "part only of a building", s 11(1A)(a) requires s 11(1)(a) to be read as if it required a landlord "to keep in repair the structure and exterior of any part of the building in which [he] has an estate or interest". As Lewison LJ said in para [6] of his judgment, when discussing the argument then advanced by counsel then appearing for Mr Kumarasamy:

"He argues that the extended covenant only applies to a part of the building in which Mr Kumarasamy has an estate or interest. The word 'building' in section 11(1A)(a) is not defined, and should be given its ordinary dictionary meaning of 'structure with a roof and walls'. The paved area in which Mr Edwards sustained his accident does not fall within this definition. I agree that, viewed on its own, the paved area where Mr Edwards tripped is not itself a building. But that is not the statutory question. The statutory question is whether

the paved area is part of the *structure or exterior* of part of the building in which Mr Kumarasamy has an estate or interest ... In my judgment Mr Kumarasamy's legal easement over the front hall means that the front hall is a part of a building in which he has an estate or interest.'

[15] In the light of that analysis this appeal raises three questions. The first is whether, to quote again from Lewison LJ, "the paved area which leads from the front door to the car park [can] be described as part of the exterior of the front hall" within s 11(1A)(a). The second question is whether Mr Kumarasamy had an "estate or interest" in the front hall within s 11(1A)(a). The third question is whether Mr Kumarasamy could be liable to Mr Edwards for the disrepair in question notwithstanding that he had had no notice of the disrepair in the paved area before Mr Edwards's accident.

[17] In my view, it is not possible, as a matter of ordinary language, to describe a path leading from a car park (which serves the building and can be said to be within its curtilage) to the entrance door which opens directly onto the front hall of a building, as "part of the exterior of the front hall". It is hard to see how a feature which is not in any normal sense part of a building and lies wholly outside that building, and in particular outside the floors, ceilings, walls and doors which encase the front hall of the building, can fairly be described as part of the exterior of that front hall. The paved area may be said to abut the immediate exterior of the front hall, but it is not part of the exterior of the front hall, as a matter of normal English. Unless the natural meaning of the words of a statutory provision produces a nonsensical result, or a result which is inconsistent with the intention of the legislation concerned, as gathered from admissible material, the words must be given their ordinary meaning. (I should perhaps add that in many cases, particularly when the words are read in their context, they can have more than one ordinary meaning, and it is then for the court to decide which of those meanings is correct.)' *Edwards v Kumarasamy* [2016] UKSC 40, [2017] 2 All ER 624 at [14]–[15], [17], per Lord Neuberger P

PARTICIPATE

Participate in any treatment

[Abortion Act 1967, s 4(1): 'Subject to subsection (2) of this section, no person shall be

under any duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this Act to which he has a conscientious objection'.] '[28] We have been presented with a spectrum of constructions of "participating in any treatment authorised by this Act to which he has a conscientious objection". This must be read together with s 1 of the Act, which prescribes the conditions under which a pregnancy may lawfully be terminated. As was pointed out in the *Royal College of Nursing* case [*Royal College of Nursing of the UK v Dept of Health and Social Security* [1981] 1 All ER 545, [1981] AC 800, HL], although s 1(1) does not use the term "treatment" at all, the termination of pregnancy must be the treatment referred to in s 4.

[29] However, no-one suggests that the conscience clause is limited to the actual ending of the pregnancy, that is, when the pregnancy comes to an end because the woman has been delivered of the foetus. In a surgical termination of pregnancy, the events are simultaneous, but in a medical termination, they are not. In a medical termination, it would make no sense to make lawful the ending of the pregnancy without also making lawful the prescribing and administration of the drugs which bring that termination about. Rather, at one end of the spectrum, the Royal College of Midwives argue that the "treatment authorised by this Act" is limited to the treatment which actually causes the termination, that is, the administration of the drugs which induce premature labour. It does not extend to the care of the woman during labour, or to the delivery of the foetus, placenta and membrane, or to anything that happens after that.

[31] At the other end of the spectrum, the petitioners argue that they have the right to object to any involvement with patients in connection with the termination of pregnancy to which they personally have a conscientious objection. The exercise of conscience is an internal matter which each person must work out for herself. It is bound to be subjective. In their case, as practising Roman Catholics, their objections extend to receiving and dealing with the initial telephone call booking the patient into the Labour Ward, to the admission of the patient, to assigning the midwife to look after the patient, to the supervision of the staff looking after the patient, both before and after the procedure, as well as to the direct provision of any care for those patients, apart from that which they are required to perform under s 4(2).

...
 '[33] This is, as already stated, a pure question of statutory construction. Section 4(1) of the 1967 Act refers to "treatment authorised by this Act" but s 1(1) does not in so many words refer to "treatment" at all. Nevertheless, the section is headed "Medical termination of pregnancy". Section 1(1) makes lawful the termination of a pregnancy by a registered medical practitioner in certain circumstances. Section 1(4) also refers to the termination of a pregnancy by a registered medical practitioner and modifies the circumstances in which it is lawful. Section 1(3) refers to "any treatment for the termination of a pregnancy". Hence, as the House of Lords decided in the *Royal College of Nursing* case, what is authorised by the Act is *the whole course of medical treatment bringing about the ending of the pregnancy*. By virtue of s 5(2), any other conduct which is prohibited by ss 58 and 59 of the Offences against the Persons Act 1861 in England and Wales or by any rule of law in Scotland remains a criminal offence.

'[34] Thus I would agree with the appellants that the course of treatment to which the petitioners may object is the whole course of medical treatment bringing about the termination of the pregnancy. It begins with the administration of the drugs designed to induce labour and normally ends with the ending of the pregnancy by delivery of the foetus, placenta and membrane. It would also, in my view, include the medical and nursing care which is connected with the process of undergoing labour and giving birth—the monitoring of the progress of labour, the administration of pain relief, the giving of advice and support to the patient who is going through it all, the delivery of the foetus, which may require the assistance of forceps or an episiotomy, or in some cases an emergency caesarian section, and the disposal of the foetus, placenta and membrane. In some cases, there may be specific aftercare which is required as a result of the process of giving birth, such as the repair of an episiotomy. But the ordinary nursing and pastoral care of a patient who has just given birth was not unlawful before the 1967 Act and thus was not made lawful by it.

'[35] These conclusions are supported by the exception in s 4(2), which provides that the right of conscientious objection does not affect any duty to participate in treatment which is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman. One would expect this duty to cover any medical and nursing care during the process of termination and delivery

which was necessary for those purposes.

...
 '[37] The more difficult question is what is meant by "to participate in" the course of treatment in question. The employers accept that it could have a broad or a narrow meaning. On any view, it would not cover things done before the course of treatment began, such as making the booking before the first drug is administered. But a broad meaning might cover things done in connection with that treatment after it had begun, such as assigning staff to work with the patient, supervising and supporting such staff, and keeping a managerial eye on all the patients in the ward, including any undergoing a termination. A narrow meaning would restrict it to "actually taking part", that is actually performing the tasks involved in the course of treatment.

'[38] In my view, the narrow meaning is more likely to have been in the contemplation of Parliament when the Act was passed. The focus of s 4 is on the acts made lawful by s 1. It is unlikely that, in enacting the conscience clause, Parliament had in mind the host of ancillary, administrative and managerial tasks that might be associated with those acts. Parliament will not have had in mind the hospital managers who decide to offer an abortion service, the administrators who decide how best that service can be organised within the hospital (for example, by assigning some terminations to the Labour Ward, some to the Fetal Medicine Unit and some to the Gynaecology Ward), the caterers who provide the patients with food, and the cleaners who provide them with a safe and hygienic environment. Yet all may be said in some way to be facilitating the carrying out of the treatment involved. The managerial and supervisory tasks carried out by the Labour Ward Co-ordinators are closer to these roles than they are to the role of providing the treatment which brings about the termination of the pregnancy. "Participate" in my view means taking part in a "hands-on" capacity.' *Doogan v Greater Glasgow Health Board* [2014] UKSC 68, [2015] 2 All ER 1 at [28]–[29], [31], [33]–[35], [37]–[38], per Lady Hale DP

PARTICIPATOR

[For the Income and Corporation Taxes Act 1988, s 417(1) see now the Corporation Tax Act 2010, s 454(1), (2).]

PARTISAN POLITICAL VIEWS

[The Education Act 1996, s 406 is headed 'Political indoctrination' and requires the local

education authority, governing body and head teachers to forbid the promotion of ‘partisan political views’ in the teaching of any subject in the school.] ‘[11]... Although there was some earlier suggestion on behalf of the defendant that “*partisan*” might relate to “party political”, it soon became clear that it could not be and is not so limited. Mr Downes pointed to dictionary definitions suggesting the relevance of commitment, or adherence to a cause. In my judgment, the best synonym for it might be “one sided”. Mr Downes, in para 27 of his skeleton argument, helpfully suggested that there were factors that could be considered by a court in determining whether the expression or promotion of a particular view could evidence or indicate “*partisan promotion*” of those views:

- “(i) A superficial treatment of the subject matter typified by portraying factual or philosophical premises as being self-evident or trite with insufficient explanation or justification and without any indication that they may be the subject of legitimate controversy; the misleading use of scientific data; misrepresentations and half-truths; and one-sidedness.
- (ii) The deployment of material in such a way as to prevent pupils meaningfully testing the veracity of the material and forming an independent understanding as to how reliable it is.
- (iii) The exaltation of protagonists and their motives coupled with the demonisation of opponents and their motives.
- (iv) The derivation of a moral expedient from assumed consequences requiring the viewer to adopt a particular view and course of action in order to do ‘right’ as opposed to ‘wrong’.”

This is clearly a useful analysis.’ *R (on the application of Dimmock) v Secretary of State for Education and Skills* [2007] EWHC 2288 (Admin), [2008] 1 All ER 367 at [11], per Burton J

PARTITION

[For 39(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 215 see now 87 Halsbury’s Laws of England (5th Edn) (2017) para 222.]

PARTNERSHIP

[For 35 Halsbury’s Laws of England (4th Edn) (Reissue) para 2 see now 79 Halsbury’s Laws of England (5th Edn) (2014) para 4.]

PARTY

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

Same parties

‘[4]... The point of law which arises on this appeal is whether the parties to the English proceedings and the parties to the Cyprus proceedings are the “same parties” for the purposes of art 27 of Council Regulation (EC) 44/2001 (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) (OJ 2001 L12 p 1) (the Judgments Regulation), which gives priority to the courts of the member state which is first seised.

‘[41] The principal questions which arise on this appeal are these. First, what is the critical date for determining whether “proceedings ... between the same parties are brought in the courts of different Member States”, and does art 27 apply where the assignee has become a party to the first set of proceedings only after the second proceedings have been commenced? Second, does the “good arguable case” test apply to determine whether parties are “the same parties” for the purpose of art 27, and, if so, how should it be applied? Third, when, if at all, is an assignee to be regarded as the same party as an assignor?

‘[44] I agree with the judge’s conclusion that the critical question is whether, at the time the Cyprus proceedings were begun on 14 February 2007, there were then in existence two sets of proceedings involving the same cause of action and between “the same parties” within the meaning of art 27 of the Judgments Regulation. If on 14 February 2007 there were two sets of proceedings involving the same cause of action and the same parties, then the subsequent substitution of Kolden for the original claimants would not matter.

‘[45] The fact that as a matter of English law Kolden only became party to the English action when it was substituted is irrelevant. The relevant question is whether Kolden and the original claimants are to be regarded as the “same party” for the purposes of art 27. If they are, then the English court was and remains first seised of the proceedings between the original claimants (and later, by substitution, Kolden) and the appellants.

‘[54] The appellants say that the interests of a (purported) assignor and (purported) assignee

are neither “identical” nor “indissociable”. First, a valid assignment operates merely to transfer the benefit of a contract or the rights arising thereunder but it does not operate to transfer the burden. Second, the assignor continues to remain primarily liable to the obligor for the non-performance of its outstanding contractual obligations. Third, the assignors can influence proceedings involving the assignees. Kolden is suing in its own name and there is nothing to prevent the original claimants from becoming parties to the proceedings again, either by being added as claimants (eg in response to the contention that the assignment is invalid) or by being added as defendants by counterclaim.

[55] The appellants also say: (1) The particulars of claim (especially para 37(g) ..., and which pleaded that the sellers, and Kolden, had a legitimate interest in preventing the appellants from profiting from their breach of obligation) showed that Kolden was claiming damage to itself. If Kolden had simply taken the assignment and not been substituted, the appellants would have filed proceedings in Cyprus (as they have done at present) challenging the validity of the alleged assignment, and this could have caused any subsequent English proceedings to be stayed pursuant to art 28 of the Judgments Regulation. (2) The amended claim form is fundamentally flawed in that it fails to identify any cause of action by Kolden against the appellants. It does not plead the (purported) assignment and thus does not disclose any cause of action in favour of Kolden, contrary to CPR 16.2. Kolden’s purported rights derive from an alleged unpleaded assignment and not from any alleged breach nor the SPAs themselves.

[56] Kolden says that the original claimants and Kolden are the same parties. First, judgment against Kolden would constitute *res judicata* against the original claimants, and vice versa: see *Gleeson v J Wippell & Co Ltd* [1977] 3 All ER 54, [1977] 1 WLR 510. Second, as regards (a) the rights of the assignee and assignor, and (b) the claims brought on the basis of those rights by the assignee and assignor, there is an identity of interest in the precise sense that there is only one interest. That is in the nature of assignment: there is only one right, and there are successive owners of that one right. Third, after the assignment, the original claimants cannot influence the proceedings.

[57] Kolden also says that the fact that an assignment only passes the benefit and not the burden of a contract (and that the assignor remains primarily liable to the obligor for the non-performance of its outstanding contractual

obligations) is irrelevant. There are no “outstanding contractual obligations” on the part of the original claimants. It is the appellants who continue to have an obligation under the SPAs to transfer the Maltsovsky shares immediately onwards to JV (or to pay damages for breach of that obligation).

[58] I come to my conclusions on this aspect of the appeal. The rulings in *The Maciej Rataj, Tatry (cargo owners) v Maciej Rataj* Case C-406/92 [1995] All ER (EC) 229, [1994] ECR I-5439 and *Drouot Assurances SA v Consolidated Metallurgical Industries* Case C-351/96 [1998] All ER (EC) 483, [1998] ECR I-3075 are very fact-specific, and it is necessary to deal with the rulings in some detail to extract the principles.

...
[85] The starting point is that these general propositions can be derived from *The Tatry* and the *Drouot* case. First, the object of art 27 is to prevent parallel proceedings in different member states and to avoid conflicts between decisions and irreconcilable judgments: see *The Tatry* (para 32), the *Drouot* case (para 17). Second, the term between “the same parties” has an independent or autonomous meaning: see *The Tatry* (para 47). Third, in considering whether two entities are the “same party” for the purposes of applying the regulation, the court looks to the substance, and not the form: see *The Tatry*. Fourth, although the parties must be “identical” (see *The Tatry* (para 33), the *Drouot* case (para 18)), this identity is not destroyed by the mere fact of there being separate legal entities involved: in *The Tatry* in the English proceedings the party was the sister ship, and in the Dutch proceedings was the shipowner; in the *Drouot* case the barge owner and the hull insurer were held to be capable of being the “same parties”. Fifth, whether they are identical for this purpose may depend on whether there is such a degree of identity between the interests of the entities that a judgment given against one of them would have the force of *res judicata* as against the other: see the *Drouot* case (para 19). Sixth, it will also depend on whether the interests of the entities are identical and indissociable, and it is for the national court to ascertain whether this is in fact the case: see the *Drouot* case (para 23). In the context of a subrogated claim the court also emphasised that the insured would not be in a position to influence the proceedings: see the *Drouot* case (para 19). *Kolden Holdings Ltd v Rodette Commerce Ltd* [2008] EWCA Civ 1468, [2008] 3 All ER 612 at [4], [41], [44], [54–58], [85], per Lawrence Collins LJ

PARTY-WALL

[For 4(1) Halsbury’s Laws of England (4th Edn) (2002 Reissue) para 962 see now 4 Halsbury’s Laws of England (5th Edn) (2011) para 365.]

PASSENGER

In aeroplane

[Carriage by Air Acts (Application of Provisions) Order 1967, SI 1967/480, Sch 1 Pt III arts 1, 17, 24(1), 29 (the whole order revoked by the Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899 art 9, Sch 4, as from 6 August 2004). ‘[60] Mr Davey submits that a “passenger” within the meaning of art 17 must be in an aircraft for the predominant purpose of being conveyed from one place to another. He says that the predominant purpose of the claimant being carried in the hot-air balloon was recreational (the enjoyment of the view and the experience as a whole) and not being conveyed from one place to another. The normal purpose of travelling in an aircraft is to be conveyed from one place to another. The normal use of an air balloon is purely recreational. Moreover, a hot-air balloon is inherently unsuitable as a means of being conveyed from one place to another as it is incapable of direction.

‘[61] The term “passenger” is not defined by the 1967 Order or the convention [the Warsaw Convention as amended at The Hague, 1955, as further amended by Protocol No 4 of Montreal, 1975]. As Buxton LJ said in *Disley v Levine* [2002] 1 WLR 785 at [70], the rule of purposive construction requires the concept of “passenger” to be looked at in the context of the convention as a whole. I do not think that it is disputed that, in the context of the convention as a whole, a “passenger” is someone (i) who is not regarded as contributing to the carriage of himself or the other persons on board (see *Fellowes (or Herd) v Clyde Helicopters Ltd* [1997] 1 All ER 775 at 781 and 786–787, [1997] AC 534 at 542 and 548) and (ii) who is on the aircraft for the predominant purpose of being conveyed from one place to another (see *Disley v Levine* [2002] 1 WLR 785 at [67] and [70]–[74]). Obvious examples of persons who are carried on aircraft, but not as passengers, are trainee pilots (who are being carried for the purpose of receiving instruction) and pilots, stewards and other members of the crew (who are being carried for the purposes of carrying other persons).

‘[62] I agree with what the judge said at [41]–[43] of his judgment. The claimant was

undoubtedly being carried in the balloon at the material time and was not himself making any contribution to the process of flying. The fact that the claimant just went for the ride and the destination was to a large extent unpredictable was immaterial to whether he was carried as a passenger. The predominant purpose of the journey was to be carried by air from the starting point to the destination point, wherever that turned out to be. The claimant did not know precisely where the destination point would be, but that did not prevent him from being carried as a passenger. A person who pays to be carried on a conventional aeroplane “magical mystery tour” has no idea where the flight will end. That is the whole point of such a tour. But that does not mean that he is not carried as a passenger. I can find nothing in the convention or Sch 1 to indicate that such a person is not a passenger. If he is not a passenger, what is he? No plausible alternative description was provided by Mr Davey.

‘[63] In my view, the judge was right to hold that the claimant was a “passenger” within the meaning of art 17 of Sch 1. He was not a member of the crew. Unlike Miss Disley in *Disley v Levine*, he did not contribute to the flight in any way. He was not on board as a pilot under instruction. His role was even more passive than that of Sergeant Herd in *Fellowes (or Herd) v Clyde Helicopters Ltd*, who was held to be a passenger although he was on board the helicopter directing the surveillance operations and giving necessary instructions to the pilot. As between the carrier and the carried, the purpose of the carriage of Sergeant Herd was for him to be carried as a passenger. As between the claimant and the defendant, the purpose of the hot-air balloon flight was to carry the claimant as a passenger. The fact that the claimant was to be carried from one place to another by hot-air balloon for pleasure or reasons of recreation did not mean that he was not carried as a passenger. In this respect, his case stands on the same footing as that of a person carried by conventional aeroplane on a magical mystery tour.’ *Laroche v Spirit of Adventure (UK) Ltd* [2009] EWCA Civ 12, [2009] 2 All ER 175 at [60]–[63], per Dyson LJ

PASTURE

Common of pasture

[For 6 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 409 see now 13 Halsbury’s Laws of England (5th Edn) (2017) para 331,

and for 6 Halsbury's Laws of England (4th Edn) (2003 Reissue) paras 452–464 see now 13 Halsbury's Laws of England (5th Edn) (2017) paras 332–355.]

PATENT

[For 35 Halsbury's Laws of England (4th Edn) (Reissue) para 303 see now 79 Halsbury's Laws of England (5th Edn) (2014) para 303.]

The term 'patent' (short for 'letters patent') is derived from the fact that the forms of grant were *litterae patentes*, or open letters, being addressed to all to whom they may come. The term now bears none of its original meaning and the 'grant' is purely notional. (79 Halsbury's Laws of England (5th Edn) (2014) para 303n)

PATENTABLE INVENTION

Australia [Patents Act 1990 (Cth), s 18.] '[286] Assuming that all other requirements for patentability are met, a method (or process) for medical treatment of the human body which is capable of satisfying the *NRDC* case [*National Research Development Corp v Commissioner of Patents* (1959) 102 CLR 252; [1960] ALR 114] test, namely that it is a contribution to a useful art having economic utility, can be a manner of manufacture and hence a patentable invention within the meaning of s 18(1)(a) of the 1990 Act.

...
[290] Drawing on jurisprudence in Europe and the United Kingdom, *Apotex* contended that in Australia, a hitherto unknown therapeutic use of a substance (having prior therapeutic uses) is not a manner of manufacture. This appeared to be a reinvigorated attack on novelty, or a suggestion of obviousness, in the guise of a s 18(1)(a) objection, stimulated by the construction of claim 1 favoured by the primary judge. Reliance was placed on the circumstance that there is no equivalent in the 1990 Act to subs (3) and (4) of s 4A of the Patents Act 1977 (UK), which "deem" novel known substances and compounds in respect of their first and subsequent (hitherto unknown) therapeutic uses. Those deeming provisions are the legislative response in the United Kingdom to the express exclusion from patentability of pharmaceutical method patents, from which the 1990 Act is free.

[291] Novelty of purpose can confer novelty even if a substance is known, a principle determined in the *NRDC* case, which can be seen in the relevant passages extracted

above. Provided a hitherto unknown therapeutic use of a pharmaceutical substance or compound can satisfy the requirements of novelty and inventive step and is not obvious, such a use can be an invention within the meaning of s 18(1)(a) of the 1990 Act, irrespective of whether it is a first or subsequent novel use.' *Apotex Pty Ltd (ACN 096 916 148) v Sanofi-Aventis Australia Pty Ltd* [2013] HCA 50, (2013) 304 ALR 1 at [286], [290]–[291], per Crennan and Kiefel JJ

PATRON

[Note that the Pastoral Measure 1983 is repealed as from 1 July 2012 by the Mission and Pastoral Measure 2011, s 111, Sch 9. The definition of 'patron', in the same terms as before but with the omission of the proviso, is now contained in the 2011 Measure, s 106(1).]

PAWN

[For 36(1) Halsbury's Laws of England (4th Edn) (2007 Reissue) paras 1,3 see now 4 Halsbury's Laws of England (5th Edn) (2011) paras 189–190.]

PAWNBROKER

[For 36(1) Halsbury's Laws of England (4th Edn) (2007 Reissue) para 1 see now 4 Halsbury's Laws of England (5th Edn) (2011) para 189.]

PAY (VERB)

In Income Tax Acts

[For the Income and Corporation Taxes Act 1988, s 338 see now the Corporation Tax Act 2010, s 189.]

PAYABLE

New Zealand [In relation to unclaimed money in the Unclaimed Money Act 1971, s 4(1)(e).] '[32] "Payable" in relation to a sum of money is capable of having a narrow or broad meaning. It can mean due or unpaid when due. The latter is the appellants' preferred meaning. Another meaning is that given in *Black's Law Dictionary*:

payable ... (Of a sum of money or a negotiable instrument) that is to be paid. o

An amount may be payable without being due. Debts are commonly payable long before they fall due.

As both are tenable meanings of the term, the Court must ascertain the applicable meaning from the text of the enactment in light of its purpose.

...
[35] In the present case, the money in issue has been paid by customers to purchase drafts and bank cheques. It was provided to the banks to take up the facility they offered for making payments. Although in form the money is paid to the appellants by their customer to acquire an asset (the draft or cheque), in substance the customer is putting the appellants in funds, against which both parties expect a third party to draw (via another bank in the case of drafts). If that expectation is not fulfilled, the situation is one that is covered by the first principle of the legislation identified by the Minister. That situation also fits within the ordinary meaning of the language of s 4(1)(e) as long as “payable” is given the meaning of payable if and when demand for the money is made. This, as we have seen, is an available meaning of payable and a meaning that is consistent with the statutory purpose.

...
[45] Where provisions in antecedent statutes reappear in a different context in an amending enactment, it is often the case that Parliament did not intend that the words should carry their previous meanings. The different context often signals that the intention of the legislature at the time of the new Act was to make a fresh start. In this case, the context in which “payable” is used differs in the 1898 (and 1908), the 1932 and the 1971 statutes. The context within the 1971 Act does not point to a particular meaning of “payable” in relation to whether a present obligation has arisen. It is possible that the word could carry this meaning, but equally possible that it means payable on demand being made.

[46] In these circumstances, the purpose of the 1971 Act, as summarised above, is a more reliable aid to the meaning of “payable” than comparisons with its use in the earlier statutes. To adopt the technical rules of when liability arises, under which there would in all cases have to be a present obligation to pay, would defeat that purpose. And to read s 4(1)(e) as having effect in its application to money payable under foreign currency drafts and bank cheques only if demand is made for the dormant moneys would introduce a self-defeating element to the meaning of the definition that

Parliament would not have contemplated. Nor can the meaning of “money” be confined to that in investment funds or on deposit or otherwise similar to the instances referred to in s 4, as the appellants submitted in their alternative argument. That would be contrary to the breadth of the opening words of s 4(1)(e).

[47] So read, s 4(1)(e) is consistent with the overall context and structure of s 4. There is no suggestion in the other categories of unclaimed money, which are specified in s 4(1)(a)–(d), that a cause of action must have arisen before time starts to run under the 1971 Act.

[48] In answer to the appellants’ concerns over the consequences of treating conditional liabilities to pay money as money that is payable under the 1971 Act, we should say that the present decision addresses the particular instruments involved where the only precondition to liability to pay is making demand for, that is claiming, the money. While the Act remains in its present form, the significance of other conditions would have to be addressed having regard to the general principles we have identified for interpretation of the term “unclaimed money” under the 1971 Act.

[49] For these reasons, we are satisfied that the approach taken to the Act by the Privy Council in *Thomas Cook [Commissioner of Inland Revenue v Thomas Cook (New Zealand) Ltd* [2005] UKPC 53, [2005] 2 NZLR 722 was the correct one. Had we favoured the appellants’ approach to this difficult question of construction, it would have been necessary to consider whether our preference for that different view was sufficient to justify departure from the meaning which had been adopted by the Privy Council. That would have raised questions concerning, on the one hand, desirability of stability in the law and respect for the principle of stare decisis and, on the other, whether there are cogent reasons for reconsideration of, and departure from, that judgment. Having however had in this appeal the benefit of full argument on the interpretation of s 4(1)(e) of the 1971 Act, we are satisfied that the Privy Council’s interpretation, expressed in *Thomas Cook*, is the correct one and that it applies to the foreign drafts and bank cheques in this case.’ *Westpac Banking Corp v Comr of Inland Revenue* [2011] NZSC 36, [2011] 2 NZLR 726 at [32], [35], [45]–[49], per McGrath J

PAYMENT INTO COURT

[25] ... Orders for payments into court are routinely made by civil courts week in and week

out. When the words “pay into court” or “payment into court” are used by a judge, they are intended to refer to payments into court whose meaning and effect are governed by the CPR and the CFR [Court Funds Rules 1987, SI 1987/821]. I doubt whether there is power in the court to make an order for a payment into court whose meaning and effect differs from that prescribed or permitted by those rules. But if a judge does have such power, he will not be taken to have exercised it unless it is clear, whether by the use of express language or by necessary implication, that he intended that it should have that different meaning and effect.’ *ENE Kos 1 Ltd v Petroleo Brasileiro SA* [2009] EWCA Civ 1127, [2010] 1 All ER 1099 at [25], per Dyson LJ

PAYMENT TO AN EMPLOYEE

Australia [Fair Work Act 2009 (Cth), s 470(1): if an employee engaged, or engages, in protected industrial action against an employer on a day, the employer must not make a payment to an employee in relation to the total duration of the industrial action on that day. Whether this includes providing accommodation.] ‘[45] The appellant’s argument based on s 323 is not persuasive. The terms of s 323(3) acknowledge that an enterprise agreement may specify a method for the payment of “the money” by a “particular method” other than “in money”. The reference in s 323(3) to “the money” is a reference back to the prescription in s 323(1) of “amounts payable to the employee in relation to the performance of work”. It is tolerably clear from the terms of s 323(3), and is confirmed by the explanatory memorandum which accompanied the Bill for the Act, that s 323(1) addresses the same mischief addressed by “Truck Acts” as they had by then come to exist in each state, that is, that an employee’s entitlement to payment for work might be compromised by an employer requiring the employee to accept some form of payment in kind of less value than the payment of money forgone. Section 323(3) expressly acknowledges that this mischief is not a concern where the provision is contained in an enterprise agreement.

‘[46] The provision of accommodation by an employer to an employee may involve the transfer from the employer to the employee of an economic benefit. The benefit may even be capable of being measured and expressed in terms of monetary value, by reference to the cost to the employer paid or payable for the

accommodation. But that circumstance itself does not mean that there has been a payment by the employer to the employee of that sum.

‘[47] While the signification of “payment” in various sections of the Act may be affected by the particular context in which it appears, none of the other provisions of the Act to which the respondent referred in its argument actually speaks of “payment” of non-monetary benefits. It is true, as Gilmour J noted, that in other provisions within the Act where the terms “payment” and “pay” are to be found, the terms are used variously with other words that qualify or confine them, for example “payment of wages and other monetary entitlements” and “pay ... the employee’s base rate of pay”. It is also true that the term “payment” in s 470(1) is not qualified by the text in which it appears. Nevertheless, the usage of these other provisions is consistently to the effect that when the Act speaks of payment it is speaking of a payment in money.

‘[48] The true construction of “payment” within the meaning of s 470(1) as a payment of money is also suggested by the character of s 470(1) as a civil remedy provision. It is only a transaction which answers the description of “a payment to an employee” which attracts the penalty imposed. Like the imposition of criminal liability, the imposition of a civil penalty should be “certain and its reach ascertainable by those who are subject to it”. That general principle of statutory construction is reinforced in this case by the expressly articulated object of the Act to provide “clear rules governing industrial action”.

‘[49] These considerations lead us to conclude that liability to the penalty imposed upon a contravention of s 470(1) is not attracted by the transfer of just any economic benefit by an employer to an employee during a period of protected industrial action. Not only would such an imposition be insufficiently clear and of insufficiently ascertainable reach, it would also have the consequence that employers and employees could become liable to a penalty, not only by taking some positive action, but also by doing no more than maintaining the status quo. It is not to be supposed that the legislature intended such a result.’ *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* (ACN 075 483 644) [2013] HCA 36, (2013) 300 ALR 460 at [45]–[49], per Crennan, Kiefel, Bell, Gageler and Keane JJ

PECULIAR

[For 14 Halsbury's Laws of England (4th Edn) para 492 see now 34 Halsbury's Laws of England (5th Edn) (2011) para 213.]

PECUNIARY ADVANTAGE

New Zealand '[6] The grounds on which Ms Hayes was granted leave to appeal on this aspect of the case were:

- (a) Whether, in terms of s 229A, now replaced by s 228, of the Crimes Act "pecuniary advantage" includes a situation where there is an avoidance of the risk of losing a compensation benefit under accident compensation legislation.
- (b) Whether the trial Judge erred in law in not directing the jury in respect of the legislative provisions relating to continuing entitlement to a compensation benefit.

'[7] The concept of pecuniary advantage first entered New Zealand law in 1973 with the enactment of s 229A by s 4 of the Crimes Amendment Act 1973. Its source was the Theft Act 1968 (UK). The English authorities on pecuniary advantage do not assist because of the definition which applied to its use there and the way it was interpreted. In New Zealand the expression is not defined.

'[8] The issue, as the Court of Appeal saw it, was whether, in order to obtain a pecuniary advantage, the accused had to obtain compensation payments to which she was not entitled; or whether a pecuniary advantage included the situation where she avoided the risk of losing compensation. In the former case, the question of the accused's entitlement to compensation would be a material issue and the Judge's failure to direct the jury on that issue would have been a material error. The Court of Appeal concluded that a pecuniary advantage included Ms Hayes avoiding the risk that, on a reassessment, compensation payments would have been stopped. On this premise the Judge was justified in not directing on the question of entitlement. Ms Hayes' stance, in this Court and below, was that for her to gain a pecuniary advantage the Crown had to show more than the avoidance of the risk of the payments being stopped. It had to show she had gained an actual monetary advantage to which she had no entitlement. The Judge had therefore erred in not directing the jury on that basis.

'[9] The way in which the argument

developed in the Court of Appeal, and indeed in this Court, was substantially influenced by previous decisions of the Court of Appeal on the subject of pecuniary advantage. Those decisions held that obtaining something to which the accused is entitled cannot amount to obtaining a pecuniary advantage. Hence the Crown must show lack of entitlement.

'[10] In *R v Firth* [[1998] 1 NZLR 513] the Court of Appeal said [at 516]:

"We have not been referred to any case which specifically discusses the point but we think it is implicit in the term 'advantage' that if a defendant were legally entitled to receive the money in question, he has not obtained a pecuniary advantage to which he was not entitled. In *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 at p 163 this Court recorded, seemingly without argument on the point, that that was the position in regard to the Social Welfare benefit there in issue."

'[11] The passage in *Ruka v Department of Social Welfare* [1997] 1 NZLR 154 to which the Court was referring is contained in the judgment of Blanchard J in which Richardson P joined. Their Honours there said [at 163] of charges under s 229A:

"Miss Ruka was charged that with fraudulent intent she used applications under the Social Security Act for the purpose of obtaining a pecuniary advantage. If, as we have concluded, she qualified for the benefits in question because she was not in a relationship in the nature of marriage, it follows that she did not, whatever her intent, use a document to obtain an advantage; that is, something to which she had no entitlement."

'[12] We consider the approach taken in *Ruka* and followed in *Firth* does not reflect either the text or the purpose of the legislation. In its terms the legislation does not require proof of lack of entitlement. The concept of entitlement can arise, if at all, only by implication from the word "advantage". But if a person seeking to obtain a pecuniary advantage uses a document with intent to defraud (s 229A), or dishonestly and without claim of right (s 228), we do not consider it is any defence to say that the user of the document was entitled to the advantage. The statutory purpose is to criminalise the use of dishonest means directed to gaining the advantage even if the accused is otherwise entitled to it. Questions of actual entitlement

may well be relevant to sentence, but they are not relevant to guilt, save that a belief in entitlement will, of course, be relevant to *mens rea*.

[13] In view of the tenor of some of the submissions, it is worth stating at this point that for present purposes an unsuccessful use of a document is just as much a use as a successful one. An unsuccessful use must not be equated conceptually with an attempted use. The concept of attempt relates to use, not to the ultimate obtaining of a pecuniary advantage, which is not a necessary ingredient of the offence. Because the use does not have to be successful it may be difficult to draw a clear line between use and attempted use. That seems to be why attempts have been brought within the definition of the offence (“uses or attempts to use any document”), rather than being left to be dealt with, as is usual, under s 72 of the Crimes Act. This supports the view that the offence is directed at the dishonest conduct by means of which the pecuniary advantage is sought.

[14] Both s 229A and s 228 use the expression “pecuniary advantage” in conjunction with the expression “valuable consideration”. The composite expression is “pecuniary advantage or valuable consideration”. The second part of this conjunction does not say or *other* valuable consideration. That must, however, be the effect of the terms pecuniary advantage and valuable consideration when they are read together in their statutory context. Leaving aside the other concepts addressed in the sections, the statutory purpose must have been to encompass anything capable of being valuable consideration, whether of a monetary kind or of any other kind; in short, money or money’s worth.

[15] The construction we would adopt of the expression “pecuniary advantage” in ss 229A and 228 also derives support from the fact that if the charges against Ms Hayes had been framed on the basis that her purpose or intent was to obtain valuable consideration as opposed to pecuniary advantage, the implicit comparison with entitlement said to be inherent in the word “advantage” could not be present. It is self-evident that the weekly compensation payments represented valuable consideration, irrespective of entitlement. The same can be said of the concepts of property and service, which are also found in s 228. The more is this so because property is defined in s 2 as including money. Hence money is actually included within three of the four concepts covered by s 228. It cannot be right that the question of entitlement should be regarded as

relevant on the basis of one framing of the charges and not on the basis of another. Whether the recipient is entitled to receive the weekly compensation payments does not make them any more or less property or valuable consideration; nor should it make them any more or less a pecuniary advantage.

[16] This Court is not bound by the decisions in *Ruka* and *Firth*. We respectfully consider they should not be followed on this point. As already foreshadowed there is a different way of construing the expression “pecuniary advantage” which better reflects both the statutory language and purpose and does not involve the difficulties inherent in an approach which has been held to require consideration of entitlement to and risk of losing compensation. The preferable construction treats the expression “pecuniary advantage” as meaning simply anything that enhances the accused’s financial position. It is that enhancement which constitutes the element of advantage. If what the accused person is seeking to obtain is of that kind, it does not matter whether he or she is entitled to it, or may be trying to avoid the risk of not continuing to receive it. It follows that even if the person from whom the pecuniary advantage is sought has an obligation to supply it to the recipient, that will not prevent the use of dishonest means to procure the advantage from being an offence.

[17] As the Court of Appeal put it in *R v Thomas* [(Court of Appeal, CA 71/00, 7 June 2001, McGrath, Ellis and McGechan JJ)], a pecuniary advantage advances the economic interests of the recipient. Some of the submissions seem to have proceeded on the assumption that somehow the continuation of the weekly compensation payments could not in itself be an advantage. It must have been for this reason that the argument focused on questions such as the risk of the compensation being stopped or being lost. On the view we take, each weekly payment of compensation, which it was Ms Hayes’ purpose to obtain, constituted a pecuniary advantage to her.

[18] This approach overcomes what we see as a potentially difficult aspect of the Court of Appeal’s reasoning in *Firth*. Immediately after the passage cited above the Court said that it did not necessarily follow that in all cases the Crown must establish that the accused was not entitled to the advantage. The Court then gave as an example a case (*R v Gunthorp* [2003] 2 NZLR 433, date of judgment 9 June 1993) in which the concept of entitlement could not apply. The advantage in that case was attaining better loan terms than were available in the

marketplace. The concept of legal entitlement could not apply to such an advantage. The difficulty is twofold. First, it seems unlikely that Parliament envisaged that lack of legal entitlement would be a formal ingredient of the offence in some situations but not others. Second, *Firth* raises the potential for uncertainty as to when entitlement is an issue and when it is not. We consider that the example given and this uncertainty both demonstrate that the concept of advantage should not be construed as involving a comparative notion, that is, obtaining a better financial outcome than that to which you are entitled in law. The underlying notion is practical rather than comparative. By practical we mean simply getting something which enhances your financial position. As we have said, this construction better aligns the concept of pecuniary advantage with the cognate concepts of property, service and valuable consideration found in s 228.

‘[19] Support for the approach we are taking also comes from the decision of the Court of Appeal for England and Wales in *Re Attorney-General’s Reference (No 1 of 2001)* [[2003] 1 WLR 395]. In that case the defendants were the parents of a young woman who had been arrested overseas and charged with a criminal offence. A trust fund was established to assist the family with the proceedings. Contributions were made by members of the public. Some money which had been donated to the defendants personally, to use as they chose, was mistakenly paid into the trust fund. The defendants presented a forged invoice to the trustees of the fund seeking payment for accommodation expenses they had never incurred. The trustees paid the invoice.

‘[20] The defendants were charged with dishonestly furnishing false information with a view to gain for themselves, contrary to s 17 of the Theft Act (UK). The trial Judge held that since at least some of the money in the trust fund “must have belonged” to the defendants they could not be said to have acted with a view to gain for themselves. He accordingly directed that they be acquitted.

‘[21] The Attorney-General referred the point to the Court of Appeal, which held that, even if the accused were entitled to payment, they still committed an offence because of the dishonesty with which they sought to procure it. In the course of giving the judgment of the Court, Kennedy LJ said [at paras [27]–[28]]:

“The successful submission focused on the words ‘with a view to gain for themselves’. ‘Gain’ is defined in s 34(2)(a) as including

‘a gain by keeping what one has as well as a gain by getting what one has not’. In relation to blackmail, which is also governed by s 34, the question has arisen whether a person demanding money undoubtedly owed to him did have a view to gain. In *R v Parkes* [1973] Crim LR 358 that question was answered by Judge Dean QC in the affirmative. As he put it, by intending to obtain hard cash as opposed to a mere right of action in respect of the debt the defendant was getting more than he already had, and in his commentary on that case Professor Smith submitted that gain means acquisition, whether at a profit or not. That was the intention of the Criminal Law Revision Committee’s Eighth Report on Theft and Related Offences (1966) (Cmnd 2977), which in para 121 stated: ‘the person with a genuine claim will be guilty unless he believes that it is proper to use the menaces to enforce his claim.’ ...

“[28] In our judgment, *R v Parkes* [1973] Crim LR 358 was rightly decided, and it follows that on the facts of the present case, contrary to what was decided by the trial judge, there was clear evidence that [the defendants] were acting with a view to gain for themselves. Even if they had a valid claim to some of the money in the trust fund on the basis that the money should never have gone into the fund, and even recognising that they were beneficiaries under the trust, makes no difference, because none of that relates to what they were doing at the material time: they were dishonestly making use of a false invoice to substantiate a claim for expenses, and thus to extract from the trustees a cheque for £9113.50. As Judge Dean QC put it in *R v Parkes*, they were seeking to obtain hard cash as opposed to a mere right to claim.”

There is a sufficient conceptual parallel between “advantage” and “gain” to make the Court of Appeal’s reasoning helpful in the resolution of the case before us.

‘[22] On this basis, it is not necessary to discuss the reasoning of the Court of Appeal or the submissions which were made in this Court seeking to attack or uphold that reasoning. It is, however, appropriate to record that the Court of Appeal was not asked, nor was it free, to depart from the view that has hitherto been taken about the role that the question of entitlement should play in construing the term “pecuniary advantage”. Our focus from this point on will

necessarily depart somewhat from the precise formulation of the first ground of appeal with its reference to “risk of losing” a compensation benefit. We return to the circumstances of this case on that basis.

‘[23] The offence created by s 229A, as it related to Ms Hayes’ case, involved proof that:

- (1) with intent to defraud;
- (2) she used a document;
- (3) which was capable of being used to obtain a pecuniary advantage;
- (4) for the purpose of obtaining a pecuniary advantage.

The offence created by s 228 involved proof that:

- (1) Ms Hayes used a document;
- (2) dishonestly and without claim of right;
- (3) with intent to obtain a pecuniary advantage.

‘[24] The crucial elements for present purposes are, respectively, the fourth and the third; specifically, whether Ms Hayes had the purpose of obtaining or the intent to obtain something that constituted a pecuniary advantage when she used the medical certificates by supplying them to ACC. As documents the medical certificates were clearly capable of being used to obtain a pecuniary advantage. Ms Hayes’ purpose and intent when using them was undoubtedly to obtain weekly compensation payments. What she was endeavouring to obtain was unquestionably a pecuniary advantage in that its receipt would enhance her financial position. Provided she had an intent to defraud, or acted dishonestly and without claim of right, Ms Hayes therefore committed offences against s 229A and s 228.

‘[25] When the essential elements of the offences are analysed as they should be, there is nothing to support the contention that the trial Judge erred in not directing the jury on the legislative provisions concerning what entitlement Ms Hayes may or may not have had. Proof that her purpose was to obtain the pecuniary advantage of weekly compensation did not require any examination of her legal entitlement to that compensation. She committed an offence if she used the medical certificates for the purpose of obtaining weekly compensation and with the requisite dishonest mind. The *actus reus* of the offence was constituted by her use of the relevant document for the purpose of obtaining a pecuniary advantage. The Crown was required to prove that purpose, but not that she actually obtained a pecuniary advantage. The weekly compensation monies she was seeking were in themselves a pecuniary

advantage, irrespective of entitlement. The trial Judge did not therefore err by failing to direct on the subject of entitlement.’ *R v Hayes* [2008] NZSC 3, [2008] 2 NZLR 321 at [6]–[25], per Tipping J

PEDIGREE

[For 17(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 705 see now 12 Halsbury’s Laws of England (5th Edn) (2015) para 882.]

PEERAGE

[For 35 Halsbury’s Laws of England (4th Edn) (Reissue) paras 902–905 see now 79 Halsbury’s Laws of England (5th Edn) (2014) paras 803–806.]

[As from 1 October 2009, peerages for Lords of Appeal in Ordinary will no longer be created under the Appellate Jurisdiction Act 1876, following the repeal of the 1876 Act by the Constitutional Reform Act 2005 and the abolition of the appellate jurisdiction of the House of Lords (replaced by the Supreme Court of England and Wales).]

PENALTY ... CONTRARY TO LAW

Australia [Crimes (Sentencing Procedure) Act 1999, s 43.] ‘[32] Section 43 confers upon courts exercising jurisdiction in criminal proceedings a power to reopen those proceedings and to impose a penalty that is in accordance with law. The section only applies to criminal proceedings in which one of two conditions is fulfilled. The condition directly relevant to this appeal is that “a court has ... imposed a penalty that is contrary to law”. On the ordinary meaning of that collocation, what must be contrary to law is the “penalty”. That condition is not satisfied merely by demonstrating that the court has erred in law or fact. Notwithstanding such error, the penalty imposed may not be contrary to law. It may fall within the range of penalties permitted or required by the relevant statutory provisions and may also be consistent with the reasonable exercise of a discretion applicable to the particular offence and offender. Examples of circumstances in which a penalty may be said to be contrary to law include:

- A penalty which exceeds the maximum penalty prescribed for the offence.
- A penalty which it is beyond the power of

the court to impose because some precondition for its imposition is not satisfied – for example, the existence of an aggravating factor or the existence of prior convictions for the same kind of offence.

A penalty which lies outside the range of penalties that could have been imposed in a reasonable exercise of discretion is not, thereby, contrary to law in the sense required by s 43, not least because reconsideration of such would involve an evaluative exercise which must be dealt with by way of appeal.

...
 ‘[36] The text of s 43 is clear enough. The relevant power is conditioned upon the penalty being “contrary to law”. A construction encompassing error in the imposition of a lawful penalty would allow the power to be applied to any penalty, however appropriate, that is imposed under the influence of an error of law or fact. That construction does not fit with the text. Nor does it accord with the limited purpose of the section. The principle of finality should not be taken to have been qualified except by clear statutory language and only to the extent that the language clearly permits. The construction for which the appellant contended, and which is reflected in some earlier decisions of the Court of Criminal Appeal, can only be supported by attributing to the provision a purpose which, whatever its practical benefits, leaves the boundaries between correction and appeal porous and protected only by the exercise of the sentencing court’s discretion. The importance of the distinction between original and appellate jurisdiction in the application of s 43 to courts of first instance militates against such a result. The appellant’s construction should not be accepted. A penalty is not “contrary to law” only because it is reached by a process of erroneous reasoning or factual error.’ *Achurch v R* [2014] HCA 10, (2014) 306 ALR 566 at [32], [36], per French CJ, Crennan, Kiefel and Bell JJ

PENDING

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

PEOPLE OF ENGLAND

‘[55] Here the statute in need of construction is the 2006 [National Health Service] Act. As set out at [8], above, the Secretary of State’s duty prescribed by s 1 is to continue the promotion in England of a comprehensive health service

designed to secure improvement in the health “of the people of England”. Note that it is the people of England, not the people in England, which suggests that the beneficiaries of this free health service are to be those with some link to England so as to be part and parcel of the fabric of the place. It connotes a legitimate connection with the country. The exclusion from this free service of non-residents and the right conferred by s 175 to charge such persons as are not ordinarily resident reinforces this notion of segregation between them and us. This strongly suggests that, as a rule, the benefits were not intended by Parliament to be bestowed on those who ought not to be here.’ *R (on the application of YA) v Secretary of State for Health* [2009] EWCA Civ 225, [2010] 1 All ER 87 at [55], per Ward LJ

PEOPLE SMUGGLING

Canada [Immigration and Refugee Protection Act, SC 2001, c 27, s 37(1)(b).] ‘2. These appeals concern s 37(1)(b) of the *IRPA*, which renders a person inadmissible to Canada, and effectively denies that person access to refugee determination procedures, if he or she has engaged in, in the context of transnational crime, activities such as people smuggling, trafficking in persons or money laundering.

‘3. The appellants were all found inadmissible to Canada under s 37(1)(b) of the *IRPA* on the basis of an interpretation that did not require that the conduct leading to inadmissibility be for profit or be connected with an organized criminal operation. Their situations vary. However, all say they were simply helping fellow asylum-seekers flee persecution, and were not engaged in people smuggling.

‘4. Three questions arise. First, is “people smuggling” in s 37(1)(b) confined to activities conducted, “directly or indirectly”, for “a financial or other material benefit”? Second, what limits flow from s 37(1), which provides that a person is declared inadmissible on the grounds of “organized criminality”? Third, what is the effect of the requirement in s 37(1)(b) that the smuggling be “in the context of transnational crime”?

‘5. I conclude that s 37(1)(b) of the *IRPA* applies only to people who act to further illegal entry of asylum-seekers in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime. In coming to this conclusion, I outline the type of conduct that may render a person inadmissible to Canada and disqualify

the person from the refugee determination process on grounds of organized criminality. I find, consistently with my reasons in the companion appeal in *R v Appulonappa*, 2015 SCC 59, [2015] 3 SCR 754, that acts of humanitarian and mutual aid (including aid between family members) do not constitute people smuggling under the *IRPA*.

...
 ‘30. The starting point for the interpretation of s 37(1)(b) is the ordinary and grammatical sense of the words used. At this point, the question is what the ordinary and grammatical sense of the words suggests on two questions: whether s 37(1)(b) is confined to activity directed at “financial or other material benefit”; and what limits may be inferred from the phrases “on grounds of organized criminality” and “in the context of transnational crime”.

‘31. Under the marginal note “Organized criminality”, s 37(1) provides that “a foreign national is inadmissible on grounds of organized criminality for ... (b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering”.

‘32. The meaning of each of these phrases must be considered.

‘33. I begin with the ordinary and grammatical meaning of “people smuggling”. The appellants argue that the ordinary meaning of this phrase involves a financial or other benefit to the smuggler. I do not agree. There is no express mention in s 37(1)(b) of a profit motive and I cannot find a financial benefit requirement on the ordinary and grammatical meaning of the words alone.

‘34. I turn next to the ordinary and grammatical meaning of “organized criminality”. While the phrase “organized crime” is generally understood as involving a profit motive, the phrase “organized criminality” is arguably broad enough to include organized criminal acts for non-pecuniary motives, such as terrorism or sexual exploitation.

‘35. This leaves the ordinary and grammatical sense of the phrase “in the context of transnational crime”. The meaning of this phrase is arguably broader than that of “organized criminality”. First, the words “in the context of” suggest that a loose connection to transnational crime may suffice. Second, the phrase “transnational crime” is arguably broader than “transnational *organized* crime”. However, when the words “in the context of transnational crime” are read together with the words “organized criminality” with a view to finding a harmonious meaning for s 37(1)(b) as a whole,

it becomes clear that “transnational crime” in s 37(1)(b), construed in its ordinary and grammatical sense, refers to organized transnational crime. Since the provision renders people inadmissible on grounds of “organized criminality”, the words “transnational crime” cannot be read as including non-organized individual criminality. In summary, the words of s 37(1)(b), read in their ordinary and grammatical sense, suggest that the provision applies to acts of illegally bringing people into Canada, if that act is connected to transnational organized criminal activity.

‘36. Reference to the ordinary grammatical sense of the words used is only the first step in the statutory interpretation of s 37(1)(b). A statutory provision should be interpreted in its entire context and harmoniously with the scheme of the legislation. As we will see, the broader statutory context of s 37(1)(b) suggests that the provision targets organized criminal activity in people smuggling for financial or other material benefit, and not asylum-seekers rendering each other mutual assistance.

...
 ‘72. The wording of s 37(1)(b), its statutory and international contexts, and external indications of the intention of Parliament all lead to the conclusion that this provision targets procuring illegal entry in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime. To justify a finding of inadmissibility against the appellants on the grounds of people smuggling under s 37(1)(b), the Ministers must establish before the Board that the appellants are people smugglers in this sense. The appellants can escape inadmissibility under s 37(1)(b) if they merely aided in the illegal entry of other refugees or asylum-seekers in the course of their collective flight to safety.

...
 ‘76. The tools of statutory interpretation — plain and grammatical meaning of the words; statutory and international contexts; and legislative intent — all point inexorably to the conclusion that s 37(1)(b) applies only to people who act to further illegal entry of asylum-seekers in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime. I conclude that a migrant who aids in his own illegal entry or the illegal entry of other refugees or asylum-seekers in their collective flight to safety is not inadmissible under s 37(1)(b).’
B010 v Canada (Citizenship and Immigration) [2015] SCJ No 58, [2015] 3 SCR 704 at paras 2–5, 30–36, 72, 76, per McLachlin CJ

PER STIRPES

[25] More troublesome is a misunderstanding of the phrase per stirpes which appears in the judgments below, was repeated in the course of the argument before the Board and may account for the fact that the phrase has been misused at the end of cl 6(ii). The Latin word stirpes can be translated as meaning “stock”, as *Williams on Wills* (9th edn, 2008) p 819 (para 87.1) explains. But this is not an expression that is likely to occur to a testator today when he is telling his lawyer how he wishes his estate to be distributed. It is more helpful to use the alternative meaning that *Williams on Wills* p 819 (para 87.1) gives to it, which is “family”. In modern usage the phrase as a whole can be taken to mean “by family”.

[26] But that meaning still begs the question how the gift is to be distributed among the members of the family. Mr Bompas QC submitted that a gift per stirpes requires the bequest to be distributed among all the living members of each family, so that children share in it as well as their parent if he or she is still alive. That is a misconception. As *Williams on Wills* p 822 (para 87.3) points out, a characteristic of distribution per stirpes is that remote descendants do not take in competition with a living immediate ancestor of their own who takes under the gift: see also 50 *Halsbury's Laws* (4th edn) (2005 reissue) para 682.

[27] There is ample authority for this proposition. In *Gibson v Fisher* (1867) LR 5 Eq 51, it was common ground that this was how the phrase was to be interpreted. Sir Roundell Palmer QC is recorded at 54 as submitting that you must look to the heads of each line and take the head in preference to the descendants. Mr Baggallay QC is recorded at 55 as saying that he supported the contention that the children of a living parent cannot take concurrently with the parent. A direction to this effect was included in the court's declaration at 59. In *Ralph v Carrick* (1879) 11 Ch D 873 at 884, James LJ said that the effect of a direction that the descendants were to take their parent's share was that they took per stirpes and not per capita, ‘so that children do not take concurrently with their parents’. In *Re Rawlinson, Hill v Withall* [1909] 2 Ch 36 at 38 Joyce J said:

“Where property is bequeathed simply to the issue or to the descendants in equal shares per stirpes it is quite settled, as is mentioned by James LJ in *Ralph v Carrick*, where, it being held that the effect of the will was to give the residue to descendants

per stirpes and not per capita, his Lordship adds, ‘so that children do not take concurrently with their parents’.”

[28] This characteristic of the phrase was well described by Professor Candlish Henderson in his book on *Vesting* (2nd edn, 1938) p 221, where he explained that, where the division among issue was per stirpes, the provision in favour of issue was to be construed as meaning that the issue should be substituted for their parent in the event of his predeceasing and should take the share which would have been his had he survived. That is a Scots textbook, but in my opinion the law of Scotland is the same on this point as the law of England. The effect of the phrase can be demonstrated by a simple example. The testator has two children, both of whom also have two children. One of his children predeceases, survived by his two children. A distribution of the residue per stirpes will give an equal share to each family. The surviving child will take the whole of his family's share. The children of the predeceasing child will take that family's share equally between them.

[29] In the Supreme Court Hall CJ said in para 13 of his judgment that he was of the view that the distribution was between the cousins as one class distinct from Ruby, and that this was a distribution per stirpes. The Court of Appeal expressed the same opinion when they said in para 18 of their judgment that the evidence tilted the scale in favour of a per stirpes distribution as opposed to a per capita distribution. I do not think, with respect, that this was an apt use of the phrase per stirpes in this context. Correctly used, the phrase enables a gift to a person who predeceases the testator to be distributed among the person's descendants, if any, so that it is kept within that person's family. Where the gift is to a number of persons all of whom are named, the addition of the words per stirpes tells one nothing about how the gift is to be divided between those individuals if they all survive. The general rule is that the gift will be divided between them equally. The addition of the words per stirpes may be taken to indicate that there is to be a gift over to their heirs or their issue if one or more of them predecease the testator. But this will usually be done by adding an express direction to this effect, as was done in this case.’ *Sammut v Manzi* [2008] UKPC 58, [2009] 2 All ER 234 at [25]–[29], per Lord Hope of Craighead

PERAMBULATION

[For 12(1) Halsbury's Laws of England (4th Edn) (Reissue) para 640 see now 32 Halsbury's Laws of England (5th Edn) (2012) para 40.]

PEREMPTORY

[For 45(2) Halsbury's Laws of England (4th Edn) (Reissue) para 252 see now 97 Halsbury's Laws of England (5th Edn) (2015) para 353.]

PERFORMANCE

[For 9(2) Halsbury's Laws of England (4th Edn) (Reissue) para 324 see now 23 Halsbury's Laws of England (5th Edn) (2016) para 920 et seq.]

PERILS OF THE SEAS

[For 25 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 332 see now 60 Halsbury's Laws of England (5th Edn) (2011) para 323.]

[For 43(2) Halsbury's Laws of England (4th Edn) (Reissue) para 1490 see now 7 Halsbury's Laws of England (5th Edn) (2015) para 272.]

PERJURY

[For 11(2) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 712 et seq see now 26 Halsbury's Laws of England (5th Edn) (2016) para 778 et seq.]

PERMANENTLY RESIDENT

[Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961; TS 19 (1965) Cmnd 2565) ('the VCDR'), art 38(1). A Permanent Representative is entitled to the same immunity from suit and legal process as that accorded to the head of a diplomatic mission, subject to the limitation, pursuant to the International Maritime Organisation (Immunities and Privileges) Order 2002, SI 2002/1826, art 15, that a Permanent Representative who is 'permanently resident' in the UK is only entitled to such immunities and privileges in respect of his official acts.] '[60] It seems that there is no authority on the meaning of "permanently resident" from any senior court in the United Kingdom.

'[61] Soon after becoming a party to the VCDR in 1964, the UK Government decided that the most satisfactory interpretation of the term "permanently resident" depended on

asking the question whether, but for his employment with the mission, the person concerned would choose to remain in the receiving state (the so-called "but for test"). After a few years, the FCO formulated some general rules and in January 1969 a Circular Note ("the Circular") was sent to all diplomatic missions in London by the Secretary of State.

...

'[66] In my view, the Circular provides valuable guidance as to the meaning of "permanent residence". It has the imprimatur of general international acceptance: see para [62], above. I see no basis for accepting the test put forward by Mr Pointer of whether the person has or intends to apply for the right to remain in the receiving state. That is too narrow an approach. Nor do I consider that, in order to establish permanent residence, it must be shown that the person intends to live in the country until he dies (the *Re Gape* [*Re Gape's Will Trusts*, *Verey v Gape* [1952] 2 All ER 579 at 581, [1952] Ch 743] test). Indeed, I did not understand Mr Pointer in the end to be contending for such an absolutist approach.

'[67] In *Jimenez v IRC* [2004] STC (SCD) 371, Mr John Walters QC, sitting as a Special Commissioner of Income Tax said, with reference to the Circular, that he was "not surprised" that "permanently resident" means "resident for a purpose unconnected with the holding of the status of membership of a mission". It seems to me that this may be another way of expressing the "but for" test stated in the opening paragraph of the Circular. In my view, it is a necessary condition of being "permanently resident" in a host country that the individual would be resident in that country even if he had not been a Permanent Representative or diplomatic agent. But it is not a sufficient condition, because what is required is *permanent* residence. Thus, it is difficult to see how an individual who (i) would be resident in a host country even if he were not appointed a Permanent Representative or diplomatic agent and yet (ii) intends to leave the host country as soon as his appointment comes to an end can be said to be permanently resident in the host country. That is why other factors, such as those identified in the Circular, should be borne in mind when applying the "but for" test. It is clear from the Circular that what is required is a degree of permanence, not a settled intention to reside in the host country until death.' *Estrada v Al-Juffali* (*Secretary of State for Foreign and Commonwealth Affairs intervening*) [2016] EWCA Civ 176, [2017] 1 All ER 790

at [60]–[61], [66]–[67], per Lord Dyson MR

PERSECUTION

No serious risk of persecution

‘[1] Is the description that “there is in general in that State ... no serious risk of persecution of persons entitled to reside in that State”, in s 94(5) of the Nationality, Immigration and Asylum Act 2002, applicable to a state in which (a) there is a serious risk of persecution of gays and other members of the LGBT community, (b) that community is estimated to amount to between 5% and 10% of the population and (c) there is no such risk affecting the remainder of the population? The state in question is Jamaica.

‘[2] At first instance Mr Nicholas Paines QC, sitting as a Deputy High Court Judge in the Administrative Court ([2012] EWHC 1660 (Admin), [2012] All ER (D) 237 (May)), held that the Home Secretary could rationally find that the words applied to Jamaica, since 90% or more of the population did not face a serious risk of persecution. The Court of Appeal reversed his decision by a majority: [2013] EWCA Civ 666, [2014] 2 All ER 91, [2014] 1 WLR 836. ...

‘[21] Section 94 is concerned with the return of unsuccessful asylum and human rights claimants. It is in that context that the Home Secretary may designate a state (or part of a state) only if satisfied that there is in general no serious risk of persecution of persons entitled to live there. I take s 94(5) in its natural meaning to refer to countries (or parts of countries) where its citizens are free from any serious risk of systematic persecution, either by the state itself or by non-state agents which the state is unable or unwilling to control. This is the effect of the words “in general” and “serious”. I do not read the words “there is in general ... no serious risk of persecution of persons ...” as meaning “there is no serious risk of persecution of persons in general”, and therefore as intended to permit the designation of a state which systematically carries out or tolerates persecution provided that it is limited so as not to affect the large majority. I read the words “in general” as intended to differentiate a state of affairs where persecution is endemic, ie it occurs in the ordinary course of things, from one where there may be isolated incidents of persecution.

‘[22] I am influenced by the fact that persecution within the meaning of the Refugee

Convention (United Nations Convention relating to the Status of Refugees 1951 (Geneva, 28 July 1951; TS 39 (1954), Cmd 9171)) will by its nature often be directed towards minorities (as Wilson J said in *R (on the application of Husan) v Secretary of State for the Home Dept* [2005] EWHC 189 (Admin), [2005] All ER (D) 371 (Feb) (at [55])), and the great majority of asylum and human rights claimants belong to minorities of one kind or another. For a serious risk of persecution to exist in general, ie as a general feature of life in the relevant country, it must be possible to identify a recognisable section of the community to whom it applies, but to require it to be established also that the relevant minority exceeds x% of the population is open to several objections. The first is the absence of any yardstick for determining what x should be. If the Home Secretary was entitled to conclude that 10% was insufficient, would the same apply to 15%, 20% or 25%? It is no answer to say that it is a question of degree for the judgment of the Home Secretary, within a wide margin of appreciation, if there is simply no way of deciding it. Secondly, if it were possible to place a value on x, it is nevertheless hard to see any reason why it should make a difference whether the group represented, say, more than 20% or only 15%. Thirdly, in the case of many minority groups there will be no way of obtaining reliable information as to their total size for obvious reasons. Even without the risk of persecution, a person’s sexuality is a matter which many would prefer to keep private, and to disclose something which carries with it a serious risk of persecution is to court trouble.

‘[23] I am not persuaded by Mr Eadie’s argument that it makes little or no difference to members of minority groups who are exposed to a serious risk of persecution whether the state has been designated under s 94(4). As Mr Stephen Knafler QC argued, although there may be a different outcome in some cases, the purpose of designation is that applicants from designated countries will normally be detained and fast tracked. In the present case, although the Home Secretary did not certify that the respondent’s claim was clearly unfounded, he was previously detained as a claimant from a designated state. I would endorse Black LJ’s comment at [2014] 2 All ER 91, [2014] 1 WLR 836, para [44] that the designation of a state “changes the complexion of the analysis of the claim”.’ *R (on the application of Brown) v Secretary of State for the Home Department* [2015] UKSC 8, [2015] 3 All ER 317 at [1]–[2], [21]–[23], per Lord Toulson

PERSISTENT

See also GATING ORDER

[The Highways Act 1980, Pt 8A (ss 129A–129G) empowers councils which are highway authorities to make, vary and revoke orders restricting the public right of way over highways in their areas (gating orders) and enforce those restrictions by physical barriers. Before making such an order a council has to be satisfied (inter alia) that the existence of the highway is facilitating the ‘persistent commission’ of criminal offences or anti-social behaviour (s 129A(3)(b)).] [21] The word “persistent” in s 129A(3)(b) of the 1980 Act is an ordinary English word, commonly understood to mean “continuing or recurring; prolonged”, that does not require further definition.’ *Ramblers’ Association v Coventry City Council* [2008] EWHC 796 (Admin), [2009] 1 All ER 130 at [21], per Michael Supperstone QC (sitting as a Deputy High Court Judge)

PERSON

[For 7(1) Halsbury’s Laws of England (4th Edn) (2004 Reissue) para 284 see now 14 Halsbury’s Laws of England (5th Edn) (2016) para 96.]

Australia [Migration Act 1958 (Cth), s 424(2).]

‘(2) Does the word “person” in s 424(2) mean only a natural person?’

[103] In SZLPP’s application, one ground on which the minister seeks to distinguish *SZKTI* [*SZKTI v Minister for Immigration and Citizenship* (2008) 168 FCR 256; 247 ALR 699; 102 ALD 506; [2008] FCAFC 83] and *SZKCQ* [*SZKCQ v Minister for Immigration and Citizenship* (2008) 170 FCR 236; 247 ALR 657; 102 ALD 250; [2008] FCAFC 119] is that the tribunal’s requests in those cases were addressed to “natural persons and not corporations or polities or government departments”. The minister submits that s 424(2) provides “the voluntary equivalent of the compulsive power to summon an identified person to attend the tribunal and give evidence (s 427(3)(a))”.

[104] As will appear, we do not find it necessary to answer the question posed, but as it was fully argued we will express our view on it.

[105] We think that the answer to the question posed is “yes”.

[106] First, we would be disposed to accept the minister’s submission outlined above.

[107] Second, in s 441A the person to

whom the document is to be given is called the “recipient”. This is a person to whom it is possible to hand the document (s 441A(2)) or who has provided to the tribunal an address of one kind or another: subss 441A(3), (4), (5). In various ways subss 441A(3), (4) and (5) suggest that the recipient is a natural person.

[108] Third, the kinds of issues into which the tribunal is required to enquire suggest information that an individual is able to give concerning an individual. They are issues concerning the question whether the protection visa applicant falls within the definition of a “refugee” in the Convention relating to the Status of Refugees of 1951 as affected by the 1967 Protocol relating to the Status of Refugees.

‘(3) Is the word “person” in s 424(2) limited by reference to a person whose identity is known at the time of the extending of the invitation?’

[109] Again, we think that the answer is “yes”. This answer is required by the answer to (1) above.’ *SZLPO v Minister for Immigration and Citizenship* (NSD 1227 of 2008) [2009] FCAFC 51, (2009) 255 ALR 407 at [103]–[109], per Lindgren, Stone and Bennett JJ

Any other person

[Offences Against the Person Act 1861, s 23: offence to unlawfully administer to ‘any other person, any poison or destructive or noxious thing’, so as to inflict grievous bodily harm.] [1] The issue raised in this appeal concerns the ability of a child (CP) to claim criminal injuries compensation from the Criminal Injuries Compensation Authority (CICA), as a result of being born with foetal alcohol spectrum disorder (FASD) as a direct consequence of her mother’s excessive drinking while pregnant in circumstances where it was asserted that the mother was aware of the danger of harm to her baby being caused by drinking to excess.

...

[15] The first issue which arises is whether CP is “any other person”, given that she was a foetus at the time the alcohol was ingested. It is the Upper Tribunal’s finding in favour of the CICA’s argument that CP could not in those circumstances be “any other person”, that is the primary issue in this appeal. CICA, as the interested party, seeks to sustain that finding, but in any event through its respondent’s notice seeks to justify the Upper Tribunal’s quashing of the First-tier Tribunal’s decision on two additional grounds.

...
 '[36] In *R (on the application of Jones) v First-tier Tribunal* [2013] UKSC 19, [2013] 2 All ER 625, [2013] 2 AC 48 Lord Hope, giving the judgment, said that in a criminal injuries compensation case there were two questions for a tribunal to consider. The first was whether, having regard to the established facts, a criminal offence had been committed. The second was whether, having regard to the nature of the criminal act, the offence committed was a crime of violence. The assessment of the first question, once facts are established, is clearly a question of law involving construction of the statute. It is on this aspect of the case that the answer to the primary question turns. The section requires administration of the noxious substance to "any other person". As set out above, Mr Foy sought to bring himself within that phrase by reference to two alternative arguments.

'[37] As to the first, he acknowledged its apparent weakness, and conceded that he was unable to produce authority in support of it. It is clear to me that the decision in *A-G's Ref (No 3 of 1994)* itself is fatal to this limb of the argument. Both Lord Mustill and Lord Hope were in agreement that a foetus is not to be regarded as another person. It was neither a distinct person nor an adjunct of the mother but was a unique organism. As Lord Hope said at ([1997] 3 All ER 936 at 954, [1998] AC 245 at 267):

"... an embryo is in reality a separate organism from the mother from the moment of its conception. This individuality is retained by it throughout its development until it achieves an independent existence on being born. So the foetus cannot be regarded as an integral part of the mother ... notwithstanding its dependence upon the mother for its survival until birth."

'[38] Additionally, the first sentence of rule three cited by Lord Mustill—"Except under statute an embryo or foetus in utero cannot be the victim of a crime of violence"—is again inconsistent with Mr Foy's contention.

...
 '[44] ... The time at which harm, acknowledged in this case to amount to grievous bodily harm, occurred was whilst CP was in the womb. At that stage the child did not have legal personality so as to constitute "any other person" within the meaning of s 23. The basis upon which the actus reus is extended in a

manslaughter case cannot apply here since nothing equivalent to death occurred to CP after her birth.' *CP (a child) v First-tier Tribunal (Criminal Injuries Compensation) (Criminal Injuries Compensation Authority, interested party) (British Pregnancy Advisory Service and others intervening)* [2014] EWCA Civ 1554, [2015] 4 All ER 60 at [1], [15], [36]–[38], [44], per Treacy LJ

PERSON AGGRIEVED

Australia [Corporations Act 2001 (Cth), s 601AH: power to order reinstatement of a company's registration on the application of, inter alia, a person aggrieved by deregistration.] '[45] The Deputy Commissioner [of Taxation] was a person aggrieved both before and after he served the notices of amended assessment. This is because in order to take steps to recover taxation liabilities (or contingent taxation liabilities as they may be characterised prior to the service of the notices of amended assessment: see *Civic Finance [Deputy Commissioner of Taxation v Australian Securities and Investments Commission; Re Civic Finance Pty Ltd (Deregistered)* (2010) 81 ATR 456; [2010] FCA 1411] at [13]) the company must remain registered. Since the Deputy Commissioner is charged with the responsibility of administering the taxation legislation and would be hindered in discharging this responsibility in the event that the company is not registered, both at the time of the registrar's decision and now, the Deputy Commissioner was and remains properly regarded as a person aggrieved for the purposes of s 601AH(2) of the Corporations Act.' *Deputy Commissioner of Taxation v Australian Securities and Investments Commission* [2013] FCA 623, (2013) 304 ALR 319 at [45], per Kenny J

In Patents Act or Trade Marks Act

[For 48 Halsbury's Laws of England (4th Edn) (2007 Reissue) para 809 see now 97A Halsbury's Laws of England (5th Edn) (2014) para 107.]

PERSON IN AUTHORITY

Canada

'[34] The confessions rule ensures that statements made out of court by an accused to a person in authority are admissible only if the

statements were voluntary. The relevant principles were canvassed by this Court in *R v Hodgson* [1998] 2 SCR 449, and *R v Oickle* [2000] 2 SCR 3, 2000 SCC 38. In *Oickle*, at paras 47–71, the Court set out the factors relevant to the voluntariness inquiry. The issue argued on this appeal by the appellant was whether the impugned statements were made to a “person in authority” within the meaning of *Hodgson*, and not whether they were free and voluntary within the meaning of *Oickle*.

[35] The rule, the policies supporting it, and the definition of “person in authority”, were all considered in *Hodgson*. Cory J expressed the rule’s rationale as follows:

The rule is based upon two fundamentally important concepts: the need to ensure the reliability of the statement and the need to ensure fairness by guarding against improper coercion by the state.

...

It cannot be forgotten that it is the nature of the authority exerted by the state that might prompt an involuntary statement In other words, it is the fear of reprisal or hope of leniency that persons in authority may hold out and which is associated with their official status that may render a statement involuntary This limitation [ie, the person in authority requirement] is appropriate since most criminal investigations are undertaken by the state, and it is then that an accused is most vulnerable to state coercion. [paras 48 and 24]

The underlying rationale of the “person in authority” analysis is to avoid the unfairness and unreliability of admitting statements made when the accused believes himself or herself to be under pressure from the uniquely coercive power of the state. In *Hodgson*, although explicitly invited to do so, the Court refused to eliminate the requirement for a “person in authority” threshold determination. As Cory J stated, were it not for this requisite inquiry,

all statements to undercover police officers would become subject to the confessions rule, even though the accused was completely unaware of their status and, at the time he made the statement, would never have considered the undercover officers to be persons in authority. [para 25]

[36] There is no doubt, as the Court observed in *Hodgson*, at para 26, that statements can

sometimes be made in such coercive circumstances that their reliability is jeopardized even if they were not made to a person in authority. The admissibility of such statements is filtered through exclusionary doctrines like abuse of process at common law and under the *Canadian Charter of Rights and Freedoms*, to prevent the admission of statements that undermine the integrity of the judicial process. The “abuse of process” argument was, in fact, made by Mr Grandinetti at trial, but was rejected both at trial and on appeal, and was not argued before us.

[37] In *Hodgson*, the Court delineated the process for assessing whether a confession should be admitted. First, there is an evidentiary burden on the accused to show that there is a valid issue for consideration about whether, when the accused made the confession, he or she believed that the person to whom it was made was a person in authority. A “person in authority” is generally someone engaged in the arrest, detention, interrogation or prosecution of the accused. The burden then shifts to the Crown to prove, beyond a reasonable doubt, either that the accused did not reasonably believe that the person to whom the confession was made was a person in authority, or, if he or she did so believe, that the statement was made voluntarily. The question of voluntariness is not relevant unless the threshold determination has been made that the confession was made to a “person in authority”.

[38] The test of who is a “person in authority” is largely subjective, focusing on the accused’s perception of the person to whom he or she is making the statement. The operative question is whether the accused, based on his or her perception of the recipient’s ability to influence the prosecution, believed either that refusing to make a statement to the person would result in prejudice, or that making one would result in favourable treatment.

[39] There is also an objective element, namely, the reasonableness of the accused’s belief that he or she is speaking to a person in authority. It is not enough, however, that an accused reasonably believe that a person can influence the course of the investigation or prosecution. As the trial judge correctly concluded:

[R]eason and common sense dictates that when the cases speak of a person in authority as one who is capable of controlling or influencing the course of the proceedings, it is from the perspective of

someone who is involved in the investigation, the apprehension and prosecution of a criminal offence resulting in a conviction, an agent of the police or someone working in collaboration with the police. It does not include someone who seeks to sabotage the investigation or steer the investigation away from a suspect that the state is investigating.

(Alta QB, No 98032644C5, April 30 1999, at para 56)

‘[40] Although the person in authority test is not a categorical one, absent unusual circumstances an undercover officer will not be a person in authority since, from the accused’s viewpoint, he or she will not usually be so viewed. This position is supported by precedent. As Cory J explained in *Hodgson*:

The receiver’s status as a person in authority arises only if the accused had knowledge of that status. If the accused cannot show that he or she had knowledge of the receiver’s status (as, for example, in the case of an undercover police officer) ..., the inquiry pertaining to the receiver as a person in authority must end. [para 39]

See also *Rothman v The Queen* [1981] 1 SCR 640, at p 664; *R v Todd* (1901) 4 CCC 514 (Man KB), at p 527.

‘[41] The appellant conceded that undercover officers are usually not persons in authority. His position is that although undercover officers are not usually persons in authority, when an undercover operation includes as part of its ruse a suggested association with corrupt police, who the accused is told could influence the investigation and prosecution of the offence, the officers qualify as persons in authority.

‘[42] However, under the traditional confession rule,

a person in authority is a person concerned with the prosecution who, in the opinion of the accused, can influence the course of the prosecution.

(*R v Berger* (1975) 27 CCC (2d) 357 (BCCA), at p 385, cited in *Hodgson*, at para 33).

‘[43] This, it seems to me, is further elaborated in *Hodgson* by Cory J’s description of a person in authority as someone whom the confessor perceives to be “an agent of the police or prosecuting authorities”, “allied with the state authorities”, “acting on behalf of the police or prosecuting authorities”, and “acting in concert with the police or prosecutorial authorities, or as

their agent” (paras 34–36 and 47). He amplified this theory as follows:

Since the person in authority requirement is aimed at controlling coercive state conduct, the test for a person in authority should not include those whom the accused unreasonably believes to be acting on behalf of the state. Thus, where the accused speaks out of fear of reprisal or hope of advantage because he reasonably believes the person receiving the statement is acting as an agent of the police or prosecuting authorities and could therefore influence or control the proceedings against him or her, then the receiver of the statement is properly considered a person in authority. In other words, the evidence must disclose not only that the accused subjectively believed the receiver of the statement to be in a position to control the proceedings against the accused, but must also establish an objectively reasonable basis for that belief ...

... there is no catalogue of persons, beyond a peace officer or prison guard, who are automatically considered a person in authority solely by virtue of their status. A parent, doctor, teacher or employer all may be found to be a person in authority if the circumstances warrant, but their status, or the mere fact that they may wield some personal authority over the accused, is not sufficient to establish them as persons in authority for the purposes of the confessions rule... [T]he person in authority requirement has evolved in a manner that avoids a formalistic or legalistic approach to the interactions between ordinary citizens. Instead, it requires a case-by-case consideration of the accused’s belief as to the ability of the receiver of the statement to influence the prosecution or investigation of the crime. That is to say, the trial judge must determine whether the accused reasonably believed the receiver of the statement was acting on behalf of the police or prosecuting authorities. [paras. 34 and 36]

‘[44] The appellant believed that the undercover officers were criminals, not police officers, albeit criminals with corrupt police contacts who could potentially influence the investigation against him. When, as in this case, the accused confesses to an undercover officer he thinks can influence his murder investigation by

enlisting corrupt police officers, the state's coercive power is not engaged. The statements, therefore, were not made to a person in authority.' *R v Grandinetti* [2005] 1 SCR 27, 2005 SCC 5 at [34]–[44], per Abella J

PERSON INSURED UNDER THE CONTRACT

Canada [Whether the plaintiff, as a result of being listed as the principal driver of a designated vehicle within a contract of Insurance was by that fact a 'person insured under the contract' within the meaning of the Automobile Insurance Act, RSNL 1990, c A-22, s 33(1) (under which 'person insured under the contract' includes 'the insured named in the contract') and the Uninsured Automobile and Unidentified Automobile Coverage Regulation, CNLR 985/96, Schedule, s 1.] '21. The principal driver is identified in the policy, but he is not named as the owner of the vehicles, he is not named as the owner of the policy and he is not identified as the named insured. To include the "principal driver" on an endorsement within the meaning of "named insured", would require the Court to imply wording into the legislation and, in effect, create a definition extending the plain and ordinary meaning of the words used by the legislature. This is not required to give purpose to the section or meet the objects of the legislation. While being insured under the contract, the Plaintiff is not the named insured and does not qualify for the extended indemnity pursuant to s 33(1)(b)(iii)(B).

'22. As often quoted, the Judge's task is to interpret the statute and not create it and I am of the view that the wording of s 33(1)(b)(iii)(B) is meant to be restrictive, allowing recovery for personal injuries to be extended only to the insured named in the contract when that individual is operating or a passenger in an uninsured automobile or struck by an uninsured automobile. [Section 33(1)(b)(iii)(B) does include the dependants of the insured named in the contract, but reference is not required to this group for the purpose of analysis.]

'23. The Plaintiff receives coverage under the Policy as principal driver of one specific vehicle, the endorsement does not identify the Plaintiff as the named insured which would entitle the Plaintiff to general indemnity under the Policy or the extended indemnity through s 33(1)(b)(iii)(B). The language "insured named in the contract" within s 33(1)(b)(iii)(B) does not include the Plaintiff.' *Young v Canadian Union Insurance Co* [2010] NJ No 156, 2010

NLTD 84, 297 Nfld & PEIR 256, [2010] ILR I-4979, Nfld and Labrador SC, at paras 21–21, per R P Whalen J

PERSONAL DATA

See also BARNARDISATION

[Data Protection Act 1998, ss 1(1), 4(4).] '[21] Section 1(1) defines "personal data" in these terms:

" 'personal data' means data which relate to a living individual who can be identified – (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."

The word "data" is also defined in s 1(1), although the word "information" is not. For the purposes of the 1998 Act "data" means information which is in a form capable of being processed by a computer or other automatic equipment, or is recorded with the intent that it be should be processed by such means, or is recorded as part of a relevant filing system, such as a card file, which is structured in such a way that specific information relating to a particular individual is readily accessible or is part of an accessible record as defined by s 68, such as a set of notes kept by a health professional which relate to a named patient. The word "processing" is also given a wide meaning by s 1(1). It includes carrying out any operations on data, including adapting, altering or disclosing it.

'[22] As the definitions in s 1(1) of the 1998 Act make clear, disclosure is only one of the ways in which information or data may be processed by the data controller. The duty in s 4(4) is all embracing. He must comply with the data protection principles in relation to all "personal data" with respect to which he is the data controller and to everything that falls within the scope of the word "processing". The primary focus of the definition of that expression is on him and on everything that he does with the information. He cannot exclude personal data from the duty to comply with the data protection principles simply by editing the data so that, if the edited part were to be disclosed to a third party, the third party would not find it possible from that part alone without the assistance of other information to identify a

living individual. Paragraph (b) of the definition of "personal data" prevents this. It requires account to be taken of other information which is in, or is likely to come into, the possession of the data controller.

'[23] The question then is whether the respondent can meet Mr Collie's request by requiring the agency to release the information to him in a barnardised form. Barnardisation is a method of rendering the information, so far as it is possible to do so, anonymous. If the definition of "personal data" can be read in a way that excludes information that has been rendered fully anonymous in the sense that it is information from which the data subject is no longer identifiable, putting it into that form will take it outside the scope of the agency's duty as data controller under s 4(4) of the 1998 Act to comply with the data protection principles. It will also remove it from the definition of exempt information in s 38 of the [Freedom of Information (Scotland) Act 2002]. This is because that definition extends only to information which is "personal data" within the meaning of s 1(1) of the 1998 Act. If the definition of "personal data" cannot be read in this way, it will not be open to the respondent to require the agency to release the information to Mr Collie, even although barnardised to eliminate any possible risk of identification, unless processing it in this way would be in accordance with the data protection principles. There is an obvious attraction in the first of these two routes towards meeting the request, as it is a much simpler way of dealing with it. But is the definition open to this construction?

'[24] The relevant part of the definition is head (b). It directs attention to "those data", which in the present context means the information which is to be barnardised, and to "other information" which is or may come to be in the possession of the data controller. "Those data" will be "personal data" if, taken together with the "other information", they enable a living individual to whom the data relate to be identified. The formula which this part of the definition uses indicates that each of these two components must have a contribution to make to the result. Clearly, if the "other information" is incapable of adding anything and "those data" by themselves cannot lead to identification, the definition will not be satisfied. The "other information" will have no part to play in the identification. The same result would seem to follow if "those data" have been put into a form from which the individual or individuals to whom they relate cannot be identified at all,

even with the assistance of the other information from which they were derived. In that situation a person who has access to both sets of information will find nothing in "those data" that will enable him to make the identification. It will be the other information only, and not anything in "those data", that will lead him to this result.

'[25] The wording of recital 26 of the preamble to [EC Council Directive 95/46 (on the protection of individuals with regard to the processing of personal data and on the free movement of such data)] supports this approach. It provides:

"Whereas the principles of protection must apply to any information concerning an identified or identifiable person; whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable ..."

The definition of "personal data" gives effect to recital 26. The first phrase in the recital is the situation referred to in head (a) of the definition, where the information itself enables the person to whom it relates to be identified. The second phrase is the situation referred to in head (b), where the information has this effect when taken together with other information. The third phrase casts further light on what member states were expected to achieve when implementing the 1995 Directive. Rendering data anonymous in such a way that the individual to whom the information from which they are derived refers is no longer identifiable would enable the information to be released without having to apply the principles of protection. Read in the light of the 1995 Directive, therefore, the definition in s 1(1) of the 1998 Act must be taken to permit the release of information which meets this test without having to subject the process to the rigour of the data protection principles.

'[26] The effect of barnardisation would be to conceal, or disguise, information about the number of incidences of leukaemia among children in each census ward. The question is whether the data controller, or anybody else who was in possession of the barnardised data, would be able to identify the living individual or individuals to whom the data in that form

related. If it was impossible for the recipient of the barnardised data to identify those individuals, the information would not constitute "personal data" in his hands. But we are concerned in this case with its status while it is still in the hands of the data controller, as the question is whether it is or is not exempt from the duty of disclosure that the 2002 Act says must be observed by him.

'[27] In this case it is not disputed that the agency itself holds the key to identifying the children that the barnardised information would relate to, as it holds or has access to all the statistical information about the incidence of the disease in the health board's area from which the barnardised information would be derived. But in my opinion the fact that the agency has access to this information does not disable it from processing it in such a way, consistently with recital 26 of the 1995 Directive, that it becomes data from which a living individual can no longer be identified. If barnardisation can achieve this, the way will be then open for the information to be released in that form because it will no longer be personal data. Whether it can do this is a question of fact for the respondent on which he must make a finding.' *Common Services Agency v Scottish Information Comr* [2008] UKHL 47, [2008] 4 All ER 851 at [21]–[27], per Lord Hope of Craighead

Sensitive personal data

'[34] Section 2 of the [Data Protection Act 1998] provides:

"In this Act 'sensitive personal data' means personal data consisting of information as to—(a) the racial or ethnic origin of the data subject, (b) his political opinions, (c) his religious beliefs or other beliefs of a similar nature, (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992), (e) his physical or mental health or condition, (f) his sexual life, (g) the commission or alleged commission by him of any offence, or (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings."

'[35] The item on this list which is relevant to this case is item (e). The information which Mr Collie asked for was details of all incidents of childhood leukaemia for all the Dumfries and

Galloway postal area by census ward. This was information about the physical health or condition of the children who had been diagnosed as having this disease. For the reasons already given, I consider that it is open to the commissioner to hold that the barnardised data would constitute personal data within the meaning which has been given to that expression by s 1(1) of the 1998 Act. It would seem to be a short step to conclude, that if it was personal data, it must be sensitive personal data too because it was data about the physical health of living children who could be identified from data released in response to the request together with other information in the possession of, or likely to come into the possession of, the agency. This too is a question of fact on which the commissioner must make a finding.

'[36] But Mr Cullen for the commissioner submitted that it would not be open to him because the definition in s 2 was a self-standing definition. The only data that were relevant to the question whether the information was sensitive personal data were the data that were to be processed by releasing it. As it would not be possible from the barnardised data alone to discover the children's identities it could not be said to consist, in that form, of information about their physical health or condition. The difficulty of meeting any of the conditions in Sch 3 if it was to be released was another factor to be taken into account. A narrow interpretation of the expression was necessary in these circumstances. Otherwise it would not be lawful for information about a matter which was of genuine public interest to be released in this case.

'[37] I do not think that the wording of the Act as whole supports this interpretation. The fact that the expression that is being defined in s 2 of the 1998 Act includes the words "personal data" suggests that the whole of the definition of "personal data" is written into it. This is not just "data" as defined in s 1(1). "Sensitive personal data" is a subset, or a species, of "personal data". This approach is reinforced by s 4(4), which provides:

"Subject to section 27(1) [exemptions], it shall be the duty of a data controller to comply with the data protection principles in relation to all personal data with respect to which he is the data controller."

The expression "personal data" in this subsection must be taken to mean personal data as defined in s 1(1). The context shows that it is being used here to embrace not only all

"personal data" as so defined but also "sensitive personal data", although sensitive personal data as such are not separately identified. This is because the data protection principles make special provision in Sch 3 for the processing of sensitive personal data. The expression "personal data" must include sensitive personal data to bring that species of data too within the scope of the obligation that is imposed on the data controller by s 4(4).

[38] The same use of language is to be found in para 1 of Sch 1. It sets out the first principle for the processing of "personal data", within which special provision is made for the processing of "sensitive personal data." I can find nothing in the context of this schedule or of Sch 3 to suggest that the reference to data of that kind should be read as narrowly as Mr Cullen suggested. The words "personal data" are also used repeatedly in Sch 3. There seems to me to be no good reason for refusing to apply the full definition of that expression in s 1(1) to its use in this context, especially in view of the way the obligation that s 4(4) sets out is expressed.

[39] Reference was made to art 8(1) of the 1995 Directive [EC Council Directive 95/46 (on the protection of individuals with regard to the processing of personal data and on the free movement of such data)] which uses the words "personal data" when it refers in the first place to the processing of data "revealing" some things such as racial and ethnic origin and the word "data" only when it refers in the second place to the processing of data "concerning" health or sex life. But the directive is not as precise as the statute is in its choice of language, and I would not attach any significance to this aspect of the article. On the contrary, recital 2 read together with art 1(1) of the directive seem to me to support the view that data of such a sensitive nature as that relating to a person's health or sex life should be given just as much protection in the hands of the data controller as that relating to his racial or ethnic origin and the other things referred to in the first place in art 8(1).

[40] For these reasons I would hold that the 1998 Act requires the definition of "personal data" to be read into the definition of "sensitive personal data". I would not be deterred by any difficulty that may be found in any particular case in meeting any of the conditions in Sch 3. This is not an appropriate context for the statutory language to be construed liberally in favour of the release of information. The 1998 Act, as its short title indicates, is designed to regulate and control the processing of data and

to protect the interests of those who may be affected by its release. The definition of "sensitive personal data" forms an essential part of the statutory scheme of data protection. The fact that the definition is relevant to the question whether the data is exempt information as defined by s 38 of the [Freedom of Information (Scotland) Act 2002] does not justify giving it a narrower meaning than it has for the purposes of the 1998 Act. If none of the conditions in Sch 3 can be met, so be it. This must be taken to be what Parliament intended when the legislation that it enacted was put into effect.' *Common Services Agency v Scottish Information Comr* [2008] UKHL 47, [2008] 4 All ER 851 at [34]–[40], per Lord Hope of Craighead

PERSONAL INJURY DAMAGES

Australia [Legal Profession Act 1987 (NSW), s 198D(1), setting maximum costs for legal services provided to a party in connection with 'a claim for personal injury damages'; whether intentional tort covered.] [33] The construction favoured by the Court of Appeal and supported in this court by the respondents must be rejected. The text of the provisions at issue in these appeals readily yields the construction which the appellants urged: that the expression "personal injury damages" when used in the costs limiting provisions of Div 5B of Pt 11 of the 1987 Legal Profession Act extended to any and every form of damages that relate to the death of or personal or bodily injury to a person caused by the fault of another person. In its terms, the definition of "personal injury damages" contained in the Liability Act [Civil Liability Act 2002 (NSW)] and picked up by the 1987 Legal Profession Act neither required nor permitted any different application according to whether the "fault" which founded the claim was a failure to take reasonable care or the commission of an intentional act with intent to injure. And s 198C(1) of the 1987 Legal Profession Act, by providing that "personal injury damages" has the same *meaning* as in the Liability Act, naturally and immediately directed attention to the definition of that expression in the Liability Act, which used the cognate word "means": "personal injury damages *means*". [Emphasis added.] It did not refer to the operation or application of the Liability Act. It did not direct attention to whatever was identified as being the legal effect or consequence which the Liability Act produced by using that defined expression in its various provisions.

[34] At least in this court, if not also in the courts below, the respondents' argument for confining the application of the costs limiting provisions by reference to the operation or application of the Liability Act depended upon a false premise. The respondents focused attention on the expression "personal injury damages" as if that expression was the hinge on which both the 1987 Legal Profession Act and the Liability Act turned. Hence, their argument was that "personal injury damages" in the 1987 Legal Profession Act is to be confined to those "personal injury damages" regulated by the Liability Act.

[35] The premise underlying this argument is not sound. Each Act used the defined expression "personal injury damages" as part of a larger composite phrase: "*award of personal injury damages*" in the Liability Act and "*claim for personal injury damages*" in the 1987 Legal Profession Act. [Emphasis added.] The hinge on which the relevant operation of each Act turned was the larger composite phrase and not the defined expression "personal injury damages". None of the statutory provisions that depended on the composite expressions "claim for personal injury damages" or "award of personal injury damages" affected the sense in which the defined expression "personal injury damages" was used in the relevant Acts. There is no textual reason to limit the expression "personal injury damages" in the 1987 Legal Profession Act to those *claims* for personal injury damages the award of which was regulated by the Liability Act.

[36] There is an additional problem with the respondents' argument. It assumed that the costs limiting provisions of the 1987 Legal Profession Act and the Liability Act were to have coextensive operation. For example, the respondents submitted that "the Civil Liability Act and the costs limitation provisions of the Legal Profession Act were introduced as a single package of reforms in the Civil Liability Act and were clearly intended to work in harmony". From this premise, the argument continued that because the Liability Act regulated some but not all forms of *awards* of "personal injury damages", the only *claims* for "personal injury damages" to which the costs limiting provisions of the 1987 Legal Profession Act applied were those claims for personal injury damages the award of which was regulated by the Liability Act. Again, the premise underpinning this argument is not right.

[37] The use of the defined expression "personal injury damages" in both composite phrases provides no *textual* basis for reading the

defined expression (when it is used in the 1987 Legal Profession Act) as confined by reference to the Liability Act's field of operation once due regard is paid to the wider, and different, composite expressions that are central to the relevant provisions of each Act. Further, as has already been noted, the two Acts expressly identified circumstances in which their respective provisions were not to apply, some of which were the same but some of which were different. In their very terms the relevant provisions of the two Acts demonstrate that each had, and was intended to have, a different area of operation.

[38] Considerations of context do not support the conclusion that the two Acts are to be read as having coextensive fields of operation. The Liability Act's exclusion of intentional torts done with intent to injure from the application of its operative provisions (all of which were originally to be found in Pt 2 of the Act) demonstrates that the mischiefs to which *that* Act was directed were identified as arising in connection with claims for damages for personal injury *other* than claims in respect of intentional torts. It by no means follows, however, that the mischiefs to which Div 5B of Pt 11 of the 1987 Legal Profession Act was directed were confined to mischiefs arising in respect of only those classes of claims for personal injury damages the award of which was regulated by the Liability Act. Particularly is that so when intentional torts were not expressly excluded from the operation of Div 5B, as they might so easily have been.

[39] The only circumstance which can be identified as suggesting that the "purpose" or "intention" of Div 5B should be read as confined in the manner described is that it was the Liability Act which introduced the relevant provisions into the 1987 Legal Profession Act. But when it is observed that the provisions of the two Acts were not connected, as they might so easily have been, by express reference in the 1987 Legal Profession Act to the *operation* of the Liability Act, it is apparent that the supposed limitation by reference to "purpose" or "intention" is not soundly based. The text of the relevant provisions provides no support for confining Div 5B to those claims for personal injury damages the award of which was regulated by Pt 2 of the Liability Act. The statutory text reveals no "intention" so to confine Div 5B.

...

[42] The claims which the respondents made were claims for damages that related to personal or bodily injury suffered by them.

Contrary to the conclusions reached by the Court of Appeal in each matter, the claims that each respondent made were “claims for personal injury damages” within the meaning of s 198D(1) of the 1987 Legal Profession Act.’ *Certain Lloyd’s Underwriters Subscribing to Contract No IH00AAQS v Cross (Matter No S417/2011)* [2012] HCA 56, (2012) 293 ALR 412 at [33]–[39], [42], per French CJ and Hayne J

[Civil Liability Act 2002 (NSW), ss 3B, 11; Legal Profession Act 2004 (NSW), ss 337, 338.] ‘[2] As in the Lloyd’s appeals [see above], this appeal concerns the construction of New South Wales statutory provisions fixing the maximum costs that can be awarded in certain personal injury damages matters. Two questions arise in this appeal. Does a “claim for personal injury damages” include a claim for personal injury damages based on an intentional tort? Does it include a claim for damages for false imprisonment?

...
[17] The definition of “personal injury damages” in s 337(1) of the 2004 Legal Profession Act lay at the centre of the debate about construction in this court, just as the definition of the same expression in the Act’s legislative ancestor lay at the centre of the debate in the Lloyd’s appeals. The central point of difference between the parties in this appeal mirrored that in the Lloyd’s appeals: does the definition of “personal injury damages” in the 2004 Legal Profession Act (it “has the same meaning as in Part 2” of the Liability Act) direct attention only to the words of the definition of that expression in s 11 of the Liability Act or does it direct attention to both the words of the definition and the kinds of awards of personal injury damages to which Pt 2 of that Act applied? The appellant advanced the first construction, the respondent the second.

[18] The first construction should be adopted. “Personal injury damages” in the 2004 Legal Profession Act means any and every form of damages that relate to personal injury to a person whether that injury results from a failure to take reasonable care or the commission of an intentional act with intent to cause injury. This construction accords with the text of the relevant provisions of both Acts. The second construction does not. The definition of “personal injury damages” in s 337(1) does not refer to the operation or application of the Liability Act. It refers to the *meaning* of the expression in Pt 2 of the Liability Act, and s 11 in Pt 2 of the Liability Act provides that personal injury damages “*means* damages that

relate to the death of or injury to a person”. [Emphasis added.] That definition draws no distinction between damages awarded in claims for negligence and damages awarded in claims for an intentional tort.

...
[31] The costs limiting provisions of the 2004 Legal Profession Act are engaged where an amount has been “recovered on a claim for personal injury damages”. As already explained, “personal injury damages” was defined to have the same meaning as in Pt 2 of the Liability Act. And as has already been noted, s 11 of the Liability Act defined “personal injury damages” as “damages that relate to the death of or injury to a person” and “injury” as “personal injury”, including “impairment of a person’s physical or mental condition”.

[32] The respondent sued the appellant for trespass to the person (alleging several instances of battery) and false imprisonment. He alleged that the batteries he had suffered had caused him personal injury, but it was far from clear that he alleged that the wrongful deprivation of his liberty had itself impaired his physical or his mental condition.

[33] Often but not always, a battery will cause personal injury to the victim. False imprisonment is often accompanied by an assault and battery and the accompanying battery may (but need not) cause personal injury. There may be cases where an act of false imprisonment itself causes psychiatric, even physical injury.

[34] Even assuming, however, that the respondent did allege that the act of wrongful imprisonment (as distinct from the batteries he alleged he had suffered) had caused him some personal injury, the claim for false imprisonment was necessarily a claim for damages on account of the deprivation of liberty with any accompanying loss of dignity and harm to reputation. The deprivation of liberty (loss of dignity and harm to reputation) is not an “impairment of a person’s physical or mental condition” or otherwise a form of “injury” within s 11 of the Liability Act. The claim for false imprisonment, at least to the extent to which it sought damages for deprivation of liberty, is not a “claim for personal injury damages”.’ *New South Wales v Williamson* [2012] HCA 57, (2012) 293 ALR 440 at [2], [17]–[18], [31]–[34], per French CJ and Hayne J

PERSONAL OR OTHER RELATIONSHIP

[Regulation of Investigatory Powers Act 2000, s 26(8)(a). Allegations that police officers

established and maintained intimate sexual relationships with persons for the covert purpose of obtaining intelligence, in breach of human rights.] ‘[32] ... The phrase “personal or other relationship” in s 26(8)(a) forms part of the definition of the type of conduct which can be authorised under s 27 and which, if it is carried out in “challengeable circumstances”, may be the subject of human rights proceedings before the [Investigatory Powers Tribunal] under s 65. In its plain and ordinary meaning, it includes intimate sexual relationships. In the principle of legality cases, there was a general power which was capable of being used for many purposes. There was doubt as to whether Parliament intended that it should be capable of being used so as to override fundamental rights. In the present context, there is no doubt that, in enacting the 2000 Act, Parliament intended to override fundamental human rights subject to certain protections. Most pertinently, these include the requirement for necessity and proportionality. It can fairly be said that Parliament may not have foreseen in precisely what way those human rights might be overridden and there is certainly nothing to suggest that Parliament contemplated that surveillance by a CHIS [covert human intelligence source] might be conducted by using the extraordinary techniques that are alleged to have been used in the present case. But none of that matters. To give “personal or other relationships” its ordinary meaning so as to include intimate sexual relationships does not produce any startling or unreasonable consequences which Parliament cannot have intended. That is why we do not consider that the principle of legality requires the words to be given a narrower meaning than they naturally bear.’ *AJA v Metropolitan Police Comr* [2013] EWCA Civ 1342, [2014] 1 All ER 882 at [32], per Lord Dyson MR

PERSONAL PROPERTY

[For 35 Halsbury’s Laws of England (4th Edn) (Reissue) paras 1201, 1204 see now 80 Halsbury’s Laws of England (5th Edn) (2013) paras 801, 805.]

PERSONAL REPRESENTATIVE

[For 17(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 4 see now 103 Halsbury’s Laws of England (5th Edn) (2010) para 608.]

PERVERTING THE COURSE OF JUSTICE

‘[35] For present purposes, the state of the law concerning the offence of perverting the course of justice may be summarised as follows. (i) There is no closed list of acts which may give rise to the offence. (ii) That said, any expansion of the offence should only take place incrementally and with caution, reflecting both principles of common law reasoning and the requirements of art 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). (iii) So far as concerns the offence generally, neither authority nor principle supports confining the requisite acts to those giving rise to some other independent criminal wrongdoing. (iv) If there is no such limitation generally, then there is no basis for importing such a restriction—as a matter of law—into the elements of the offence where it arises in the context of a breach of a restraint order.

‘[36] We have reached these conclusions as to the scope of the offence in the light of principle and existing authority; reliance on the good sense of prosecutors has played no part in it. However, having formed the views already outlined, we add this. In cases of breach of restraint orders, nothing we have said should encourage prosecutors to charge perverting the course of justice where it is unnecessary to do so; ordinarily the sanction of contempt of court will suffice. We would respectfully echo the observations in *Archbold*, para 28–2, themselves founded on *R v Sookoo* [2002] EWCA Crim 800, (2002) Times, 10 April, that in such cases the offence of perverting the course of justice should only be charged where there are serious aggravating features. Sensibly applied, such an approach permits the offence of perverting the course of justice to be charged where it is appropriate to reflect the gravity or complexity of the wrongdoing in question and where it may be thought (whatever the ultimate outcome) that the maximum sentence for contempt may prove insufficient. We are not persuaded that our conclusion involves any extension of the offence, save that, *Michel v A-G of Jersey* [[2011] JCA 145, 2011 JLR 634] perhaps aside, neither party has found any reported case precisely in point. If, however, our conclusion does involve an extension of the offence, we are amply satisfied that it is no more than incremental and, on any view, not open-ended.’ *R v Kenny* [2013] EWCA Crim 1, [2013] 3 All ER 85 at [35]–[36], per Gross LJ

Australia

[Crimes Act 1900 (NSW), s 319.] '[1] Section 319 of the Crimes Act 1900 (NSW) (the Crimes Act) makes it an offence for a person to do any act, or make any omission, intending in any way to pervert the course of justice. The course of justice begins with the filing or issue of process invoking the jurisdiction of a court or judicial tribunal or the taking of a step that marks the commencement of criminal proceedings. The issue in the appeal is whether liability for the s 319 offence is confined to acts or omissions carried out with the intention of perverting an *existing* course of justice.

...
[35] The focus of the respondent's submissions on the claimed common law understanding of the phrase "the course of justice" is, in any event, beside the point. The defined phrase for the purpose of liability under s 319 is "perverting the course of justice", the meaning of which includes "preventing ... the course of justice". The concept that a person may pervert a course of justice by "preventing it" is eloquent of a legislative intention that liability extend to acts done with the proscribed intention in relation to contemplated proceedings.

[36] As the appellant correctly submits, liability for the offence created by s 319 hinges on the intention to pervert the course of justice and not upon the perversion of a course of justice. Once this is acknowledged, there is no reason to confine the provision's reach to conduct that is engaged in with the intention of perverting existing proceedings.

[37] Part 7 abolishes a number of common law offences against public justice, including perverting the course of justice and attempting or conspiring to pervert the course of justice. Perverting the course of justice and attempting to pervert the course of justice are each substantive offences. Each has in common the doing of an act, or the making of an omission, with the intention of obstructing, preventing, perverting or defeating existing or contemplated curial proceedings. They are distinguished by result. There is nothing in the language of s 319 or the scheme of Pt 7 to suggest that the abolition of the common law offences, and the enactment of a single offence having as its elements the doing of an act or the making of an omission with the intention of obstructing, preventing, perverting or defeating the course of justice, had as its object confining liability to acts done or omissions made with the requisite intention in respect of *existing* proceedings.

[38] It was an error to distinguish the offence created by s 319 from the common law offence

of attempting to pervert the course of justice on the basis that s 319 creates a substantive offence. Contrary to the Court of Criminal Appeal's reasoning, nothing in *Rogerson* [R v *Rogerson* (1992) 174 CLR 268, 107 ALR 225] supports a conclusion that the s 319 offence is confined to conduct that is intended to pervert an existing course of justice. ...' *R v Beckett* [2015] HCA 38, (2015) 325 ALR 385 at [1], [35]–[38], per French CJ, Kiefel, Bell and Keane JJ

PHILOSOPHICAL BELIEF

[Employment Equality (Religion or Belief) Regulations 2003, SI 2003/1660, reg 2: '(1) In these Regulations (a) "religion" means any religion, (b) "belief" means any religious or philosophical belief, (c) a reference to religion includes a reference to lack of religion, and (d) a reference to belief includes a reference to lack of belief ...'. Under the Regulations a person (A) discriminates against another person (B) if on the grounds of religion or belief of B, A treats B less favourably than he treats or would treat another person. An employee dismissed by his employer applied to the employment tribunal claiming that his dismissal had been unfair because he had been discriminated against contrary to the 2003 Regulations because of his asserted philosophical belief about climate change and the environment.]

[24] I do not doubt at all that there must be some limit placed upon the definition of "philosophical belief" for the purpose of the Regulations, but before I turn to consider Mr Bowers's [counsel for the employer] suggested such limitations, I shall endeavour to set out the limitations, or criteria, which are to be implied or introduced by reference to the jurisprudence set out above. (i) The belief must be genuinely held. (ii) It must be a belief and not, as in *McClintock v Dept of Constitutional Affairs* [2008] IRLR 29, an opinion or viewpoint based on the present state of information available. (iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour. (iv) It must attain a certain level of cogency, seriousness, cohesion and importance. (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others (*Campbell v UK* (1982) 4 EHRR 293, [1982] ECHR 7511/76 (para 36) and *Williamson's case* [R (on the application of *Williamson*) v *Secretary of State for Education and Employment* [2005] UKHL

15] [2005] 2 All ER 1 at [23], [2005] 2 AC 246).

[25] Mr Bowers submits that, in order satisfactorily to place a limitation on the philosophical belief that is to be protected, and in order to be *similar* to a religious belief, it must form part of a system of beliefs, and not be one-off. He refers to dicta of the High Court of Australia in *Church of the New Faith v Comr of Pay-Roll Tax (Victoria)* (1983) 154 CLR 120 at 134, referring to philosophies which “seek to explain, in terms of a broader reality, the existence of the universe, the meaning of human life, and human destiny”. He refers also to Vickers’ exposition [*Religious Freedom, Religious Discrimination, and the Workplace* (2008) by Lucy Vickers] of how another member state, the Netherlands, approaches the question of belief in its equivalent Regulations:

“In the Netherlands the term ‘philosophy of life’ (*levensovertuiging*) is used ... in order to place limitations on the type of belief that can be covered. The term ‘philosophy of life’ requires a coherent set of ideas about fundamental aspects of human existence. It includes broad philosophies such as humanism, but does not extend to more general views about society.” (See p 209.)

[26] His submission is that what is required is a philosophical belief based on a philosophy of life, not a scientific or political belief or opinion, or a lifestyle choice. Both sides refer to dictionary definitions of philosophy, as did the regional employment judge, but I do not find them particularly helpful to resolve the question, since, as one would expect, each dictionary referred to has a number of definitions of philosophy. It is, as I have said, common ground that there must be some limitation, and hence Malcolm Evans, cited by Vickers (at p 22), from a work *Religious Liberty and Non-Discrimination* is plainly right to say that “[n]o system could countenance the right of anyone to believe anything and to be able to act accordingly”. I am satisfied that, notwithstanding the amendment to remove “similar”, it is necessary, in order for the belief to be protected, for it to have a similar status or cogency to a religious belief. However, as is apparent from the decision of Elias P in *Eweida v British Airways plc* [2009] IRLR 78, [2009] ICR 303, which is a decision of the Employment Appeal Tribunal on these Regulations, and not part of the ECHR jurisprudence, even a religious belief is not required to be one shared by others:

“Accordingly, it is not necessary for a belief to be shared by others in order for it to be a religious belief, nor need a specific belief be a mandatory requirement of an established religion for it to qualify as a religious belief. A person could, for example, be part of the mainstream Christian religion, but hold additional beliefs which are not widely shared by other Christians, or indeed shared at all by anyone ...” (See [2009] IRLR 78 at 81, [2009] ICR 303 at 310 (para 29).)

[27] I conclude that it is not a bar to a *philosophical belief* being protected by the Regulations if it is a one-off belief and not shared by others, a fortiori where it is likely that others do share the belief. Pacifism and vegetarianism can both be described as one-off beliefs in the sense in which I understand it to be being used by Mr Bowers, namely a belief that does not govern the entirety of a person’s life. Hence, provided that there are the limitations referred to above, which I accept as being appropriately applied to the Regulations, I would subscribe, even were the jurisprudence of the ECHR not otherwise, as I conclude it to be, persuasive, if not binding upon me, to the proposition that, as concluded by the court in *Campbell v UK* (1982) 4 EHRR 293, [1982] ECHR 7511/76 (para 36), the philosophical belief in question does not need to constitute or “allude to a fully-fledged system of thought”, *provided that* it otherwise satisfies the limitations set out in [24], above. As it was put in argument, such *philosophical belief* does not need to amount to an “-ism”.

[28] I turn to Mr Bowers’s next suggested limitation, relating to political belief. As appears from the passage in Hansard, the Attorney General suggested that “support of a political party” might not meet the description of a *philosophical belief*. That must surely be so, but that does not mean that a belief in a political philosophy or doctrine would not qualify. The Attorney General’s other example of a suggested non-candidate was a belief in the supreme nature of the Jedi Knights, and this would fail on the basis of non-compliance with at least four of the limitations suggested above. However, belief in the political philosophies of socialism, Marxism, communism or free-market capitalism might qualify. There is nothing to my mind in the make-up of a *philosophical belief*—particularly against the background of art 14 of the ECHR referred to above—which would disqualify a belief based on a political

philosophy. The belief asserted by the respondent in this case, by reference to his alleged *philosophical belief* in anthropogenic climate change, if established, is likely to be characterised as a political belief: see [3] and [4] in my judgment in relation to Vice-President Gore's film in *R (on the application of Dimmock) v Secretary of State for Education and Skills* [2007] EWHC 2288 (Admin), [2008] 1 All ER 367. But I do not see that as a ground for excluding it, if it be otherwise qualified as a genuinely held *philosophical belief*. It seemed to me that the real concern that Mr Bowers had, and one which the court would naturally share, would be the fear that reliance could be placed upon an alleged *philosophical belief* based on a political philosophy which could be characterised as objectionable: a racist or homophobic political philosophy for example. In my judgment, the way to deal with that would be to conclude that it offended against the requirement set out in para 36 of *Campbell v UK*, that the belief relied on must be "worthy of respect in a 'democratic society' and not incompatible with human dignity" or, in accordance with [23] of *Williamson's* case [2005] 2 All ER 1, [2005] 2 AC 246, a belief "consistent with basic standards of human dignity or integrity". Paragraph 36 in *Campbell v UK* expressly refers, as the source of this requirement/caveat to art 17 of the ECHR, which deals with "Prohibition of abuse of rights".

[29] As to Mr Bowers's suggested limitation by reference to a belief based upon or by reference to science, this appears to me to be drawn by him from two sources. The first is his reference to what must be the first appearance in a bundle of legal authorities of the *History of Western Philosophy* by Bertrand Russell. Russell commences his introduction by a discussion of the word *philosophy*, which has, as he says, been used in many ways, some wider and some narrower. He continues "Philosophy, as I shall understand the word, is something intermediate between theology and science". He thus creates his own parameters, which indeed extend to a compartmentalisation of history, whereby theology dominated in primitive times, philosophy began in Greece in the sixth century BC, was again submerged by theology as Christianity rose and Rome fell, and remained dominant throughout the Middle Ages thanks to the pre-eminence of the Catholic church, and was then followed by "[t]he third period, from the seventeenth century to the present day ... dominated, more than either of its predecessors, by science; traditional religious beliefs remain important, but are felt to need

justification, and are modified wherever science seems to make this imperative". But these categorisations, even by someone as eminent as Bertrand Russell, are not conclusive. The second source for his argument appears to be the decision of Elias P in *McClintock v Dept of Constitutional Affairs* [2008] IRLR 29, by reference to what he said in para 45 of his judgment But that seems to me, as I have said above, to mean that Mr McClintock was *not* acting on the basis of a philosophy, as opposed to his acting on the basis of a philosophy derived from science.

[30] In my judgment, if a person can establish that he holds a *philosophical belief* which is based on science, as opposed, for example, to religion, then there is no reason to disqualify it from protection by the Regulations. The employment judge drew attention to the existence of empiricist philosophers, no doubt such as Hume and Locke. The best example, as it seems to me, which was canvassed during the course of the hearing, is by reference to the clash of two such philosophies, exemplified in the play *Inherit the Wind*, ie one not simply between those who supported creationism and those who did not, but between those who positively supported, and wished to teach, only creationism and those who positively supported, and wished to teach, only Darwinism. Darwinism must plainly be capable of being a philosophical belief, albeit that it may be based entirely on scientific conclusions (not all of which may be uncontroversial).

[31] The last of Mr Bowers's careful and persuasive submissions needs to be addressed, and that is his case that the provisions of reg 2(1)(d) of the Regulations must be borne in mind, ie that "a reference to belief includes a reference to lack of belief". He submits that, if the respondent's belief in climate change and its consequence is to be allowed to amount to a *philosophical belief*, then the absence of such a belief, the belief, for example, that man is *not* causing climate change, and that development of the world's resources is an imperative, then that too would have to amount to a *philosophical belief*, manifested, for example, by driving a gas-guzzling car and taking frequent flights. But that, in my judgment, is a non sequitur. It may be possible for someone to establish such a philosophical belief, but it is certainly not necessary in order for Miss Rose's [counsel for the employee] argument to succeed. The existence of a positive *philosophical belief* does not depend upon the existence of a negative *philosophical belief* to the contrary. What is intended to be protected by reg 2(1)(d) is

discrimination against a person on the grounds of his *lack of belief*. Thus, if the respondent has his *philosophical belief* in climate change, and *he* were to discriminate against someone else in the workforce who does *not* have that belief, then the *latter* would be capable of arguing that he was being treated less favourably because of his *absence* of the belief held by the respondent.’ *Nicholson v Grainger plc* [2010] 2 All ER 253, EAT, at [24]–[31], per Burton J

PICKETING

[For 47 Halsbury’s Laws of England (4th Edn) (2001 Reissue) paras 1545–1544 see now 41 Halsbury’s Laws of England (5th Edn) (2009) paras 1333, 1349.]

PIN MONEY

[For 29(3) Halsbury’s Laws of England (4th Edn) (Reissue) para 195n see now 91 Halsbury’s Laws of England (5th Edn) (2012) para 625.]

PIRACY

[For 18(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 732 see now 61 Halsbury’s Laws of England (5th Edn) (2010) para 156.]

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 340 see now 60 Halsbury’s Laws of England (5th Edn) (2011) para 331.]

PISCARY

[For 6 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 476 see now 13 Halsbury’s Laws of England (5th Edn) (2017) para 360.]

PIT

[For 31 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 18 see now 76 Halsbury’s Laws of England (5th Edn) (2013) para 16.]

PLACE OF PUBLIC RELIGIOUS WORSHIP

[Whether a Mormon temple which was not open to the public and open only to members of the Mormon church who had acquired a ‘recommend’ from the bishop after demonstrating belief in Mormon doctrine, an appropriate way

of life and payment of the required contribution to church funds, was a ‘place of public religious worship’ qualifying for exemption from non-domestic rating under the Local Government Finance Act 1988 Sch 5 para 11.] ‘[4] The chief dispute is over whether the temple is a “place of public religious worship” within the meaning of para 11(1)(a), although the church submits in the alternative that it is “a church hall, chapel hall or similar building used in connection with a place falling within paragraph (a)” within the meaning of sub-para (1)(b), the place falling within (a) being the Stake Centre.

‘[5] The valuation officer’s case is extremely simple. He says that the temple is not a place of “public religious worship” because it is not open to the public. It is not even open to all Mormons. The right of entry is reserved to members who have acquired a “recommend” from the bishop after demonstrating belief in Mormon doctrine, an appropriate way of life and payment of the required contribution to church funds. Such members are called patrons and the rituals which take place in the temple are exclusive to them. These facts are agreed.

‘[6] Mr Sumption QC, in an argument deployed with great skill and learning, submitted that a “place of public religious worship” did not have to be open to the public. Read in its historical context (the phrase first appeared in the Poor Rate Exemption Act 1833 and has been carried over into subsequent rating legislation) the statute required only what has been called “congregational worship”, that is to say, the assembly of a congregation whose association is solely for the purpose of joining in worship and not because they have private links such as being members of the same family, school or college: see Goddard J in *Cole v Police Constable 433A* [1936] 3 All ER 107 at 119, [1937] 1 KB 316 at 334. The fact that the services of the Church of England were open to the public did not mean that the legislation was intended to impose the same pattern upon everyone else. A construction which did not require conformity to the practice of the Established Church would be more ecumenical and in accordance with the spirit of the age.

‘[7] Mr Sumption pointed out the difficulties and anomalies which might arise if public access were insisted upon: some religions segregated the sexes and others excluded the public from parts of the building such as the sanctuary of an Eastern Orthodox Church. There was no rational basis for the requirement of access by non-participants in the services and the law accepted that religious institutions could provide the necessary public benefit to qualify

as religious charities even if their premises were not open to the public. If they could qualify for the purpose of charity law, why not for rating?

[8] These arguments were extremely interesting but the difficulty for the appellants is that this very point was decided more than 40 years ago by this House in *Church of Jesus Christ of Latter Day Saints v Henning (Valuation Officer)* [1963] 2 All ER 733, [1964] AC 420. The case concerned the Mormon temple at Godstone and the question was whether it was exempt from rates as a "place of public religious worship" within the meaning of s 7(2)(a) of the Rating and Valuation (Miscellaneous Provisions) Act 1955, which was the relevant legislation then in force. The House, affirming a unanimous Court of Appeal (Lord Denning MR, Donovan and Pearson LJ) [1962] 3 All ER 364, [1962] 1 WLR 1091, held that the words could not apply to places used for religious worship from which the public was excluded. Lord Evershed alone showed some sympathy for the construction now advanced by Mr Sumption, but did not carry his opinion to the point of dissent, saying that he had stated his doubts in case the matter should again be considered by Parliament. No doubt the House did not have the benefit of all the arguments advanced to your Lordships by Mr Sumption, but there is no doubt that the question was squarely raised.

[9] Lord Pearce, who gave the leading opinion, said ([1963] 2 All ER 733 at 741, [1964] AC 420 at 440–441) that Parliament was entitled to take the view that religious services which were open to the public provided a public benefit which justified the exemption. No doubt the concept of public benefit in charity law was different, but it would be unwise to regard charity law as a paradigm of rationality (Lord Simonds, in *Gilmour v Coats* [1949] 1 All ER 848 at 856, [1949] AC 426 at 449 said that it had been built up "not logically, but empirically").

[10] Mr Sumption submitted that the House should depart from *Church of Jesus Christ of Latter Day Saints v Henning (Valuation Officer)* or at any rate not apply its reasoning to Sch 5 of the 1988 Act. It is true that since *Church of Jesus Christ of Latter Day Saints v Henning (Valuation Officer)* [1963] 2 All ER 733, [1964] AC 420, the exemption has been extended to buildings used for administrative purposes (para 11(2)(a), added by the 1988 Act) and office purposes (para 11(2)(b), added by the Local Government Finance Act 1992). So the current legislation is not the same as the statute which was construed in *Church of Jesus Christ of Latter Day Saints v Henning (Valuation*

Officer). But the extensions are dependent upon the central concept of a "place of public worship": the administrative buildings must be used for purposes relating to the organisation of worship in such a place and the offices must be used by an organisation responsible for public worship in such a place. Although there is no rigid rule that words used in an Act of Parliament must be given the same construction as the courts have given those words in an earlier Act (see *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402, [1933] All ER Rep 52 as explained in *R v Chard* [1983] 3 All ER 637, [1984] AC 279) it seems to me inconceivable that Parliament did not intend the phrase to carry the meaning which it had been given in *Church of Jesus Christ of Latter Day Saints v Henning (Valuation Officer)*. The legislature has had at least two opportunities (in 1988 and 1992) to take up Lord Evershed's invitation to reconsider the matter and has not done so. In my opinion, therefore, *Church of Jesus Christ of Latter Day Saints v Henning (Valuation Officer)* is conclusive against the appellants on this point.

...
[26] I cannot accept Mr Sumption's primary argument that the temple is a place of public religious worship. There might have been something to be said for his appeal to history and to various anomalies, had it been open to us to take a fresh look at this issue. But I am not persuaded that your Lordships would be justified in departing from the meaning that this House gave to the words "a place of public religious worship" in *Church of Jesus Christ of Latter Day Saints v Henning (Valuation Officer)* [1963] 2 All ER 733, [1964] AC 420. In *London Corp v Cusack-Smith* [1955] 1 All ER 302 at 314, [1955] AC 337 at 361 Lord Reid said that where Parliament has continued to use words of which the meaning has been settled by decisions of the court, it is to be presumed that it intends the words to continue to have that meaning. This is a presumption, not a rule. But the history of the legislation since the date of the judgment indicates that Parliament has been content that the words "a place of public religious worship" should continue to receive the interpretation that the House gave to them in *Church of Jesus Christ of Latter Day Saints v Henning (Valuation Officer)*.

[27] Both sides of the argument about the meaning of those words were fully deployed in the speeches that were delivered in that case. I would attach particular significance to what was said by Lord Evershed ([1963] 2 All ER 733 at 734–735, [1964] AC 420 at 430). He did not

share the view of the other members of the committee that the legislative intention was that the word "public" when applied to "religious worship" in s 7(2)(a) of the Rating and Valuation (Miscellaneous Provisions) Act 1955 should mean, as Lord Morris of Borth-y-Gest put it ([1963] 2 All ER 733 at 738, [1964] AC 420 at 435), a place to which all properly disposed persons who wish to be present are admitted. He made it clear at the outset of his speech that he was not prepared to dissent. But he wished to state his doubts and the reasons for them in case the matter should at some time come up for further consideration in Parliament. Despite this invitation, and despite changes in religious practice in this country during the past forty years, Parliament adhered to the words used in the 1955 Act when it re-enacted the exemption in s 39 of the General Rate Act 1967. It did so again when it enacted para 11 of Sch 5 to the 1988 Act. And it did so again when it enacted the 1992 Act which amended that paragraph.

[28] It is worth noting that the appellant is not the only Christian body whose religious practices might have prompted a change in the legislation, had this been thought to be appropriate, because they fell outside the scope of the exemption as interpreted in *Church of Jesus Christ of Latter Day Saints v Henning (Valuation Officer)*. In *Broxtowe BC v Birch* [1983] 1 All ER 641, [1983] 1 WLR 314 the question was whether two buildings used for religious worship by a company of Christians known as the Exclusive Brethren were entitled to the exemption. When one of them was first used for this purpose in 1967 a notice board was placed outside it which stated that the word of God would be preached there at certain times on a Sunday. This was taken to be a declaration that the building was open to the public for religious worship according to the *Church of Jesus Christ of Latter Day Saints v Henning (Valuation Officer)* test, so it was shown as exempt in the valuation list. The second building came into use in 1971, and it too was shown as exempt. But by that time the Brethren who occupied the buildings had decided to follow the teaching of James Taylor junior, principally in his teaching about separation from evil. Consequently no notice board was placed outside the second building, and the notice board outside the first building was taken down. In the result there was no sign that the public had permission to enter either of them and attend religious worship there. A proposal by the rating authority to alter the valuation list by entering the buildings as rateable was

dismissed by the local valuation court, but it was upheld on appeal. The Court of Appeal was told that there might be 300 other halls where Brethren of same persuasion met that would lose the benefit of the statutory exemption as result of that decision.

[29] Slade LJ said in *Broxtowe BC v Birch* [1983] 1 All ER 641 at 657, [1983] 1 WLR 314 at 334, that in his judgment a meeting of persons which takes place on private premises cannot be said to be "public" within the ordinary meaning of words unless members of the public, or of the particular section of the public most concerned, are given some notice that they will not be treated as trespassers or intruders if they seek to enter the premises and attend the meeting. The forms of notice, he said, could be many and various. In some cases even the exterior appearance of the building might be enough to indicate to members of the public that they will be welcome.

[30] In the present case however the respondent does not need to rely on the absence of a notice or on the appearance of the temple from outside. To some it may seem like a large church or a cathedral. But there is no invitation to the public, or any section of it, to enter the temple and worship there. On the contrary, the public, and even that section of the public most concerned because they are members of the Mormon Church, are actively excluded from it. There simply is no question of members of the public in general being admitted to the temple to participate in religious worship there. And only those Mormons whose worthiness to do so has been established after a searching private interview with the local bishop or branch president and stake president may receive a pass to enter it. The worship that takes place in the temple on those conditions cannot, in the application of the *Church of Jesus Christ of Latter Day Saints v Henning (Valuation Officer)* test, be said to be public religious worship. *Gallagher (Valuation Officer) v Church of Jesus Christ of Latter-Day Saints* [2008] UKHL 56, [2008] 4 All ER 640 at [4]–[10], per Lord Hoffmann and at [26]–[30], per Lord Hope of Craighead

PLACE OF WORK

New Zealand [Health and Safety in Employment Act 1992, s 16: duties of persons who control places of work. Visitor to block of flats injured while on driveway by debris thrown from roof under repair.] [40] ... My preferred interpretive approach would focus on the ambit

of the term “place of work”.

[41] More particularly it might be said that a “place of work” can only be a place where a reasonable person would appreciate that work is being undertaken. Thus in the absence of clear signage or any other external indications that the work being done on the roof was implicating the drive, then it could not be said that the drive is included in the “place of work”.

[42] That conclusion is supported by the fact that here, the “place of work” was, in any event, confined to the roof of the units and the scaffolding. The “work” in question involved repairs to the roof of a block of residential units that were located in a residential area. Although in a general sense it might be said that work involved removing the unwanted parts of the roof from the roof area and onto the driveway (and later removing them from the driveway), the driveway was also the only means of entry and egress to the units themselves. Because the units were residential, both the occupants and their visitors were likely to come and go during the day, while work on the roof was being undertaken. Accordingly although the driveway might have been connected with the work on the roof, its principal purpose continued to be a means of public entry and egress to the units. It could not therefore be said properly to form part of the place of work, at least in the absence of some clear demarcation.

[43] In short, I consider that a “place of work”, at least for the purposes of s 16(1), must be clearly identifiable as such and not be serving some other function that is not related to the work being done there. On that analysis the “place of work” here did not include the driveway. It follows inexorably that, in walking down the driveway, Ms Zhao-Trainor had not entered the relevant place of work but was “in the vicinity” of it. *Alliance Roof Solutions Ltd v Ministry of Business Innovation and Employment* [2014] NZHC 2625, (2014) 12 NZELR 204 at [40]–[43], per Ellis J

PLANT

[Taxation of Chargeable Gains Act 1992, s 44(1)(c): whether a valuable painting exhibited in a house open to the public on payment of admission fees was ‘plant’ and therefore a wasting asset for the purposes of exemption from capital gains tax.] [17] The word “plant” is not defined in the 1992 Act. In *Yarmouth v France* (1887) 19 QBD 647 at 658, Lindley LJ referred to the ordinary meaning of the word in these terms:

“There is no definition of plant in the Act: but, in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business—not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business: see [*Blake v Shaw* (1860) John 732, [1843–60] All ER Rep 504].”

[18] *Blake v Shaw* concerned the meaning of “plant” in a will. The principal distinction drawn was between stock and plant. Plant was described as consisting of items permanently used for the purposes of a trade as distinguished from fluctuating stock.

[22] The issue in this case is whether the asset which the appellants disposed of by sale in 2001 was within the phrase “plant and machinery” in s 44(1)(c) of the 1992 Act. No one submitted that the painting was “machinery”. The appellants say that the painting was “plant”. The respondents say that the painting was not plant for essentially three reasons. The first is that the use of the painting by the company did not satisfy the test as to function identified in the above authorities. The second reason is that the use of the painting by the company did not satisfy the test as to permanence identified in the above authorities. The third reason is that the trade in which the painting was arguably used was the trade of the company not the trade of the owner who disposed of the painting.

[33] The word “plant” must be construed in the context of the 1992 Act and that context is not necessarily the same as the context of the Inheritance Tax Act 1984 nor the legislation dealing with capital allowances. In the 1992 Act, s 44(1)(c) uses the term “plant” and does not in terms say that the object must have been used by the owner of the object in his trade. The 1984 Act proceeds on the basis that an object can be called plant even if it is used in the trade of a company controlled by the owner of the object rather than used by the owner in his trade. The capital allowances legislation expressly provides that the plant must belong to the person who incurs capital expenditure on the object for the purposes of his trade. These other statutory provisions are consistent with the appellant’s submission that the ordinary meaning of plant, when it is not elaborated or restricted by further express provisions, can apply to an item which its owner makes

available to another for use in that other's trade. However, because the statutes are expressed in different terms and their context is different from that of the 1992 Act, I think it would be wrong to place too much weight on the way in which these other statutes are expressed.

'[34] Having considered the rival submissions and, in particular, the three arguments put forward by the respondents, my provisional view is that the painting satisfies the established test as to plant, both as regards the test as to function and the test as to permanence. Further, my provisional view is that in the context of the 1992 Act, the question whether an object is plant is to be answered by applying the established test to the object. If the object is plant on that basis then it is to be regarded as plant whether one is considering the position of the trader using the plant or the owner of the plant and no distinction is to be made between these persons.'

...
'[43] ... In this case, on the findings of fact made by the [First-tier Tribunal (Tax Chamber)], the painting satisfied the tests as to function and as to permanence in the established test as to the meaning of plant. Further, the meaning of plant in s 44(1)(c) of the 1992 Act does not permit a finding that an asset is plant in the hands of a person using the asset in his business but, at the same time, not plant in the hands of the owner of the asset. I conclude that the painting was plant within s 44(1)(c) of the 1992 Act and in the absence of any argument that the painting had ceased to be plant a short time before it was disposed of by the executors, the executors are entitled to the exemption conferred by s 45(1) of the 1992 Act.' *Executors of Lord Howard of Henderskelfe v Revenue and Customs Commissioners* [2013] UKUT 129 (TCC), [2013] 3 All ER 817 at [17]–[18], [33]–[34], [43], per Morgan J; affd [2014] EWCA Civ 278, [2014] 3 All ER 50

'[33] Finally, Mr Goy submitted that the picture could not be "plant" within the meaning of s 44 because the section contemplates that what is plant is an asset with a limited life that wastes away with use. An "old master" such as the picture, which on its 226th birthday proves to be worth £9.4m, cannot fit such a description.

'[34] This was a new point not argued below. I would reject it. The problem with it is that what is "plant" is not identified by the predictable life of a chattel. It is identified by whether or not the chattel passes the *Yarmouth v France* test; and an item is capable of doing so whatever its predictable life. Once an item qualifies as "plant", it is "in every case" deemed

by s 44(1)(c) to be a wasting asset; and for HMRC to argue that an item of plant enjoying unusual longevity is not plant at all is to advance an argument that the section expressly excludes and which amounts to no more than a pointless beating of the air. On the facts of this case, s 44 may have proved inconvenient to HMRC. They must, however, take the rough with the smooth; and this case may be an example of the rough.' *Executors of Lord Howard of Henderskelfe v Revenue and Customs Commissioners* [2014] EWCA Civ 278, [2014] 3 All ER 50 at [33]–[34], per Rimer LJ

PLURALITY

Sufficient plurality of persons with control of ... media enterprises

[Enterprise Act 2002, ss 58(2C)(a), 58A(5).]
'[80] The question turns on the correct view of the interaction between s 58(2C) and s 58A(5) of the 2002 Act, and in particular on the meaning of the phrase, not defined in the Act, "sufficient plurality of persons with control of ... media enterprises" in s 58(2C)(a). The commission held that what was required was not just an exercise of counting heads, and that it was proper and necessary to have regard to the actual degree of control exercised by one enterprise over another. If the control was less than complete, and if in practice it would not enable the controlling enterprise to dominate the policy and the output of the controlled enterprise, that was something that should be taken into account. It referred to this situation as "internal plurality", as compared with the effect of counting the number of controlling enterprises, and ignoring the limits on the control exercised by any of them, which it referred to as external plurality. The tribunal [Competition Appeal Tribunal] considered that this approach was wrong in law, being excluded by s 58A(5).

'[81] The relevant provisions have been set out above (at [24], [25]). They need to be seen in their context. A crucial element is the possibility of three different degrees of control under s 26, as already noted (at [11], [12], above). Even though the commission concluded that Sky had control over ITV for the purposes of the 2002 Act, because Sky could exercise material influence over ITV's policy, it recognised that in practice such control was confined to limited circumstances, important in terms of competition but not necessarily bearing on the issue of plurality.

‘[82] The puzzle presented by the two sections is this. On the one hand, s 58(2C)(a) requires an assessment of whether, following the merger, there is or would be sufficient plurality of persons in control of relevant media enterprises. This suggests that one should look at the actual position as regards the extent of control. On the other hand, s 58A(5) provides that where there is any degree of control over one such enterprise by another, both of them have to be treated as under the control of only one person. This seems to impose an overriding assumption of 100% control, regardless of the actual facts. The Competition Commission favoured the former view, and considered that s 58A(5) did not prevent it from having regard to the actual level of control. The tribunal on the other hand felt unable to reconcile this reading with s 58A(5), and therefore held that the latter view was correct.

...
 ‘[87] Section 58(2C) deals with three different considerations. Apart from sufficient plurality of media controllers, it identifies the need for the availability of a wide range of broadcasting of high quality, calculated to appeal to a wide variety of tastes and interests, in para (b), and the need for those carrying on media enterprises, and those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in the [Communications Act 2003], in para (c). Each of these, like (2A) and (2B), requires a qualitative assessment of the position resulting, or likely to result, from the particular RMS.

‘[88] The same is true of sub-s (2C)(a), in that, on any view, it requires an assessment of the sufficiency of the plurality of media controllers. Even if plurality means no more than “number” in this context, there has to be an assessment of whether the remaining number is sufficient. The criterion of sufficiency, for this purpose, seems to be the need to avoid over-concentration of the market.

‘[89] Mr Gordon’s submission for Virgin was that plurality in this paragraph does mean no more than number. At para 5.7 the commission said that it referred to both range and number: “We took the concept of plurality of persons with control of media enterprises to refer both to the range and the number of persons with control of media enterprises”.

‘[90] We agree with the commission on this and would reject Mr Gordon’s argument. The word plurality can connote more than just a number exceeding one. It may carry an implication of range and variety as well.

Certainly it has that meaning in sub-s (2B). We consider that it does so in sub-s (2C)(a) as well.’ *British Sky Broadcasting Group plc v Competition Commission* [2010] EWCA Civ 2, [2010] 2 All ER 907 at [80]–[82], [87]–[90], per Lloyd LJ

POISON

[For 30(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 284 et seq see now 75 Halsbury’s Laws of England (5th Edn) (2013) para 528 et seq.]

POLICIES FOR THE SUPPLY OF HOUSING

‘[2] These two conjoined appeals concern the meaning and effect of government policy in paragraph 49 of the National Planning Policy Framework (“the NPPF”). In particular, they concern the meaning of the requirement in the policy that “[relevant] policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites”, and the way in which the policy is to be applied in the making of planning decisions. ...

...
 ‘[32] The contentious words are “[relevant] policies for the supply of housing”. In our view the meaning of those words, construed objectively in their proper context, is “relevant policies affecting the supply of housing”. This corresponds to the “wider” interpretation, which was advocated on behalf of the Secretary of State in these appeals. Not only is this a literal interpretation of the policy in paragraph 49; it is, we believe, the only interpretation consistent with the obvious purpose of the policy when read in its context. A “relevant” policy here is simply a policy relevant to the application for planning permission before the decision-maker—relevant either because it is a policy relating specifically to the provision of new housing in the local planning authority’s area or because it bears upon the principle of the site in question being developed for housing. The meaning of the phrase “for the supply” is also, we think, quite clear. The word “for” is one of the more versatile prepositions in the English language. It has a large number of common meanings. These include, according to the *Oxford Dictionary of English*, 2nd edition (revised), “affecting, with regard to, or in respect of”. A “supply” is simply a “stock or amount of something supplied or available for

use”—again, the relevant definition in the *Oxford Dictionary of English*. The “supply” with which the policy is concerned, as the policy in paragraph 49 says, is a demonstrable “five-year supply of deliverable housing sites”. Interpreting the policy in this way does not strain the natural and ordinary meaning of the words its draftsman has used. It does no violence at all to the language. On the contrary, it is to construe the policy exactly as it is written.

[33] Our interpretation of the policy does not confine the concept of “policies for the supply of housing” merely to policies in the development plan that provide positively for the delivery of new housing in terms of numbers and distribution or the allocation of sites. It recognises that the concept extends to plan policies whose effect is to influence the supply of housing land by restricting the locations where new housing may be developed—including, for example, policies for the Green Belt, policies for the general protection of the countryside, policies for conserving the landscape of Areas of Outstanding Natural Beauty and National Parks, policies for the conservation of wildlife or cultural heritage, and various policies whose purpose is to protect the local environment in one way or another by preventing or limiting development. It reflects the reality that policies may serve to form the supply of housing land either by creating it or by constraining it—that policies of both kinds make the supply what it is.

[34] The “narrow” interpretation of the policy, in which the words “[relevant] policies for the supply of housing” are construed as meaning “[relevant] policies providing for the amount and distribution of new housing development and the allocation of sites for such development”, or something like that, is in our view plainly wrong. It is both unrealistic and inconsistent with the context in which the policy takes its place. It ignores the fact that in every development plan there will be policies that complement or support each other. Some will promote development of one type or another in a particular location, or by allocating sites for particular land uses, including the development of housing. Others will reinforce the policies of promotion or the site allocations by restricting development in parts of the plan area, either in a general way—for example, by preventing development in the countryside or outside defined settlement boundaries—or with a more specific planning purpose—such as protecting the character of the landscape or maintaining the separation between settlements.’ *Hopkins*

Homes Ltd v Secretary of State for Communities and Local Government; Cheshire East Borough Council v Secretary of State for Communities and Local Government [2016] EWCA Civ 168, [2017] 1 All ER 1011 at [2], [32]–[34], per Lindblom LJ

POLICY OF INSURANCE

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) paras 78–79 see now 60 Halsbury’s Laws of England (5th Edn) (2011) paras 96–97.]

Canada [Nova Scotia SEF 44 Endorsement, automobile insurance excess.] ‘2. The Endorsement stipulates that future benefits from a “policy of insurance providing disability benefits” are deducted from the shortfall in determining the amount payable by the insurer (cl 4(b)(vii)). The issue in this appeal is whether the Canada Pension Plan (CPP) is a “policy of insurance” for that purpose.

‘3. The trial judge in this case found that CPP benefits were not benefits from a “policy of insurance” under the Endorsement and thus would not be deducted from the amount payable by the insurer. The Nova Scotia Court of Appeal disagreed, concluding that the CPP was a “policy of insurance” under the Endorsement.

‘4. I agree with the trial judge. The ordinary meaning of the words at issue is clear, reading this Endorsement as a whole. An insurer cannot rely on its specialized knowledge of the jurisprudence to advance an interpretation that goes beyond the clear words of the policy. An average person applying for this additional insurance coverage would understand a “policy of insurance” to mean an optional, private insurance contract and not a mandatory statutory scheme such as the CPP. Thus, future CPP disability benefits do not reduce the amount payable by the insurer under the Endorsement.

...

‘23. What then is the correct interpretation of “any policy of insurance providing disability benefits” under cl 4(b)(vii) of the Endorsement, reading the contract as a whole?

‘24. The dictionary meaning of the words “policy of insurance” refers to a private contract purchased as a policy of insurance. In the *Canadian Oxford Dictionary* (2nd ed 2004), an “insurance policy” has been defined as “a contract of insurance” and “a document detailing such a policy and constituting a contract”: p 783; see also *Collins Canadian*

Dictionary (2010), at p 469. The *Merriam-Webster's Collegiate Dictionary* (11th ed 2003), defines a "policy" as "a writing whereby a contract of insurance is made" (p 960).

'25. In contrast, CPP benefits are benefits provided under federal legislation: *Canada Pension Plan*, RSC 1985, c C-8. Under that legislation, contributions are mandatory for all employed Canadians over the age of 18. CPP benefits are payable as a retirement pension, as a disability benefit or as a death benefit.

'26. The use of the word "policy" (ie "motor vehicle liability policy") in cl 4(b), paras (v) and (ix), clearly indicates a private contract of insurance. Paragraphs (iii) ("the Société de l'assurance automobile du Québec") and (viii) ("any Worker's Compensation Act") clearly refer to amounts provided under legislation. The contract could have included the legislated CPP disability benefits under cl 4(b)(vii); it referred specifically to legislated amounts in a number of other enumerated sources. Had the contract done so, an average person would have known exactly what they applied for as insurance, and what was and was not covered by the premiums paid under the Endorsement.

'27. It also follows that CPP death benefits are not benefits pursuant to a "policy of insurance" payable on death for the purposes of the introductory words in cl 4(b). Therefore, where the eligible claimant has actually recovered CPP death benefits, the amount of those benefits is deducted from the amount payable under the Endorsement. Obviously, such an interpretation does not work to the advantage of the eligible claimant in the context of death benefits. However, the mere effect of different consequences arising from the meaning of a term used in different places in a contract does not create ambiguity.

'28. In my view, the ordinary meaning of a "policy of insurance" is limited to private contracts of insurance between an insured and a private insurance agency. An average person would not consider benefits provided under a mandatory statutory scheme to be a private insurance contract.' *Sabean v Portage La Prairie Mutual Insurance Co* [2017] SCJ No 7, 2016 SCC 16 at paras 2-4, 23-28, per Karakatsanis J

Life policy

[For the Income and Corporation Taxes Act 1988, s 539(3) see now the Income Tax (Trading and Other Income) Act 2005, s 480(2).]

POLITICAL

[For 17(2) Halsbury's Laws of England (4th Edn) (Reissue) paras 1132, 1174 et seq see now 47 Halsbury's Laws of England (5th Edn) (2014) paras 633, 652 et seq.]

POLITICAL PURPOSE

See also CHARITY—CHARITABLE PURPOSES

Australia '[35] The threshold test for "political purpose" is not always easy to articulate. The difficulties were outlined by Santow J in *Public Trustee v A-G (NSW)* (1997) 42 NSWLR 600 at 617 (*Public Trustee*):

"Pressure for political change can range from direct lobbying of the government for legislative change, to attempts to educate and persuade the public and change public opinion on a particular issue. Whether such pressure for change is termed agitation with its pejorative overtone, propaganda (*Re Shaw; Public Trustee v Day* [1957] 1 All ER 745; [1957] 1 WLR 729), a campaign (*Webb v O'Doherty* (1991) 3 Admin LR 731) or merely and legitimately education (*Re Koeppler's Will Trusts; Barclays Bank Trust Co Plc v Slack*) may be to some extent in the eye of the beholder, influenced by tone and style ..."

'[36] The activities described in Aid/Watch's constitution include "monitoring, researching and campaigning". It is clear that neither "monitoring" nor "researching" alone would allow Aid/Watch to fulfil its stated objects of "ensuring" that aid is delivered in the ways outlined in its constitution. It is "campaigning" (as well as "other activities") that materially enables Aid/Watch to exercise influence over public opinion and ultimately over delivery of Australian aid. These activities are informed by, and made more effective because of, the information available to Aid/Watch obtained through its research and monitoring. Researching and monitoring, however, are preliminary to Aid/Watch's primary goal of influencing government. It is common ground between the parties that Aid/Watch is not engaged in "lobbying", nor is it involved in any attempt to influence government directly. The tribunal accepted the evidence of Dr Goodman that Aid/Watch was "campaign focused" and that it pursued "global justice" by: [T]argeting the policies and practices of inter-governmental institutions, transnational corporations, and,

most especially, the Australian Government and its allies. [Emphasis added.]

‘[37] Aid/Watch’s attempt to persuade the government (however, indirectly) to its point of view necessarily involves criticism of, and an attempt to bring about change in, government activity and, in some cases, government policy. There can be little doubt that this is political activity and that behind this activity is a political purpose. Moreover the activity is Aid/Watch’s main activity and the political purpose is its main purpose. Recognising Aid/Watch’s ultimate concern to relieve poverty does diminish its political purpose. As Lord Simonds said in [*National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31] at 61:

“... In a sense no doubt, since legislation is not an end in itself, every law may be regarded as ancillary to the object which its provisions are intended to achieve. But that is not the sense in which it is said that a society has a political object... This is a finding that the main purpose of the society is the compulsory abolition of vivisection by Act of Parliament. What else can it mean? And now [sic] else can it be supposed that vivisection is to be abolished? Abolition and suppression are words that connote some form of compulsion. It can only be by Act of Parliament that that element can be supplied.”

‘[38] As previously mentioned a political purpose will not affect an institution’s charitable status if it is ancillary or incidental to a charitable purpose: *Re Inman, (dec’d)* [1965] VR 238; and *NDG Neighbourhood Association v Revenue Canada, Taxation Department* [1988] 2 CTC 2048; 88 DTC 6279. However, where, as here, the main purpose is political, the question arises whether charitable and political purposes are mutually exclusive. This question was addressed by Santow J in [*Public Trustee v A-G (NSW)* (1997) 42 NSWLR 600]. His Honour observed, at 620:

“An object of changing government policy may be no less ‘political’ than changing the law ... But it does not follow that every intended addition to the law involves such contrariety with identifiable government policy that it becomes automatically ‘political’.”

...

‘[41] We accept that, at one level Aid/Watch’s efforts, are not in conflict with

government policy. There was no suggestion that government is not concerned to deliver aid efficiently or with due regard to environmental concerns. Aid/Watch’s concern however, is that the delivery of aid should conform to its view of the best way to achieve these objects. It does not take into account that government and its agencies inevitably have to make choices in determining where, how and how much aid is to be delivered. Undoubtedly some of those choices will involve factors with which Aid/Watch is concerned. Others, however, will involve domestic and foreign political considerations that do not concern Aid/Watch. Some of these factors may have very little to do with foreign aid or the manner of its delivery.

‘[47] The “natural and probable consequence” of Aid/Watch’s activities is an effect on public opinion and then on government opinion. Relief from poverty, however, is not either a natural or probable consequence precisely because governments have to take into account factors that institutions such as Aid/Watch do not need to consider; see [41] above. It is for this reason that, irrespective of whether in other circumstances courts may be able to judge public benefit, in this case no such determination can be made. A similar position was taken in *Southwood v A-G* [2000] TLR 541 by Chadwick LJ who said:

“The court was in no position to determine that promotion of the one view rather than the other was for the public benefit. Not only did the court have no material on which to make that choice; to attempt to do so would be to usurp the role of government.

“So the court could not recognise as charitable a trust to educate the public to an acceptance that peace was best secured by demilitarisation in the sense in which that concept was used by the appellants.

“Nor, conversely, could the court recognise as charitable a trust to educate the public to an acceptance that war was best avoided by collective security through membership of a military alliance—say, NATO.”

Comr of Taxation v Aid/Watch Incorporated [2009] FCAFC 128, (2009) 266 ALR 526 at [35]–[38], [41], [47], per Kenny, Stone and Perram JJ

POOLING

[Financial Services and Markets Act 2000, s 235(3): arrangements may be a collective

investment scheme if ... (a) the contributions of the participants and the profits or income out of which payments are to be made to them are pooled.] '[10] There are also issues about the meaning of "pooling" of profits or income in s 235(3)(a). In my opinion, pooling requires the creation of a fund for the combined or common benefit of investors and, if each investor obtains an individual return based on the yield from his plot, there is no pooling of profits or income even if—

- (a) the value of all investors' yield is subject to standard deductions for processing and expenses; or
- (b) the value of all investors' yield is received first by the operator of the scheme and then distributed to the investors in accordance with their respective, individually calculated, entitlements. ...'

Financial Conduct Authority v Capital Alternatives Ltd [2014] EWHC 144 (Ch), [2014] 3 All ER 780 at [10], per Nicholas Strauss QC

Australia [Managed investment scheme under the Corporations Act 2001 (Cth) s 601ED.] '[27]... The cases that have considered the meaning of "pooling" are considered by Pullin J in *Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd* [2001] WASC 339. Pullin J said (at [46]) that the cases show that the word has its ordinary meaning. He went on to say that pooling describes an arrangement where there is "a common fund into or from which all gains and losses of the contributions are paid" or 'a fund made up of numerous payments from participants and used for a purpose they contemplate'. He explained that "[t]he phrase 'to be pooled ... to produce' implies that the intention must be to pool the contributions and, by use of the pool, produce benefits". Other possible meanings include: (a) any aggregation of the interests or property of different persons made to further a joint undertaking or end by subjecting them to the same control and a common liability; and (b) a common fund or combination of interests for the common adventure in buying or selling.' *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd (No 3)* [2009] FCA 450, (2009) 256 ALR 427 at [27], per Finkelstein J

PORT

[For 25 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 314 see now 60 Halsbury's Laws of England (5th Edn) (2011) para 305.]

[For 36(1) Halsbury's Laws of England (4th Edn) (2007 Reissue) para 610 see now 85 Halsbury's Laws of England (5th Edn) (2013) para 8.]

Dockyard port

[For 36(1) Halsbury's Laws of England (4th Edn) (2007 Reissue) para 613 see now 85 Halsbury's Laws of England (5th Edn) (2013) para 11.]

Franchise port

[For 36(1) Halsbury's Laws of England (4th Edn) (2007 Reissue) para 607 see now 85 Halsbury's Laws of England (5th Edn) (2013) para 5.]

PORTION

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 727 see now 91 Halsbury's Laws of England (5th Edn) (2012) para 628.]

POSSESSION

[For 35 Halsbury's Laws of England (4th Edn) (Reissue) paras 1211–1214 see now 80 Halsbury's Laws of England (5th Edn) (2013) paras 834–837.]

Australia [National Security Act 1939 (Cth), s 5(1)(b); National Security (General) Regulations, reg 54.] '[5] Section 5(1) of the NSA originally empowered the Governor-General to make regulations for securing the public safety and defence of the Commonwealth and the territories of the Commonwealth, and in particular:

- (b) for authorizing—
 - (i) the taking of possession or control, on behalf of the Commonwealth, of any property or undertaking; or
 - (ii) the acquisition, on behalf of the Commonwealth, of any property other than land in Australia.

Paragraph (b)(ii) was amended in 1940.

'[6] The term "property" in para (b) was not defined. It is a term which may be used in different senses according to its statutory context. Referring to land, it may mean the physical entity or rights and interests which exist in relation to it. In para (b)(i) it applies to land as a physical entity. The words "possession" and "control" in para (b)(i) are close to synonymous in that context. That view is

supported by the observation of Williams J in *Dalziel* [*Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 306; [1944] ALR 89; [1944] HCA 4] in which he said of the difference between paras (b)(i) and (b)(ii) that:

The Parliament ... in enacting the section, intended to distinguish between the taking of temporary possession or control of land and the acquisition of some permanent estate or interest in land.

That distinction did not prevent the characterisation of “possession”, taken pursuant to a regulation made under para (b)(i), as an “acquisition” of property for the purposes of s 51(xxxi) of the Constitution. Nevertheless, as construed by Williams J, para (b)(i) conferred a regulation-making power with respect to property limited to its temporary control. It is the exercise of that power which is in issue in this case.

[7] Under s 5(3) of the NSA, the regulations could empower persons, or prescribed classes of persons, to make orders for any of the purposes for which regulations were authorised to be made by the Act. Section 10 of the Act made it an offence for a person to contravene, or fail to comply with, any provision of a regulation made under the Act or any order made pursuant to such a regulation.

[8] Queensland submitted that the NSA authorised the making of regulations under which a “right of exclusive possession” could be conferred upon the Commonwealth by military orders made pursuant to the regulations. That “right of exclusive possession” was said to have been conferred in this case and to have extinguished the native title rights and interests of the Bar-Barrum People in the land affected by the orders. The submission directs attention to the difficult concept of “possession” as used in the Act and the important distinction between “exclusive possession”, which is a logical incident of actual, factual or physical possession, and a “right of exclusive possession”. A “right of exclusive possession” in relation to fee simple grants and leases, as discussed by this court in *Fejo v Northern Territory* [(1998) 195 CLR 96; 156 ALR 721; [1998] HCA 58 at [47]], and *Western Australia v Brown* [(2014) 88 ALJR 461; 306 ALR 168; [2014] HCA 8 at [36]] involves the right to exclude anyone and everyone from the land for any reason or no reason at all. However, as appears below, the statutory powers conferred upon the Commonwealth as an incident of the grant of “possession” under the military orders

were not unqualified merely because that word was used. Broad as they were, they were to be exercised in accordance with the scope, subject matter and purpose of the NSA and the regulations made under it.

‘[11] Regulation 54(1) empowered the minister to “take possession of any land”. The word “possession” is one for which English law has never worked out a completely logical and exhaustive definition. The question in this case is: what was the nature of the possession which reg 54(1) authorised? There are two relevant possibilities. The first is that it authorised a taking of actual or physical possession, which, as noted above, brings with it a notion of exclusivity albeit it must be understood in its statutory setting. The second possibility is that it conferred a “right of exclusive possession”, equivalent to the unqualified right of a fee simple owner to exclude anyone and everyone from the land for any reason whatsoever.

[12] The text and arrangement of the regulation, read as a whole, suggest that reg 54(1) was concerned with actual possession and did not authorise the conferral upon the Commonwealth of a “right of exclusive possession”. Regulation 54(2) conferred statutory power to do the things that a fee simple owner could do and the power, by order, to restrict the exercise of the rights of persons relating to the land, whether by virtue of an interest in the land or otherwise. If reg 54(1) authorised an order conferring a “right of exclusive possession” in the sense used above, the powers in reg 54(2) would be otiose. That suggests that reg 54(1) did not go that far. Moreover, reg 54(2) conferred statutory powers not property rights, albeit it did so in para (a) using the legal fiction of a fee simple grant. Those powers had to be exercised for the purposes of the regulation, which had to accord with those of the NSA. The limiting negative purpose of the NSA apparent from the second reading speech is antithetical to a general discretion to exercise those powers against anyone and everyone for any reason whatsoever.’ *Queensland v Congoo* [2015] HCA 17, (2015) 320 ALR 1 at [5]–[8], [11]–[12], per French CJ and Keane J (footnotes omitted)

New Zealand [Fisheries Act 1996, ss 232, 233.] [1] Each of the six defendants is charged with two identical offences. The first is an offence under s 233(1) of the Fisheries Act (the Act) in that each of them did, jointly with the others, with the intention of obtaining a benefit, knowingly possess paua otherwise than in

accordance with the Act. The second and lesser charge is that, jointly with the others, each of them did possess paua taken in contravention of the Act in that more than the daily limit were taken in contravention of the relevant regulations under the Fisheries (Amateur Fishing) Regulations.

‘[2] I intend to deal first with the more serious of the two offences charged; that is, the one under s 233. There is a difference, as to the element of possession, between the two charges. Section 233 requires proof that each defendant knowingly possessed the paua in question, and unlike the other offence, under s 232, it is not a strict liability offence. The effect of that is that if a defendant is found to knowingly possess the paua for the purposes of the more serious charge under s 233, it will follow that he or she will also possess it in terms of the lesser charge under s 232.

‘[27] The next conclusion I reach is that all those actively involved in the taking on the beach, and who were in one of the three cars in the convoy, were in joint possession of the paua found in the boot of the Telstar. I find that because, first, all such persons must have known that the paua was in the boot. It is not feasible that someone could have been involved in the taking and in one of those three cars without having been aware of the shucking and the transfer of the paua into the boot of a car at the car park from which all three vehicles left at the same time in convoy.

‘[29] In my view it is a situation like that referred to by Treston J in the case of *Ministry of Fisheries v Tuala* DC Wellington 6 October 2010, CRI-2010-085-6377, when he referred to a case as long ago as 1903 in Scotland called *McCarty v Hogg*, in which the Scottish Judge said:

Take this case, suppose five men went down together to a river to take fish, caught two and were met when on their way up with the fish, would not all the five men be in possession of the fish, although some of them may never have touched them? Answer, they certainly would.

In my view the position here is no different. The fact that, at the time of stopping, the paua were in one of only three cars holding persons actively involved in the taking of those paua, does not mean that the people in the two cars which did not contain the paua were no longer in control of the paua in one of those three cars.

‘[32] However, apart from Iherangi Namana, who is in a special position as the driver of the vehicle in which the paua was found, it is not possible to infer that a person is jointly in possession of this paua solely from the fact that he or she is an occupant of one of the cars. While it may be possible to infer knowledge of the presence of the paua to all occupants (and I do), it is not possible to infer capacity to control, or an intention to control, the paua jointly to persons in the cars who are not proven to have been actually involved in the earlier taking. That is either because of the possibility that one or other person in the car may not have been a member of the group seen on the beach in the area where the paua was being taken, or because a person in the car who *was* in that group actually took no part in the taking. And when I use the word “taking”, I include shucking and/or carrying the paua for this purpose. I am not talking about “taking” in the legal sense of taking, but rather “taking” in the sense that would give rise to control of the paua.

‘[34] All that means that, in respect of proof of the primary element of possession of this paua, it comes down to this (except in the case of Iherangi Namana): whether a particular defendant, all of whom are proven to have been occupants of one or other of the three cars, is proven to have been actively involved in the joint enterprise of taking the paua earlier at Mataikona Beach—that is, the process of searching for, taking, putting in bags, transporting to the vehicle, shucking, carrying, or handling any of this paua.

‘[69] The next thing that has to be proven is that they knowingly possessed the paua. This is not a strict liability offence, as I have mentioned, so it is necessary to prove that the defendants knew that possession of paua was not in accordance with the Fisheries Act. In this case, that means that the defendants knew that the paua were taken in contravention of the daily limit of 10 paua per day—in this case, at the most a total of 100 legal paua, allocating 10 for every man, woman and child who could possibly have been in the party.

‘[70] I am satisfied that if they knew that they were in possession of the paua in the boot, all of them must have known that the amount of paua in there was way in excess of the daily limit allowed to their group, even giving it the most generous construction. There was a very large number of paua, more than seven times the amount that they were entitled to take. So, I am

sure that they knew that they possessed *paua* which was taken otherwise than in accordance with the Fisheries Act.’ *Ministry of Fisheries v Namana* [2013] DCR 354 at [1]–[2], [27], [29], [32], [34], [69]–[70], per Judge Tuohy

Of land

[For 39(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 167 see now 87 Halsbury’s Laws of England (5th Edn) (2017) para 161.]

[For 45(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 516 see now 97 Halsbury’s Laws of England (5th Edn) (2015) para 575.]

‘[1] The issue in this case is whether by entering into a “virtual assignment” of leasehold premises, the tenant of those premises acts in breach of the standard-form alienation covenants contained in the lease under which the premises are held. On 23 January 2009 Judge Hodge QC sitting as a judge of the Chancery Division ([2009] EWHC 77 (Ch), [2009] 3 All ER 175, [2009] 1 WLR 1651), declared that it did but only because the tenant either parted with possession or was sharing or was permitting the sharing of possession of the premises. He ordered an inquiry into damages. Jacob LJ granted permission for this appeal.

...

‘[32] How are we to apply those principles to a consideration of the covenant in this case which is “not to share or permit sharing possession or occupation of the Demised Premises or any part thereof or part with possession or occupation of the same”? There is no question of sharing or parting with occupation: the case turns on possession. As I see it the proper approach must be as follows. (1) We must give possession the same meaning it bears in respect of sharing possession as it bears in respect of parting with possession. (2) Because this is a common phrase in a standard alienation clause, “possession” must be given its *normal*, albeit also its technically legally correct, meaning. The true meaning must take its colour from its context. Whilst “possession” and “occupation” are different concepts (the difference between the tenant and the licensee such as the lodger) and whilst they must not be conflated as Judge Hodge said, nevertheless their juxtaposition is part of the context and serves to emphasise that aspect of physical control which is part of possession. As Lord Browne-Wilkinson pointed out in a different context in *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30 at [40], [2002] 3 All ER 865 at [40], [2003] 1 AC 419:

“... there are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control (‘factual possession’); (2) an intention to exercise such custody and control on one’s own behalf and for one’s own benefit (‘intention to possess’) ...”

And as Chadwick LJ said in *Dutton v Manchester Airport plc* [1999] 2 All ER 675 at 681; sub nom *Manchester Airport plc v Dutton* [2000] QB 133 at 142: “... possession is synonymous ... with exclusive occupation—that is to say occupation (or a right to occupy) to the exclusion of all others, including the owner or other person with superior title”. The hallmark of the right to possession is the right to exclude all others from the property in question. That is the ordinary and normal sense of the word and that is the meaning which it should be given in this covenant. (3) In the standard covenant against sharing or parting with possession, we should, therefore, adopt the standard strict meaning and only find the breach of the covenant (i) against sharing possession if, by entering into this arrangement, NatWest has allowed New Liberty to enjoy joint possession of the demised premises with it; or (ii) against parting with possession if, by entering into the virtual assignment, NatWest wholly ousted itself or completely excluded itself from the legal possession of the demised premises for all purposes. (4) The short answer to the case is that at the time the virtual assignment was entered into and at all material times thereafter, NatWest was not and has not itself been in possession of the demised premises at all. The demised premises are the suite of offices on the ground floor and first floor of this building in Clarence Street, Manchester. The occupier and person in possession is Mercers, not NatWest. By virtue of the underlease NatWest had divested itself of possession and the only person in possession was, is and remains, Mercers and Mercers alone. The virtual assignment did not alter that state of affairs. Not having been in possession of the premises, NatWest cannot possibly be said to have parted with possession to New Liberty or to have shared possession by reason of entering into these arrangements. (5) There is a long line of authorities, now well established, dealing with breaches of the covenant against parting with or sharing possession. For example, *Stening v Abrahams* [1931] 1 Ch 470, [1931] All ER Rep 437 decided that a licence to erect an advertisement on the wall of the premises did not constitute parting with possession of the wall. The *Lam*

Kee Ying case [*Lam Kee Ying Sdn Bhd v Lam Shes Tong*] [1974] 3 All ER 137, [1975] AC 247 held that the transfer to a newly formed company of the partnership business being conducted on the premises was a parting with possession. In *Akici v LR Butlin Ltd* [2006] 2 All ER 872, [2006] 1 WLR 201 allowing a third party into occupation to carry on business from the premises was a sharing of possession. This stream of cases is consistent with the notion that a leasehold covenant against parting with or sharing possession is concerned with the question of whether the tenant has allowed another into physical occupation with the intention of relinquishing his own exclusive possession of the premises to that other. Consistency demands that this case be approached in that light and in that light there has been no breach of the covenant.’ *Clarence House Ltd v National Westminster Bank plc* [2009] EWCA Civ 1311, [2010] 2 All ER 201 at [1], [32], per Ward LJ

New Zealand [Crimes Act 1961, s 56: person in peaceable possession of the land justified in using reasonable force to prevent a person trespassing or to remove him from the land.] ‘[56] The authorities referred to have focused on when possession will have the necessary peaceable character, rather than on what will constitute possession itself in the context of s 56. In the absence of any evidence to the contrary, a legal owner of property will be in possession of it. But, while possession is often an incident of ownership (or other legal right), in this context, ownership of the property is not necessarily required, nor even is a claim of right, before a person will have a defence under s 56. At the same time, something more than mere presence on the land or a mere right to use or enter a property is required.

‘[57] The characteristics of possession were identified by Lord Browne-Wilkinson in *JA Pye (Oxford) Ltd v Graham* [[2002] UKHL 30, [2003] 1 AC 419 at [41], quoting from the judgment of Slade J in *Powell v McFarlane* (1977) 38 P & CR 452 (Ch) at 470–471]:

... Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive

physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed ... Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.

Possession of this kind would give rise to a claim in trespass for interference with the land in question. That approach is appropriate. The legislative provisions in which “peaceable possession” appears require reference to the underlying principles of the law of trespass in order to determine whether or not the person against whom force was used was a “trespasser”. In this way, the statutory context indicates that the concept of possession in “peaceable possession” is that which underpins the principles of the law of trespass.

‘[58] Possession, as required by s 56, accordingly turns on whether the person raising the defence has actual control over the property in question. Whether a person has sufficient control to be in possession is a factual question turning on all the circumstances including, for example, the nature of the land in question and the manner in which it is usually enjoyed.’ *Tauaki v R* [2013] NZSC 146, [2014] 1 NZLR 235 at [56]–[58], per McGrath J

Peaceable possession

New Zealand [Crimes Act 1961, s 56: person in peaceable possession of the land justified in using reasonable force to prevent a person trespassing or to remove him from the land.] ‘[42] The meaning of “peaceable possession” in s 56 must be considered in its statutory context. “Peaceable possession” is an element of each of the provisions in the Crimes Act relating to the defence of property (ss 52–55). Each addresses directly the rights to use force in defence of possession of property ...

... ‘[59] The defence under s 56 is available only to persons who are in “peaceable possession” of property. In the overseas authorities discussed, for possession to be “peaceable” there must be no serious rival claim to possession being maintained in challenge to the possession of the person claiming justified use of force. This has led to the view that

“peaceable possession” must be possession that previously has not been seriously questioned, such as by demonstrated opposition or legal attempts to recover exclusive possession, at the time of the exercise of defensive force.

‘[60] Giving “peaceable possession” this meaning narrows the scope of the right to use force in the defence of property, an approach which helps limit the right becoming a general licence for those in possession to take the law into their own hands when their possession is interfered with by a trespasser. But this meaning would create difficulties when the term is applied in s 56 and in other sections of the Crimes Act.

‘[64] “Peaceable possession” must be given a meaning that gives due scope to both the ss 52–56 defences and the s 91 forcible entry offence. The character of the possession in s 56 which justifies limited use of defensive force is not concerned with the quality of the possessor’s title to the property, nor, generally, the basis on which possession was acquired. Overall, the meaning of “peaceable possession” which best fits the context of the Crimes Act is simply possession that has been achieved other than in the context of an immediate or ongoing dispute. In brief, it is possession obtained and maintained before the employment of the physical force the use of which the person seeks to justify.’ *Taueki v R* [2013] NZSC 146, [2014] 1 NZLR 235 at [42], [59]–[60], [64], per McGrath J

Writ of possession

[For 17(1) Halsbury’s Laws of England (4th Edn) (Reissue) paras 27, 103 see now 12A Halsbury’s Laws of England (5th Edn) (2015) para 1382.]

POST OBIT

[For 13 Halsbury’s Laws of England (4th Edn) (2007 Reissue) para 97 see now 32 Halsbury’s Laws of England (5th Edn) (2012) para 297.]

POSTAL, TELEGRAPHIC OR TELEPHONIC SERVICES

Australia [Trade Practices Act 1974 (Cth), s 6(3).] ‘[99] Section 65AAC provides that a corporation must not participate in a pyramid selling scheme or induce, or attempt to induce, a person to participate in a pyramid selling

scheme. Each of the respondents is, of course, a natural person. However, as I have already mentioned, the ACCC relies on s 6(3) of the Act which has the effect of extending the operation of s 65AAC so that it also prohibits conduct on the part of a natural person to the extent that his or her conduct involves, inter alia, the use of “postal, telegraphic or telephonic services”. Significantly, this has only been so since 15 April 2010 when the Amending Act took effect.

‘[100] The expression “postal, telegraphic or telephonic services” as used in s 6(3) of the Act extends to conduct involving the use of the internet. I think this must be so having regard to the very broad way in which the word “telegraphic” is defined in most of the well known dictionaries. For example, The *Macquarie Dictionary*, 3rd ed, Macquarie Library, 1997, p 2176 defines telegraph as:

1. an apparatus, system or process for transmitting messages or signals to a distance, especially by means of an electrical device consisting essentially of a transmitting or sending instrument and a distant receiving instrument connected by a conducting wire, or other communications channel, the making and breaking of the circuit at the sending end causing a corresponding effect, as on a sounder, at the receiving end.

The word “telegraphic” ought to be given a correspondingly broad meaning. It is open to the court to take judicial notice of the fact that the internet is a “telegraphic” apparatus or system used to transmit and receive electronic communications: see s 144(1) of the Evidence Act 1995 (Cth).’ *Australian Competition And Consumer Commission v Jutsen (No 3)* [2011] FCA 1352, (2011) 285 ALR 110 at [99]–[100], per Nicholas J

POUND-BREACH

[For 2(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 633 see now 2 Halsbury’s Laws of England (5th Edn) (2017) para 62.]

[For 11(2) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 726 see now 26 Halsbury’s Laws of England (5th Edn) (2016) para 811.]

[The common law right to distrain for arrears of rent was abolished as from 6 April 2014: see the Tribunals, Courts and Enforcement Act 2007, s 71; Tribunals, Courts and

Enforcement Act 2007 (Commencement No 11) Order 2014, SI 2017/768. See 62 Halsbury's Laws of England (5th Edn) (2016) para 282.]

POWER (OF CORPORATION)

See also CAPACITY

'I accept that, for the purposes of English domestic law, the cases have long established that a corporation created by royal charter has the full "capacity" of a natural person to contract, even if there are limiting terms in the charter of incorporation. If there are limitations in the charter, the corporation has no "power" to carry out acts which are not authorised by its charter; and the doing of them may be restrained by injunction. Yet if acts are done which are beyond the "power" of the corporation, the acts are nonetheless valid; they are not, as between the corporation and a third party contracting with it, void for being beyond the "capacity" of the corporation. So the "power" of a corporation, in that context, is used to mean something less than the inherent ability of the corporation to exercise legal rights.' *Haugesund Kommune v Depfa ACS Bank (Wikborg Rein & Co, Part 20 defendant)* [2010] EWCA Civ 579, [2011] 1 All ER 190 at [32], per Aikens LJ

PRACTICABLE

As far as is practicable

Australia '[35] The obligation imposed on Airservices by s 9(2) of the Air Services Act [1995 (Cth)] is intended to assist in the protection of the environment from the direct and indirect effects of the operation and use of aircraft, "as far as is practicable". *The Macquarie Dictionary* (revised 3rd ed) gives a fuller meaning of the word "practicable" as:

... capable of being put into practice, done, or effected, *especially with the available means or within reason or prudence; feasible.* [Emphasis added.]

What is "practicable" includes consideration of Airservices' available means to perform the relevant function and the nature of the task itself.

'[36] Airservices' function of "promoting and fostering civil aviation" in Australia under s 8(1)(b) raises the possibility that there may be an expansion of civil aviation over time to meet the changing needs and demands of the people of Australia. None the less, s 9(2) recognises

that that activity has an environmental consequence. Thus, s 9(2) requires Airservices to take measures, in a way that is reasonable and prudent, to adopt a means of promoting and fostering civil aviation that is to be the least harmful, and will offer the greatest protection, to the environment. However, s 9(2) does not impose on Airservices an absolute obligation to protect the environment. Rather the section imposes a condition on the exercise of the functions entrusted to Airservices.

'[37] And s 16(1) is a power of the minister to give directions to Airservices relating to the performance of its existing functions or the exercise of its existing powers. When Airservices exercises a function in a manner directed by the minister under s 16, s 16(3) requires it give effect to the policy objectives of the executive government.

'[38] The manner in which Airservices performs the function or exercises the power the subject of a s 16 direction is further qualified by the words "as far as is practicable" in s 9(2). What is "practicable" for the purposes of s 9(2) can be affected by the resources available to Airservices with which it can perform its functions. ...' *The Village Building Co Ltd (ACN 056 509 025) v Airservices Australia* [2007] FCA 1242, (2007) 241 ALR 685, BC200706932 at [35]–[38], per Rares J

PRACTICE AND PROCEDURE

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

PREAMBLE

[For 44(1) Halsbury's Laws of England (4th Edn) (Reissue) para 1265 see now 96 Halsbury's Laws of England (5th Edn) (2012) para 671.]

PREJUDICE

New Zealand [Official Information Act 1982, s 6: Minister can lawfully withhold some of the information requested if releasing the information requested would be likely to prejudice international relations etc.] '[120] Third, the transitive verb "to prejudice" in s 6(a), (b) and (c) of the Act should be given its natural and ordinary meaning. In the context of s 6, "to prejudice" means "to impair" the interests identified in s 6(a), (b) and (c) of the Act.' *Kelsey v Minister of Trade* [2015] NZHC 2497,

[2016] 2 NZLR 218 at [120], per Collins J

PREMISES

Any premises in which the tenant's flat is contained

[Under the Leasehold Reform, Housing and Urban Development Act 1993, s 47, the court can by order declare that the right to acquire a new lease is not exercisable by a tenant by reason of the landlord's intention to redevelop 'any premises in which the tenant's flat is contained'. The landlord intended to redevelop the 'premises' by combining the tenant's flat with a flat owned by a subsidiary of the landlord and situated immediately below the tenant's flat to form a single duplex apartment. Before the judge it contended that the two flats constituted 'premises' in which the tenant's flat was contained within s 47(2)(b). The judge held that, for the purposes of s 47(2), the premises in which the tenant's flat was contained had to be the whole block or at least some self-contained part of the block. He therefore dismissed the landlord's application. The Court of Appeal allowed the landlord's appeal, holding that any part of the block which comprised contiguous flats could constitute 'premises' in which, for s 47(2) purposes, each of the flats was contained. The tenant appealed to the House of Lords contending that 'premises' must be a physical space which is objectively recognisable at the time when the tenant serves his notice and not a notional space defined by the landlord in whatever way it chooses.] '[37] There can be no doubt about what the 1993 Act was designed to achieve. It was designed to give long-leaseholders of flats rights as close as possible to those of freeholders, at a price approximating to the market price, though subject to some statutory assumptions. That purpose would be frustrated if the landlord could defeat either of those rights by proposing to do comparatively minor works to the building involved. I accept that the definition of premises in Ch I is not applied in Ch II, but it is legitimate to look at the scale of redevelopment which would defeat the right of collective enfranchisement in Ch I in order to consider what scale of redevelopment would defeat the right to a new lease in Ch II. Section 23(2) is in almost identical terms to s 47(2). It contemplates demolition or reconstruction of or substantial works of construction to a whole or a substantial part of a whole building or self contained part of a building. These are major works, requiring a

large investment in proportion to the value of the premises, not simply the reconstruction of a small part for the purpose of making a profit on that part.

'[38] Nor can it have been Parliament's intention to allow the landlord to define the "premises" for itself. That would in many cases allow it to defeat the right to a new lease. The purpose of granting the right to buy a new lease was to support the value of the old. The final years of long leases can now be bought and sold with a reasonable expectation that they can be extended when they come to an end. There has to be some objective way of estimating how likely it is that the landlord will be able to prevent that.

'[39] Hence it seems to me clear that "any premises in which the flat is contained" must be an objectively recognisable physical space, something which the landlord, the tenant, the visitor, the prospective purchaser would recognise as "premises". In common with Lord Scott, I have little doubt that, if one asked a visitor, "in which premises is flat 77, Boydeell Court, contained?", the visitor would say "Block B". The visitor would not further sub-divide the space. In a row of terraced houses, or in a pair of semi-detached houses, the visitor would regard each house as the "premises". In a single block of flats with several entrances leading to separate staircases, the visitor might also say "Block B" rather than the whole building. Much would depend upon the physical facts on the ground. This is a much more objective test than that proposed by the landlord and in most cases would lead to very similar results to those in collective enfranchisement cases in Ch I.

'[40] It has hitherto been taken for granted that, if the premises are Block B, then two flats out of the fifty do not constitute "a substantial part of" the premises. Were it otherwise there would have been no point in the appellant pursuing matters to this House. The respondent has not hitherto sought to argue otherwise. In my view, it was right not to do so. "Substantial" is a word which has a wide range of meanings. Sometimes it can mean "not little". Sometimes it can mean "almost complete", as in "in substantial agreement". Often it means "big" or "solid", as in a "substantial house". Sometimes it means "weighty" or "serious", as in a "substantial reason". It will take its meaning from its context. But in an expression such as a "substantial part" there is clearly an element of comparison with the whole: it is something other than a small or insignificant or insubstantial part. There may be both a qualitative element of size, weight or importance in its own

right; and a quantitative element, of size, weight or importance in relation to the whole. The works intended by this landlord are substantial in relation to each of the flats involved, but those flats do not in my view constitute a substantial part of the whole premises. ...’ *Majorstake Ltd v Curtis* [2008] UKHL 10, [2008] 2 All ER 303 at [37]–[40], per Baroness Hale of Richmond

PREMIUM

Insurance

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 129 see now 60 Halsbury’s Laws of England (5th Edn) (2011) para 150.]

Rent

[For 27(2) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 926 see now 63 Halsbury’s Laws of England (5th Edn) (2016) para 752.]

PREPARED FOR USE IN COURT

Canada [Whether exhibits to affidavits written in French, prepared before litigation was contemplated, could be introduced into evidence despite an old English statute received into the colonial law of British Columbia (the ‘1731 Act’) and Rule 22–3 of the BC Supreme Court Civil Rules.] ‘2 The appellants ask this Court to hold that the British Columbia courts retain a residual discretion to admit documents in languages other than English without an English translation. For the reasons that follow, I conclude that no such discretion exists. The British Columbia legislature has ousted the inherent jurisdiction of the courts and has required that court proceedings in the province be conducted in English. As a result, this appeal must be dismissed.

...
‘58 Even if the 1731 Act were not applicable to British Columbia or if it had been modified, Rule 22–3 of the *Supreme Court Civil Rules* requires that exhibits attached to affidavits and filed in court be in English. The respondents advanced this as an alternative argument, and it was accepted by both of the courts below. Rule 22–3(2) states:

- (2) Unless the nature of the document renders it impracticable, every document prepared for use in the court

must be in the English language, legibly printed, typewritten, written or reproduced on 8 1/2 inch x 11 inch durable white paper or durable off-white recycled paper.

‘59 Although the appellants argue that the exhibits attached to the affidavits were not prepared for use in court, because they were prepared in the usual course of their business, it is my view that once the exhibits were attached to the affidavits, they became part of a document prepared for use in court. It cannot be possible to circumvent the rule by moving information on which a party seeks to rely from the body of the affidavit into an exhibit. If the appellants wish to rely on the content of the exhibits, as opposed to their existence or their authenticity, the exhibits must comply with the rule, since an exhibit that is relied upon for its content is effectively incorporated into the affidavit.

‘60 This is different from the case of documents produced in the discovery process. The appellants argue that because Rule 22–3 does not require documents produced on discovery to be translated, the same should be true for documents introduced as evidence. The appellants rely on two cases in which it was held that discovery documents do not need to be translated: *Han v. Cho*, 2008 BCSC 1208, 88 B.C.L.R. (4th) 193; *Bilfinger Berger (Canada) v. Greater Vancouver Water District*, 2010 BCSC 1104 (Can LII). In my view, those cases are inapplicable, since documents exchanged on discovery are not prepared for use in court. Indeed, it is quite possible that such documents will never find their way into a court file. Discovery documents are not filed with the court, but simply pass from one party to another. Moreover, in both of the cases cited by the appellants, the judge acknowledged that if any of the discovery documents were to be used in court, they would have to be translated: *Han*, at para. 14; *Bilfinger*, at para. 18.

‘61 However, Rule 22–3 does introduce a certain discretion to admit documents that do not comply with the rule if their nature would render compliance “impracticable”. The word “document” is defined in the rules to include photographs, films, sound recordings and “information recorded or stored by means of any device”: Rule 1–1(1). Rule 22–3 requires not only that documents be in English, but also that they be “legibly printed, typewritten, written or reproduced on 8 1/2 inch x 11 inch durable white paper or durable off-white recycled paper”. In light of the expanded

definition of “document”, it seems clear that the impracticability exception was intended to apply to items such as photographs, films, receipt books or business ledgers, to which the formatting requirements cannot logically apply.

‘62 Where, as in the instant case, the documents at issue are written in French, it is clear that there is nothing inherent in them that would render it impracticable to have them translated into English. As the chambers judge found that there was “no basis upon which I can hold that the nature of the documents exhibited to the affidavits in this case renders it impracticable that they be translated into the English language” (para. 58), I do not accept that the large volume of documents in question can change “the nature of the document[s]” so as to render compliance with the rule impracticable.’ *Conseil scolaire francophone de la Colombie-Britannique v British Columbia* 2013 SCC 42, [2013] SCJ No 42 at paras 2, 58–62, per Wagner J

PREROGATIVE

[For 8(2) Halsbury’s Laws of England (4th Edn) (Reissue) paras 367–368 see now 20 Halsbury’s Laws of England (5th Edn) (2014) paras 166, 168.]

PRESCRIBED DESCRIPTION

[Jobseekers Act 1995, s 17A.] ‘[44] To recapitulate, (a) s 17A(1) authorised the making of regulations which “impos[ed] on claimants in prescribed circumstances a requirement to participate in schemes of any prescribed description that are designed to assist them to obtain employment”, and, by s 35, “prescribed” means “specified in or determined in accordance with regulations”; and (b) [the Jobseeker’s Allowance (Employment, Skills and Enterprise Scheme Regulations 2011, SI 2011/917,] reg 2 identified the Employment, Skills and Enterprise Scheme, which—

“means a scheme within section 17A ... known by that name and provided pursuant to arrangements made by the Secretary of State that is designed to assist claimants to obtain employment or self-employment, and which may include for any individual work-related activity (including work experience or job search).”

‘[45] Whether one takes the Employment, Skills and Enterprise Scheme (which is really a group of schemes including the SBWA scheme

[sector-based work academy scheme] and the CAP [Community Action Programme]) as a single scheme, or whether, as seems more natural, one takes the SBWA scheme and the CAP as separate schemes, they were undoubtedly schemes which fell within the ambit of reg 2. However, the question which arises is whether reg 2 was or contained a “prescribed description” of the scheme in question. In other words, the question is whether reg 2 could fairly be said to have been a “regulation” either (i) which specified a “description” of (the Employment, Skills and Enterprise Scheme or) the SBWA scheme or the CAP, or (ii) “in accordance with” which (the Employment, Skills and Enterprise Scheme or) the SBWA scheme or the CAP could be said to have been “determined”.

‘[46] For the Secretary of State, Mr Eadie QC argued that the self-evident need for flexibility in the precise characteristics of any scheme introduced under s 17A renders it unlikely that Parliament can have intended much, if anything, in the way of specific information about any scheme to be included in any regulation made thereunder. The need for flexibility cannot be doubted. As Pill LJ said in the Court of Appeal [[2013] EWCA Civ 66, [2013] 3 All ER 67] (at [49]) “[t]he needs of jobseekers will vary infinitely as will the requirements of providers prepared to participate in arrangements with them”. Over and above the question of flexibility, as Ms Lieven, for Miss Reilly and Mr Wilson, effectively accepted, once one decides that s 17A(1) requires more specific information about a scheme than what is contained in reg 2, it is not easy to identify the precise extent of the information required.

‘[47] However, even bearing in mind these points, it appears clear to us that reg 2 does not satisfy the requirements of s 17A(1). The courts have no more important function than to ensure that the executive complies with the requirements of Parliament as expressed in a statute. Further, particularly where the statute concerned envisages regulations which will have a significant impact on the lives and livelihoods of many people, the importance of legal certainty and the impermissibility of sub-delegation are of crucial importance. The observations of Scott LJ in *Blackpool Corp v Locker* [1948] 1 All ER 85 at 87, [1948] 1 KB 349 at 362 are in point: “John Citizen” should not be “in complete ignorance of what rights over him and his property have been secretly conferred by the minister”, as otherwise “[f]or practical purposes, the rule of law ... breaks

down because the aggrieved subject's legal remedy is gravely impaired".

"[48] More specifically, in relation to the point at issue, we cannot improve on the reasoning of Sir Stanley Burnton in the Court of Appeal, where he said this:

"[75] Where Parliament in a statute has required that something be prescribed in delegated legislation, it envisages, and I think requires, that the delegated legislation adds something to what is contained in the primary legislation. There is otherwise no point in the requirement that the matter in question be prescribed in delegated legislation. However, the description of the Employment, Skills and Enterprise Scheme in the 2011 Regulations adds nothing to the description of such schemes in the Act... In effect, the Secretary of State contends that any scheme he creates is a scheme within the meaning of s 17A notwithstanding that it is not described in any regulations made under the Act. Furthermore, it is not possible to identify any provision of the Regulations that can be said to satisfy the requirement that the description be 'determined in accordance with' the Regulations

... "[76] Description of a scheme in regulations is important from the point of view of parliamentary oversight of the work of the administration. It is also important in enabling those who are required to participate in a scheme, or at least those advising them, to ascertain whether the requirement has been made in accordance with parliamentary authority ..."

"[49] Sir Stanley immediately went on to say—

"[t]he question as to precisely how much detail must be included in the Regulations in order to comply with the requirements of the Act does not arise for consideration in this appeal, since the Regulations contain none."

However, while it is a fundamental duty of the courts to ensure that the executive carries out its functions in accordance with the requirements of Parliament, as expressed in primary legislation, it is also incumbent on courts to be realistic in the standards they set for such compliance. In this case, it is not only self-evident, but it is clear from the contents of reg 3 of the 2013 Regulations [Jobseeker's

Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013, SI 2013/276], ..., that it is not unrealistic to hold that the Secretary of State could have done significantly more than was done in the earlier reg 2 to describe the individual schemes such as the SBWA scheme and the CAP. ...' *R (on the application of Reilly) v Secretary of State for Work and Pensions* [2013] UKSC 68, [2014] 1 All ER 505 at [44]–[49], per Lord Neuberger P and Lord Toulson SCJ

PREScription

[For 16(2) Halsbury's Laws of England (4th Edn) (Reissue) paras 74–75, 81 see now 87 Halsbury's Laws of England (5th Edn) (2017) paras 803–804, 810.]

PREsumption

[For 11(3) Halsbury's Laws of England (4th Edn) (2006 Reissue) paras 1374–1377 see now 28 Halsbury's Laws of England (5th Edn) (2015) paras 454–457.]

Of fact

[For 17(1) Halsbury's Laws of England (4th Edn) (Reissue) para 576 see now 12 Halsbury's Laws of England (5th Edn) (2015) para 755.]

Of law

[For 17(1) Halsbury's Laws of England (4th Edn) (Reissue) para 577 see now 12 Halsbury's Laws of England (5th Edn) (2015) para 756.]

PREVIEW

Canada [Copyright Act, RSC 1985, c C-42, s 29: whether previews constitute fair dealing.] '16. The Board defined "previews" as

a marketing tool offered by online music services, among others. A preview is an excerpt (usually 30 seconds or less) of a sound recording that can be streamed so that consumers are allowed to "preview" the recording to help them decide whether to purchase a (usually permanent) download. [para 18]

Society of Composers, Authors and Music Publishers of Canada v Bell Canada [2012] SCJ No 36, 2012 SCC 36 at para 16, per Abella J

PRIMA FACIE GROUND

New Zealand [Under the Judicature Act 1908, s 88B(2), leave for a vexatious litigant to pursue a proceeding is not to be granted unless the court is satisfied that the proceeding is not an abuse of the process of the court and that there was prima facie ground for the proceeding.] '[8] The key requirements are that the court must be satisfied that the proposed proceeding is not an abuse of the process of the court and that there is prima facie ground for the proceeding.

'[9] It is well settled that the discretion to grant leave to institute or continue proceedings by a vexatious litigant is a jurisdiction to be exercised very carefully since, as Davies LJ said in writing for the English Court of Appeal in *Becker v Teale* [1971] 3 All ER 715 at p 716:

"Ex hypothesi the person has already 'habitually and persistently and without any reasonable ground instituted vexatious proceedings' ..."

'[10] Davies LJ added that there is a "high onus" cast on such a person seeking leave under the English statute which was, at that time, in terms virtually identical to s 88B of the Judicature Act.

'[11] There are, however, competing interests to be considered, including the fact that a refusal to grant leave amounts to a denial of every citizen's usual right of access to the courts. As Staughton LJ said in *Attorney-General v Jones* [1990] 1 WLR 859 at p 865:

"The power to restrain someone from commencing or continuing legal proceedings is no doubt a drastic restriction of his civil rights, and is still a restriction if it is subject to the grant of leave by a High Court Judge. But there must come a time when it is right to exercise that power for at least two reasons. First, the opponents who are harassed by the worry and expense of vexatious litigation are entitled to protection; secondly the resources of the judicial system are barely sufficient to afford justice without unreasonable delay to those who do have genuine grievances, and should not be squandered on those who do not."

'[12] In England, the previous legislation considered in *Becker v Teale* has been replaced by s 42 of the Supreme Court Act 1981 (UK). The term "prima facie ground" has been replaced with "reasonable ground". But in *Re C* (1989) Times, 14 November, Brooke J (as he then was) sitting in the Queen's Bench Division,

did not consider there to be a material difference between the two terms.

'[13] In New Zealand, there is relatively little authority on the threshold prescribed by the expression "prima facie ground". In *Black, White and Grey Cabs Ltd v Hill* (High Court, Auckland, CP 1013/91, 10 December 1993), Barker J discussed *Becker v Teale* and stated at p 10:

"The requirement of a prima facie case is higher than the current test for the grant of an interim injunction; that is, a serious question to be tried. Authorities on a prima facie case show that the plaintiff must show 'probable cause for relief at the hearing'; *Republic of Peru v Dreyfus Brothers and Co* (1888) 38 Ch D 348 at p 362, or 'it is likely to succeed'; *Harman Pictures v Osborne* [1967] 2 All ER 324 at p 336. Add to that the views expressed in *Becker v Teale* that this particular jurisdiction should be 'very carefully exercised' with 'a high onus' cast on the applicant."

'[14] More recently, Fogarty J considered another application for leave by the present applicant Mr Collier in a proposed proceeding against five named defendants. Fogarty J granted leave in a reserved judgment (*Re Collier* [2004] NZAR 472). Fogarty J found at para [7] on the facts of the case before him that there was a material difference between the standard identified by Barker J in *Black, White and Grey Cabs Ltd v Hill* and the standard of "prima facie ground". Fogarty J stated at para [6]:

"... I interpret the prima facie test in the traditional way of the Court being satisfied, without hearing the other side, that the plaintiff has a good reason to start or continue a proceeding."

'[15] I agree with Fogarty J that the tests of "probable cause for relief" or "likely to succeed" referred to by Barker J in *Black, White and Grey Cabs Ltd* are not apt in the context of s 88B(2). The expression "prima facie ground" must be applied to the facts of the case in accordance with its usual meaning. Spiller, *Butterworths New Zealand Law Dictionary* (6th ed, 2005), defines "prima facie case" as:

"A serious, as opposed to a speculative case.

A litigating party is said to have a prima facie case when the evidence in his or her favour is sufficiently strong for his or her opponent to be called on to answer it."

[16] This definition adequately captures the flavour of the expression “prima facie ground” in s 88B(2), focusing on the strength of the evidence, which must reach a sufficiently high threshold to require the potential defendant to respond to it. But the threshold to be established before leave may be given under s 88B(2) is not to be confused with the level of scrutiny required in respect of the claim. The “careful scrutiny” test remains apposite and the court is not bound to accept uncritically the assertions made by the vexatious litigant seeking leave. Where relevant, the background leading to the making of the order declaring the applicant a vexatious litigant is to be considered. The court may also require the applicant to produce appropriate evidence in support of the claim as Fogarty J did in connection with the application Mr Collier made in 2004.’ *Re Collier* [2008] 2 NZLR 505 at [8]–[16], per Randerson J (Chief High Court Judge)

PRIVATE WAY

New Zealand [Local Government Act 1974 s 315, incorporated in the Dog Control Act 1996.] [4] Section 33E(1)(a) provides:

33E Effect of classification as menacing dog—(1) If a dog is classified as a menacing dog under section 33A or section 33C, the owner of the dog—

- (a) must not allow the dog to be at large or in any public place or in any private way, except when confined completely within a vehicle or cage, without being muzzled in such a manner as to prevent the dog from biting but to allow it to breathe and drink without obstruction; ...

[5] The appeal raises two issues:

- (a) What is the meaning of “private way” in s 33E(1)(a)?
- (b) Was Sprocket in a private way when he bit the complainant?

... [20] As noted above “private way” is defined to have the meaning given to it by s 315(1) of the LGA [Local Government Act 1974]. The definition of “private way” in s 315(1) is for the purposes of Part 21 which relates to roads (other than regional roads), service lanes and access ways. Section 315 also contains definitions of “access way”, “private road”, “road”, and “service lane”.

[21] A “private road” is defined in s 315(1) as:

... any roadway, place, or arcade laid out or

formed within a district on private land, whether before or after the commencement of this Part, by the owner thereof, but intended for the use of the public generally. Both private roads and private ways cross private land: the difference between them relates to the rights of access by the public.

... [25] The definition of “private way” in the Resource Management Act 1991 (RMA) also adopts the definition in s 315. In the RMA private ways are addressed in the context of survey plans of land.

[26] The treatment of private ways in both the LGA and the RMA points to a formal process of either permission or approval for the establishment of a private way similar in several respects to the treatment of private roads. What is envisaged is a recognised thoroughfare over private land which is intended for the use of identified classes of persons.

[27] The concept as used in both the LGA and the RMA does not envisage that entire properties would be considered to be private ways simply by dint of being private land. Indeed a fully fenced property, by virtue of its enclosed state, would defeat the object of a private way, namely to provide a thoroughfare. The definition in s 315(1) means any “way or passage whatsoever over private land”.

[28] Given the incorporation of the s 315 LGA definition in the DCA, I consider that the same interpretation of private way should apply in the case of the DCA, absent some clear indication in the legislation or the legislative history of a different meaning being intended to apply.

[29] There was no provision for “private way” in the original Local Government Law Reform Bill which on its introduction on 6 December 1994 was referred to the Internal Affairs and Local Government Committee. However when the Committee divided parts of that Bill to form the Dog Control Bill, that Bill as reported back included the definition of and the several references to “private way”.

[30] Despite a thorough review of the submissions and briefing papers that can still be located, with one exception there is no indication in the legislative materials as to the catalyst for the introduction of provision for “private way” in the DCA.

[31] The single exception is the following observation of the Member for Titirangi in the Second Reading debate:

One other most important matter, which is particularly relevant to Auckland — and I

make no apologies for being parochial about that — relates to the situation where a lot of properties have a common driveway. At the end of those driveways, or off them, are houses or units etc. The problem is that if a dog is on such a driveway it can be outside the law. We have dealt with that. Although it is a small matter, it is certainly very important that dog control can be covered on what could be called a common type of driveway.

‘[32] Although it does not refer expressly to the phrase “private way”, that observation is consistent with the concept of private way in the LGA. Indeed it is describing the scenario which is recognised in s 348(5).

‘[34] In my view the references to “at large or in any public place or in any private way” are to areas to which the public or certain agreed persons may have access and which are distinct from private land over which no agreed right of passage has been defined and granted.

‘[35] Consequently the backyard in which the incident concerning the complainant and Sprocket took place was not in my view a private way within the meaning of that term in s 315(1) of the LGA. Hence there was no obligation on the appellant to have Sprocket muzzled in that place.’ *Mitchell v Invercargill City Council* [2015] NZHC 460, [2015] NZAR 510 at [4]–[5], [20]–[21], [25]–[32], [34]–[35], per Brown J

PRIVILEGE

Absolute privilege

[For 28 Halsbury’s Laws of England (4th Edn) (Reissue) paras 95–95 see now 32 Halsbury’s Laws of England (5th Edn) (2012) paras 595–596.]

Any privilege of the law of evidence

Canada [Freedom of Information and Protection of Privacy Act, RSA 2000, c F-25, s 56(3): a public body must produce required records to the Information and Privacy Commissioner despite ‘any privilege of the law of evidence’.] ‘1. ... At the heart of this appeal is whether s 56(3) of *FOIPP*, which requires a public body to produce required records to the Commissioner “[d]espite ... any privilege of the law of evidence”, allows the Commissioner and her delegates to review documents over which

solicitor-client privilege is claimed.

‘2. I conclude that s 56(3) does not require a public body to produce to the Commissioner documents over which solicitor-client privilege is claimed. As this Court held in *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 SCR 574, solicitor-client privilege cannot be set aside by inference but only by legislative language that is clear, explicit and unequivocal. In the present case, the provision at issue does not meet this standard and therefore fails to evince clear and unambiguous legislative intent to set aside solicitor-client privilege. It is well established that solicitor-client privilege is no longer merely a privilege of the law of evidence, having evolved into a substantive protection. Therefore, I am of the view that solicitor-client privilege is not captured by the expression “privilege of the law of evidence”. Moreover, a reading of s 56(3) in the context of the statute as a whole also supports the conclusion that the legislature did not intend to set aside solicitor-client privilege. ...

‘37. The key issue in this case is whether s 56(3) of *FOIPP*, which requires a public body to produce to the Commissioner records “[d]espite ... any privilege of the law of evidence”, allows the Commissioner to review documents that the University claims are protected by solicitor-client privilege. I conclude that “any privilege of the law of evidence” is not sufficiently clear and precise to set aside or permit an infringement of solicitor-client privilege.’ *Alberta (Information and Privacy Commissioner) v University of Calgary* [2016] SCJ No 53, [2016] 2 SCR 555 at paras 1–2, 37, per Côté J

Legal professional privilege

Australia ‘[2] Legal professional privilege has its origins in Elizabethan times: see *Berd v Lovelace* (1577) Cary 62; 21 ER 33. Strangely, certain aspects of the privilege are still to be settled. The current view is that there are two branches of legal professional privilege — they are usually referred to as advice privilege and litigation privilege. Advice privilege is concerned with direct communications between a lawyer and his client, or their respective agents or employees: *Greenough v Gaskell* (1833) 1 My & K 98; 39 ER 618; *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 at 649. Initially the privilege was confined to communications in relation to existing or contemplated

litigation: *Southwark and Vauxhall Water Company v Quick* (1878) 3 QBD 315 (*Southwark and Vauxhall Water Company*); *Wheeler v Le Marchant* (1881) 17 Ch D 675 (*Wheeler*). That is no longer the case: *Grant v Downs* (1976) 135 CLR 674; 11 ALR 577 (*Grant*).

[3] The rationale for advice privilege is to promote “the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers”: *Grant* at CLR 685; ALR 586. To qualify, the usual criteria are that the communication must be: (a) confidential; (b) of a professional nature; and (c) made with the intention of obtaining or giving legal advice: 1 *McCormick on Evidence*, 6th ed, 2006, s 88; *Baker v Campbell* (1983) 153 CLR 52 at 115–16; 49 ALR 385 at 432–4; [1983] HCA 39. The third proposition should be amplified. The advice given or sought need not be confined to matters of legal principle. It may include advice as to what should or should not be done in a “relevant legal context”: *Balabel v Air-India* [1988] Ch 317 at 330; [1988] 2 All ER 246 at 253 per Taylor LJ ([L]egal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context); *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2005] 1 AC 610; [2005] 4 All ER 948.

[4] *Prima facie* any communication between a lawyer and his client concerning the subject matter of the lawyer’s retainer will satisfy the three requirements. Once the parties to the communication are known and its subject matter clear the privilege will be made out. But on occasion more information will be needed. The reason is that the privilege is subject to exceptions. For example, the privilege does not apply where the lawyer is not contracted in his professional capacity: *Solosky v R* [1980] 1 SCR 821 at 835. Nor does it apply to communications not intended to be confidential: *O’Shea v Wood* [1891] P 286 at 289. There is also the so-called “furtherance of fraud” exception, as to which see *R v Cox and Railton* (1884) 14 QBD 153 (*Cox and Railton*).

[5] Litigation privilege developed in the late 19th century because advice privilege did not apply to communications between the lawyer or client and a third party, although the communications were made for the purpose of enabling the lawyer to give his client advice. The courts were slow to hold those communications to be privileged. They are now protected by what is referred to as litigation privilege: *Southwark*

and Vauxhall Water Company; Wheeler. For a recent discussion of litigation privilege see *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* (2009) 254 ALR 198; [2009] FCAFC 32. This privilege is “essentially a creature of adversarial proceedings”: *Re L (A Minor) (Police Investigation: Privilege)* [1997] AC 16 at 26; [1996] 2 All ER 78 at 85. It is confined to communications in aid of pending, or contemplated, litigation.

[6] There are significant differences between advice privilege and litigation privilege. One is that, in most common law jurisdictions, advice privilege does not apply to communications with third parties, though the purpose of the communications is to enable the lawyer to tender proper advice. Communications with third parties will only be protected if made in connection with litigation: *Waugh v British Railways Board* [1980] AC 521 at 541–2; [1979] 2 All ER 1169 at 1181 (*Waugh*). This approach is followed both in New Zealand (*Guardian Royal Exchange Assurance of NZ Ltd v Stuart* [1985] 1 NZLR 596 at 602) and Canada (*General Accident Assurance Company v Chrusz* (1999) 180 DLR (4th) 241).

[7] Another difference is that litigation privilege provides protection to a wider range of communications. It applies to communications other than those made for the purpose of giving or obtaining legal advice. One instance is evidence gathered for the purpose of litigation. On the other hand, the scope of litigation privilege is narrower in that it applies only when litigation is in existence or in reasonable prospect. It does not, for example, apply to investigative or inquisitorial proceedings. By contrast, advice privilege applies even if there is no litigation in contemplation.

[8] Australian courts have not kept the two branches of privilege so distinct. ...’ *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd (No 2)* [2009] FCA 449, (2009) 256 ALR 416 at [2]–[8], per Finkelstein J

Qualified privilege

[For 28 Halsbury’s Laws of England (4th Edn) (Reissue) paras 95, 109 see now 32 Halsbury’s Laws of England (5th Edn) (2012) paras 595, 609.]

PRIVACY

[For 16(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 999 see now 12A

Halsbury's Laws of England (5th Edn) (2015) para 1634.]

PRIZE

Admiralty

[For 36(2) Halsbury's Laws of England (4th Edn) (Reissue) paras 801–803 see now 85 Halsbury's Laws of England (5th Edn) (2012) paras 601–603.]

PROCEEDING (NOUN)

Australia [Foreign States Immunities Act 1985 (Cth), s 9: 'Except as provided by or under this Act, a foreign State is immune from the jurisdiction of the courts of Australia in a proceeding'.] '[34] Firebird's submissions that a proceeding for registration and enforcement of a foreign judgment is not a "proceeding" within the meaning of that term in s 9 of the Immunities Act would not appear to be supported by the ordinary meaning given to that term in a legal context or by its meaning within the context of the Immunities Act.

'[35] In *PT Garuda [PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission]* (2012) 247 CLR 240, 290 ALR 681, [2012] HCA 33], it was observed that "jurisdiction" is a generic term that is used in a variety of senses. In s 9, and elsewhere in the Immunities Act, the term is used to identify the amenability of a defendant to the process of Australian courts. The notion expressed by the term "immunity" is that Australian courts are not to implead a foreign State, which is to say the courts will not by their process make the foreign State a party to a legal proceeding against that foreign State's will. Given that s 9 is intended to provide an immunity from all proceedings brought against a foreign State, subject only to the exceptions for which provision is made elsewhere in the Immunities Act, there is no reason not to give the term "proceeding" its widest meaning.

'[36] The term "proceeding" is apt to refer to any application to a court in its civil jurisdiction for its intervention or action; that is, some method permitted by law for moving a court to do some act according to law. In the context of s 9 and foreign State immunity, it may be understood to refer to a process by which the jurisdiction of an Australian court is invoked, in which a foreign State is named as a party and in which judicial power may be exercised against the foreign State and its interests.

...
'[39] This aspect of Firebird's submissions may be dealt with shortly. The exceptions to which Firebird points — for example, claims concerning contracts of employment (s 12), or personal injury and damage to property (s 13) — may be expected to generate pleadings of a cause of action. It does not follow that the immunity provided by s 9 extends only to proceedings in which a cause of action is pleaded. The generality of the language of s 9 does not support such a construction.

...
'[42] By applying for registration of the foreign judgment, as it was entitled to do under s 6(1) of the Foreign Judgments Act [1991 (Cth)], Firebird invoked federal jurisdiction invested in the Supreme Court of New South Wales. Nauru was named as a party, as a judgment debtor, in those proceedings. Firebird invoked the judicial power of the Commonwealth, exercised by the Supreme Court of New South Wales, in order to obtain rights against Nauru and its property. The effect of registration of the foreign judgment was to make it enforceable as a judgment of the Supreme Court. Registration, if valid, created new rights in favour of Firebird against Nauru and its property, which were then enforceable.²⁴ It is therefore not correct to say that the registration proceedings are merely the invocation of enforcement proceedings. They are proceedings of a kind to which the immunity recognised by international law is referable.' *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43, (2015) 326 ALR 396 at [34]–[36], [39], [42], per French CJ and Kiefel J

PROCEEDINGS

[Proceeds of Crime Act 2002, s 6.] '[5] At the confiscation proceedings, Mr Knox, for the prosecution, took a preliminary point. He submitted that, for the purpose of the legislation, there was a single set of proceedings before the sentencing judge, notwithstanding the presence of two indictments. It followed that the 1988 Act [Criminal Justice Act 1988], as amended, including the assumptions in s 72AA(4), applied and could be used to assess the respondent's benefit. That would lead to a conclusion that she had benefited to the extent of £524,200·4358. The conclusion, he accepted, depended on the success of his submission that a single set of proceedings was before the judge. On behalf of the respondent, Miss Bex does not challenge that conclusion if the premise that

there was a single set of proceedings was correct. Her submission was that there were two indictments and therefore two "proceedings".

[6] The meaning of the word "proceedings" in the legislation is thus the central issue between the parties. ...

[9] The appeal turns on the construction of the word "proceedings" in s 6 of the 2002 Act. That provides, in so far as is material:

- (1) The Crown Court must proceed under this section if the following two conditions are satisfied.
- (2) The first condition is that a defendant falls within any of the following paragraphs—(a) he is convicted of an offence or offences in proceedings before the Crown Court ..."

[10] The prosecution submit that, for the purposes of s 6, the "proceedings" were all those matters, on both indictments, for which the respondent fell to be sentenced on 2 November 2007. The word covered all matters dealt with on a single occasion. They rely on art 3(1) of the Proceeds of Crime Act 2002 (Commencement No 5, Transitional Provisions, Savings and Amendment) Order 2003, SI 2003/333, made on 20 February 2003. The 2003 Order provided that the relevant provisions of the 2002 Act would come into force on 24 March 2003. Article 3(1) provides:

"Section 6 of the [2002] Act (making of confiscation order) shall not have effect where the offence, or any of the offences, mentioned in section 6(2) was committed before 24th March 2003."

... [14] Mr Knox submits that the 2002 Act created a single code in relation to confiscation proceedings. That code should not be fragmented so as to make different offences amenable to different statutes. That would be both unnecessary and unjustified. Because some of the offences to be dealt with were committed before 24 March 2003, the effect of art 3(1) of the 2003 Order was that all offences dealt with on 6 September 2007 were subject to the regime in the 1988 Act, including s 72AA.

[15] For the respondent, Miss Bex accepts that the effect of art 3(1) of the 2003 Order is that an indictment containing some offences committed prior to the commencement date of the 2002 Act and some offences which were committed after that date shall be dealt with under the 1988 Act, the relevant parts of which,

by virtue of art 10, continue to apply. However, where there are two indictments, there are two "proceedings" for the purposes of s 6(2) of the 2002 Act and the relevant offences for the purposes of art 3 did not include the offence in indictment 337.

[16] Miss Bex accepts that if two indictments are, for the purposes of s 6 of the 2002 Act, to be treated as the same proceedings, the court could, under s 72AA, consider all transfers over the preceding six years in a way that proceedings under the 2002 Act could not. It could not have been intended, it is submitted, that offences straddling the commencement date of the 2002 Act, and possibly spread over a long period of time, could attract the provisions of the 1988 Act simply by being listed for sentence on the same day. Much of art 7 would be otiose, it is submitted, if art 3 already has the effect claimed.

[17] On the preliminary point, the judge ruled:

"In my judgment, here the word of the 2002 Act [s 6] is proceedings simpliciter. This legislation is not, as Mr Knox submits, similar to a sentencing exercise. On the contrary, care must be taken to ensure that the correct legislation applies to the correct indictment. If there was a proper basis for joinder of these two indictments, then it could be said that they form part of the same proceedings, but these two indictments cannot. The Act only refers to proceedings, not 'any proceedings' ... I find that the two indictments reflect two separate sets of proceedings and, as a consequence, the two frameworks apply."

... [19] We agree with the ruling of the judge and with the submissions of Miss Bex on both issues. There are two confiscation orders, one under the 2002 Act and one under the 1988 Act, as amended. There is no prosecution right of appeal against the order under the 1988 Act.

[20] However, we consider the submissions on the wording of s 6 of the 2002 Act. As a matter of construction, the expression "proceedings before the Crown Court" means proceedings under a single indictment. The word "proceedings" is perhaps a curiosity of language in that an apparently plural form is customarily used to describe what plainly is a single trial, even if only a single count indictment is involved. An action commenced in a court is normally known as proceedings, as in: "the

proceedings against X in this court". As a noun, the word is seldom used in this context without the "s". As used in s 6 of the 2002 Act, the expression does not cover everything, in whatever form, before the court on the date sentence is to be imposed. The expression "the offences, mentioned in section 6(2)", in art 3(1) of the 2003 Order, does not include offences subject to a separate indictment including only offences committed on or after 24 March 2003.' *R v Moulden* [2008] EWCA Crim 2561, [2009] 2 All ER 912 at [5]–[6], [9]–[10], [14]–[20], per Pill LJ

New Zealand '[34] The first change in wording the appellants rely on between the CCA [Care of Children Act 2004] and the GA is an alleged use of the term "proceedings" in the CCA in a wider sense than in the GA [Guardianship Act 1968] (see para [28] above). I do not accept this submission.

'[35] The word "proceedings" habitually denotes pure court matters and does not include administrative decisions (see, for example, r 3 of the High Court Rules, which defines "proceeding" as "any application to the Court for the exercise of the civil jurisdiction of the Court other than an interlocutory application"). In my view, there is nothing to suggest that the word "proceedings" in the CCA should be accorded other than its ordinary and natural meaning.

'[36] The appellants' argument has been rendered possible by the fact that, unlike in the GA, there is no reference to the courts in s 4(1) of the CCA. This is explained by the structure of the provision. It is clear from s 4(1)(a) that the first and paramount standard applies to the administration and application of the CCA generally. In this regard it is not to be limited to court proceedings. Section 4, therefore, could not limit its ambit to decisions by courts.

'[37] Section 4(1)(a), however, provides the prime indication that the word "proceedings" in s 4(1)(b) is used in its traditional sense. Section 4(1)(a) states that the paramountcy provision applies in "the administration and application of this Act, *for example*, in proceedings under this Act" (emphasis added). This makes it clear that not all the varied actions or mechanisms in administering or applying the CCA are considered to be "proceedings".

'[38] A further contextual indication that the word "proceedings" has its ordinary and natural meaning is, as pointed out by the Crown, found in s 7 of the CCA. This provides:

7. Lawyer to act for child — (1) A

Court may appoint a lawyer to act for a child who is the subject of, or who is a party to, proceedings (other than criminal proceedings) under this Act.

...

(4) The lawyer may call any person as a witness in the proceedings, and may cross-examine witnesses called by a party to the proceedings or by the Court.

'[39] Here "proceedings" is mentioned in terms of court proceedings and not administrative decision making. I accept the Crown submission that the reference to the fact that a "Court may appoint a lawyer to act for a child who is the subject of, or who is a party to, proceedings" shows that "proceedings" is used in the traditional sense, at least in s 7(1). "Court" is defined in s 8 as "a Court having jurisdiction in the proceedings". Section 7(4) also uses the term "proceedings" in its traditional sense. Section 139(2) of the CCA relating to the publication of reports also makes reference to "proceedings" as matters dealt with in court.

'[40] The appellants rely on ss 30, 44, 45, 46, 48, 53, 54, 65, 68, 69, 73, 77, 118 and 125 of the CCA as evidence of a wide range of "proceedings" in the CCA which go beyond court proceedings in the traditional sense. Many of these provisions, however, do not mention the word "proceedings" at all. See, for example, the sections on dispute resolution (s 44); review of decisions made by parents on important matters (s 46); parenting orders and contravention of such orders (ss 48 and 68); warrants to enforce orders for contact with a child (s 73); counselling (ss 65 and 69); circumstances where a lawyer must act for applicant (s 116); and the court's power to prevent removal of a child from New Zealand in order to defeat an application under the Act (s 118).

'[41] A number of the other sections of the CCA referred to by the appellants, such as ss 30, 45, 53, 54, 77 and 125, do use the word "proceedings". The term is, however, used in reference to pure court proceedings – for example, the issue of jurisdiction when "proceedings" have been filed in both the High Court and Family Court and are removed from the High Court to a Family Court and vice versa (s 30); proceedings to obtain separation orders (s 53); orders declaring a marriage or civil union void ab initio or dissolving it (s 53); proceedings used to get a protection order (s 54); contempt of court proceedings (s 77); and provisions regarding the court's jurisdiction relating to certain types of hearings (s 125).

Section 45 provides that dispute resolution is to be utilised where a spouse or partner is applying for certain orders under the CCA. It does not state that the “dispute resolution” itself, as opposed to the applications for the orders, falls within the definition of “proceedings”.

[42] There is only one indication that the CCA may extend the word “proceedings” in s 4(1)(b) beyond quasi-judicial bodies. Under ss 22 and 23(2)(b) of the CCA, reference is made to “proceedings” under Part 2 of the Children, Young Persons, and Their Families Act 1989 (the CYPFA). Sections 22, 25(4), 33, 37 and 38 of Part 2 of the CYPFA refer to a Family Group Conference (FGC) as a proceeding. Sections 22 and 23 of the CCA which refer to Part 2 of the CYPFA are provisions which govern the appointment of an additional guardian. One criterion for appointment is that the proposed additional guardian must never have been “involved in proceedings concerning a child under this Act, a former Act corresponding to this Act, or Part 2 of the Children, Young Persons, and Their Families Act 1989”.

[43] It is unlikely that these provisions intended an FGC to fall within “proceedings”, as this would mean that anyone involved in an FGC would be automatically excluded from becoming a guardian. This cannot be so as involvement in an FGC may be a necessary part of being a caregiver of a child and is seen as an innocuous and conciliatory endeavour. It is more likely that s 23 of the CCA is referring to court proceedings covered by ss 67–73 (also within Part 2 of the CYPFA) which establish care and protection declarations. It seems that reference to a FGC as a “proceeding” was merely an unintentional and lax use of the word which should not alter the interpretation of the word in s 4 of the CCA.

[44] The appellants referred to the use of the word “proceedings” in a wider sense in other legislation, for example in the BORA [New Zealand Bill of Rights Act 1990] and in the Immigration Act itself. The issue is not, however, whether the word can be used in a wider sense in a different context or in other legislation. It is whether it is used in a wider sense in the CCA. In any event, while s 3(b) of the BORA makes it clear that the BORA is applicable to administrative decision making, s 3(b) does not use the word “proceedings” and therefore is irrelevant to the argument as to whether the term “proceedings” in the CCA covers administrative actions.

[45] It is true that the term “proceeding” appears in the Immigration Act in different

contexts and senses. In some instances it refers to one or more types of court proceedings. In other cases, it expressly refers to “proceedings” before the various administrative appeal bodies which the Immigration Act creates. At most, therefore, the Immigration Act extends the term “proceedings” to cover proceedings before quasi-judicial bodies.

[46] The only provisions where the term “proceeding” is used in a wider sense are those relating to the appointment of responsible adults (see ss 141B–141D of the Immigration Act). In s 141B(6) it is stated that “the role of a responsible adult relates to those *matters or proceedings* in relation to which the nomination was made” (emphasis added). Section 141B(2) describes the matters for which a minor must be represented by a responsible adult, which includes the “making, serving, and execution of a removal order or a deportation order in the minor’s name”. Since these have been specifically defined in s 141B(6) as “matters or proceedings”, this does not aid me greatly in the interpretation of “proceedings” in either the CCA or the Immigration Act.

[47] The appellants submit that it is clear from the Immigration Act as a whole that the removal process considered in its entirety, as embodied in ss 53–62 of the Immigration Act, is a proceeding. I do not accept this submission, in particular in light of the 1999 amendments to the Immigration Act.

[48] Under the 1999 amendments, the obligation to leave New Zealand exists from the moment that a person is in New Zealand unlawfully. There is no need for any prior administrative or quasi-judicial proceeding before this obligation arises. Appeals to the RRA [Removal Review Authority] must be brought within 42 days after the later of: the day the person becomes unlawfully in New Zealand, or the day when the individual receives notification of confirmation of refusal to issue a permit (see s 47(2)).’ *Ye v Minister of Immigration* [2008] NZCA 291, [2009] 2 NZLR 596 at [34]–[48], per Glazebrook J

Proceedings in which the setting aside of a decision is not required

Australia [Uniform Civil Procedure Rules 2005 (NSW), r 59.10(5): provision as to time for commencing proceedings for judicial review does not apply to any ‘proceedings in which the setting aside of a decision is not required’.] [49] There is some ambiguity in the wording of r 59.10(5) of the UCPR. Whether

proceedings are ones “in which the setting aside of a decision is not required” might depend, on one possible construction, upon the text of the orders that are sought in the proceedings. On that view of r 59.10(5) of the UCPR if the prayers for relief do not seek an order that the decision be set aside, r 59.10(5) of the UCPR has no application. If that were the correct construction, if proceedings sought an order for certiorari, or perhaps a declaration of the invalidity of a decision, leave would be required, while if no such order or declaration was sought leave would not be required.

‘[50] In my view, the rule should not be interpreted in that way. Rather, it should be interpreted purposively, by reference to the substantial nature of the bases upon which the orders are sought. ...

‘[51] Within the meaning of r 59.10(5) of the UCPR proceedings are ones “in which the setting aside of a decision is not required” if the grounds on which the orders are sought do not include matters that, if made out, would have the consequence that the decision is one that should be set aside. There would be no sense in a rule that required leave for a summons that sought explicitly the setting aside of a decision, but did not require leave if the summons sought, for example, declarations the inevitable consequence of which was that the decision was invalid, or an injunction preventing a party from giving effect to the decision or acting on the basis that it was correct.’ *Katter v Melhem* [2015] NSWCA 213, (2015) 325 ALR 351 at [49]–[51], per Campbell AJA

Proceedings relating to a commercial transaction

[State Immunity Act 1978, s 3(1)(a).] ‘[109] The proceedings in the present appeal are proceedings at common law for the enforcement of the New York judgment. None of the statutory methods of enforcement is available for judgments rendered in the United States. On this part of the appeal the only relevant question is whether the proceedings in England at common law on the New York judgment are “proceedings relating to—(a) a commercial transaction, entered into by the State” where “commercial transaction” includes “any loan or other transaction for the provision of finance”: s 3(1)(a), (3)(b). Whether the New York proceedings were themselves “proceedings relating to a commercial transaction” is not the relevant question.

‘[110] The question on this issue is whether the expression “relating to” is to be given the

meaning ascribed to it (in proceedings different from the present ones) by Stanley Burnton J in *AIC Ltd v Federal Government of Nigeria* [2003] EWHC 1357 (QB) (registration of a Nigerian judgment under the Administration of Justice Act 1920) and by Gloster J (*Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* (No 2) [2005] EWHC 2437 (Comm), [2006] 1 All ER (Comm) 731) and the Court of Appeal in *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* (No 2) [2007] 1 All ER (Comm) 909, [2007] QB 886 (enforcement of Danish arbitral award under s 101 of the Arbitration Act 1996).

‘[111] The question, to what do the proceedings for enforcement of the New York judgment “relate”, can be given a narrow or a wide answer. The narrow meaning would result in a conclusion that they “relate” to the enforceability of the New York judgment, which would involve such matters (not likely to be the subject of dispute in a case such as the present one) as whether the New York court had in personam jurisdiction (here there was a clear submission to the jurisdiction of the New York courts) or whether enforcement could be resisted on any of the traditional grounds (such as want of natural justice, fraud, or public policy), none of which has any arguable application. The wider meaning would give effect to the practical reality that the proceedings relate to liability under the bonds, the issue of which was plainly a commercial transaction for the purposes of s 3 of the 1978 Act.

‘[112] My conclusion that the narrower meaning is the one which must be ascribed to Parliament rests on considerations somewhat different from the reasons articulated by Stanley Burnton J in the *AIC* case. I do not consider that a potential overlap with the arbitration provision in s 9 supports a narrow interpretation of s 3. The overlap would not be complete, and it would be artificial and over-technical to use the potential overlap to cut down the scope of s 3. Nor do I consider that the narrow construction is supported by an argument that s 3(1)(a) should be interpreted so as to require a link with the territorial jurisdiction of the United Kingdom. No such link is required in the 1978 Act in relation to the head of commercial transactions covered by s 3(3)(b).

‘[113] Both the Quebec Court of Appeal and the Supreme Court of Canada in *Kuwait Airways Corp v Republic of Iraq* 2009 QCCA 728, [2009] RJQ 992; *rvsd* [2011] 3 LRC 397, although reaching different conclusions on the facts, decided that, in an action to enforce an

English judgment, the question whether the proceedings in Canada “relate[d] to any commercial activity of the foreign state” (State Immunity Act, RSC 1985, c S-18, s 5) depended on the nature of the underlying proceedings in England. But neither judgment articulates the reasons for that conclusion, and they are therefore unhelpful on this appeal.

‘[114] What is not likely to be in doubt is that at the time the 1978 Act was enacted it would not have been envisaged that s 3 would have applied to the enforcement at common law of a foreign judgment against a foreign state based on a commercial transaction. That was because until RSC Ord 11, r 1(1)(m) (now CPR PD6B, para 3.1(10)) was enacted in 1982 (and came into force on 1 January 1984) a defendant outside the jurisdiction could not be served in an action on a foreign judgment even if there were assets within the jurisdiction to satisfy the judgment (and consequently no freezing injunction could be made in relation to those assets: *Perry v Zissis* [1977] 1 Lloyd’s Rep 607). Nor is it likely that s 31 of the 1982 Act [Civil Jurisdiction and Judgments Act 1982] would have been enacted in the form that it was enacted if Parliament had thought that the 1978 Act already applied to a class of foreign judgments.

‘[115] I accept that neither of those points is conclusive as to the meaning of s 3. There is no impediment in public international law to the institution of proceedings to enforce a foreign judgment based on commercial transactions. It is now possible to serve a foreign sovereign out of the jurisdiction in such proceedings, and the 1978 Act could be construed in the light of present circumstances: *Fitzpatrick v Sterling Housing Association Ltd* [1999] 4 All ER 705 at 726, [2001] 1 AC 27 at 49–50; *Yemshaw v Hounslow London BC* [2011] UKSC 3 at [5]–[27], [2011] 1 All ER 912 at [5]–[27], [2011] 1 WLR 433.

‘[116] But for s 31 of the 1982 Act, and the almost invariable employment of wide express waivers of immunity, it might have been desirable as a matter of policy to give s 3 the wider meaning. There would, however, be no principled basis on which to found such a conclusion. The proceedings in England relate to the New York judgment and not to the debt obligations on which the New York proceedings were based.’ *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31, [2011] 4 All ER 1191 at [109]–[116], per Lord Collins SCJ

PROCESSION. See **COMMONLY OR CUSTOMARILY HELD**

PROFIT À PRENDRE

[For 16(2) Halsbury’s Laws of England (4th Edn) (Reissue) paras 44, 254 see now 87 Halsbury’s Laws of England (5th Edn) (2017) paras 773, 974.]

[For 31 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 23 see now 76 Halsbury’s Laws of England (5th Edn) (2013) para 21.]

Appendant

[For 16(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 260 see now 87 Halsbury’s Laws of England (5th Edn) (2017) para 980.]

Appurtenant

[For 16(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 261 see now 87 Halsbury’s Laws of England (5th Edn) (2017) para 981.]

In gross

[For 16(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 262 see now 87 Halsbury’s Laws of England (5th Edn) (2017) para 982.]

PROHIBITING ORDER

[For 1(1) Halsbury’s Laws of England (4th Edn) (2001 Reissue) para 123 see now 61 Halsbury’s Laws of England (5th Edn) (2010) para 689.]

PROMOTER

[For 7(1) Halsbury’s Laws of England (4th Edn) (2004 Reissue) para 244 see now 14 Halsbury’s Laws of England (5th Edn) (2016) para 49.]

PROMOTION

[The Education Act 1996, s 406 is headed ‘Political indoctrination’ and requires the local education authority, governing body and head teachers to forbid the ‘promotion’ of partisan political views in the teaching of any subject in the school.] ‘[12] Mr Downes submits that, if the film [former United States Vice-President Al Gore’s film, ‘An Inconvenient Truth’], which is sent to schools in order to facilitate its showing, is itself a partisan political film, one that

"promotes partisan political views", and if schools then make available such film to its teachers, and if teachers then show such film to their pupils, then inevitably there is the "promotion of partisan political views" in the teaching of any subject in the school, which is thus not only not being "forbidden" by the local education authority (and the DES), but being positively facilitated by them. Thus he submits, irrespective of any publication of guidance, the breach of the statute is, as he puts it, irremediable. I do not agree, and prefer the submissions of Mr Chamberlain. The statute cannot possibly mean that s 406 is breached whenever a partisan political film is shown to pupils in school time. Mr Downes has to assert that there is, depending on the context, an exception that can be made in respect of the teaching of history, but I cannot see how, on his interpretation of the statute, any such exception can be carved out. It must be as much of a breach of the statute, on his construction, for the school or a teacher to show in a history class a film for example of Nazi or Leninist/Stalinist propaganda, or for that matter to make available such literature in documentary form, or to show a racist or an anti-racist film in a history or a citizenship class, as it is to show or distribute any other film or document which promotes partisan political views. Such an approach however construes the word "promotion" as if it meant nothing more than "presentation". What is forbidden by the statute is, as the side heading makes clear, "political indoctrination". If a teacher uses the platform of a classroom to promote partisan political views in the teaching of any subject, then that would offend against the statute. If on the other hand a teacher, in the course of a school day and as part of the syllabus, presents to his pupils, no doubt with the appropriate setting and with proper tuition and debate, a film or document which itself promotes in a partisan way some political view, that cannot possibly in my judgment be the mischief against which the statute was intended to protect pupils. It would not only lead to bland education, but to education which did not give the opportunity to pupils to learn about views with which they might, vehemently or otherwise, either agree or disagree. I conclude that the mere distribution by the defendant to schools to facilitate their showing the film, and accompanied by guidance, to which I shall refer, is not per se, or irremediably, a promotion of those partisan political views.' *R (on the application of Dimmock) v Secretary of State for Education and Skills* [2007] EWHC 2288

(Admin), [2008] 1 All ER 367 at [12], per Burton J

PRO-MUTUUM

[For 3(1) Halsbury's Laws of England (4th Edn) (2005 Reissue) para 36 see now 4 Halsbury's Laws of England (5th Edn) (2011) para 142.]

PROPERTY

Canada '[1] The question raised by this appeal is whether a commercial fishing licence, which enables a fisher to engage in a regulated industry where participation is otherwise prohibited, constitutes "property" available to a trustee under the federal *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("BIA"), or a creditor who has registered a general security agreement under the Nova Scotia *Personal Property Security Act*, SNS 1995-96, c 13 ("PPSA").

'[2] The appellant, a bankrupt commercial fisherman, and his wholly owned company, the appellant Bingo Queen Fisheries Limited, say that a fishing licence is merely a "privilege" to do that which would otherwise be illegal. As such, it does not pass to the respondent Royal Bank under the General Security Agreement which the appellants signed, nor to the respondent trustee in bankruptcy. In the result, they say, the appellant Saulnier, who holds the four fishing licences in question, is entitled to carry on fishing despite the bankruptcy, leaving the creditors to fight over the remaining assets. Without the licences the assets do not come close to covering the liabilities.

'[3] The appellants were unsuccessful in the courts of Nova Scotia. The trial judge based his decision on "commercial reality". The Nova Scotia Court of Appeal agreed in the result but declined to base its decision on "commercial reality". Instead it looked to the rights acquired by the holder of a fishing licence to the earnings from the catch, and to the administrative law principles which the court felt would govern the exercise of the Minister's discretion in any application for renewal or transfer of the licence under the federal *Fishery (General) Regulations*, SOR/93-53 ("Regulations"). Collectively, in its opinion, the components of this "bundle of rights" invested the licence holder with property-like rights sufficient to bring the licences within the bankruptcy regime and the PPSA.

'[4] For different reasons, and on a more

limited basis, I also agree that the appeal must be dismissed.

...
 '[16] The questions before the Court essentially raise a dispute about statutory interpretation. We are not concerned with the concept of "property" in the abstract. The notion of "property" is, in any event, a term of some elasticity that takes its meaning from the context. The task is to interpret the definitions in the *BIA* and *PPSA* in a purposeful way having regard to "their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (R Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed 2002), at p 1). Because a fishing licence may not qualify as "property" for the general purposes of the common law does not mean that it is also excluded from the reach of the statutes. For particular purposes Parliament can and does create its own lexicon.

'[17] In determining the scope of the definition of "property" in a statutory context, it is necessary to have regard to the overall purpose of the *BIA*, which is to regulate the orderly administration of the bankrupt's affairs, keeping a balance between the rights of creditors and the desirability of giving the bankrupt a clean break: *Husky Oil Operations Ltd v Minister of National Revenue* [1995] 3 SCR 453, at para 7. The exemption of designated property from distribution among creditors under s 67(1) is to allow the bankrupt to continue a living pending discharge and, when discharged, to make a fresh start. Those exemptions do not, it seems to me, bear much similarity to the proposed "exempting" of a valuable asset such as a commercial fishing licence. If Saulnier had "sold" his licences prior to discharge the cash proceeds would, it seems, be after-acquired property that would be divided amongst his creditors under s 67(1)(c) of the *BIA*.

...
 '[22] The fishery is a public resource. The fishing licence permits the holder to participate for a limited time in its exploitation. The fish, once caught, become the property of the holder. Accordingly, the fishing licence is more than a "mere licence" to do that which is otherwise illegal. It is a licence coupled with a proprietary interest in the harvest from the fishing effort contingent, of course, on first catching it.

'[23] It is extremely doubtful that a simple licence could itself be considered property at common law. See generally A M Honoré,

"Ownership", in A G Guest, ed, *Oxford Essays in Jurisprudence* (1961). On the other hand, if not property in the common law sense, a fishing licence is unquestionably a major commercial asset.

...
 '[43] As described above, the holder of a [Fisheries Act] s 7(1) licence acquires a good deal more than merely permission to do that which would otherwise be unlawful. The holder acquires the right to engage in an exclusive fishery under the conditions imposed by the licence and, what is of prime importance, a proprietary right in the wild fish harvested thereunder, and the earnings from their sale. While these elements do not wholly correspond to the full range of rights necessary to characterize something as "property" at common law, the question is whether (even leaving aside the debate about the prospects of renewal) they are sufficient to qualify the "bundle of rights" the appellant Saulnier *did* possess as property for purposes of the statutes.

'[44] For ease of reference I repeat the relevant part of [the *BIA*] s 2:

"property" means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;

The terms of the definition are very wide. Parliament unambiguously signalled an intention to sweep up a variety of assets of the bankrupt not normally considered "property" at common law. This intention should be respected if the purposes of the *BIA* are to be achieved.

'[45] Reliance was placed on s 16 of the *Regulations* which provides that a fishing licence is a "document" which is "the property of the Crown and is not transferable". From this it was inferred that the licence, in its commercial dimension, is declared by the *Regulations* to be a property right in the hands of the Crown. I think s 16 merely says that the *Regulations* contemplate that the *documentation* of the licence (as opposed to the licence itself) is the property of the Crown, in the same way that a Canadian Passport is declared to be the property of the Crown, not the holder: *Veffer v Canada (Minister of Foreign Affairs)* [2008] 1 FCR 641, 2007 FCA 247, at para 6. A fisher

whose licence is suspended or revoked cannot refuse the Minister's demand for a return of the documentation on the basis the Minister gave it to him and it is now his property.

'[46] I prefer to look at the substance of what was conferred, namely a licence to participate in the fishery coupled with a proprietary interest in the fish caught according to its terms and subject to the Minister's regulation. As noted earlier, the *BIA* is intended to fulfill certain objectives in the event of a bankruptcy which require, in general, that non-exempt assets be made available to creditors. The s 2 definition of property should be construed accordingly to include a s 7(1) fishing licence.

'[47] It is true that the proprietary interest in the fish is contingent on the fish first being caught, but the existence of that contingency is contemplated in the *BIA* definition and is no more fatal to the proprietary status for *BIA* purposes than is the case with the equivalent contingency arising under a *profit à prendre*, which is undeniably a property interest.' *Saulnier v Royal Bank of Canada* [2008] 3 SCR 166, [2008] SCJ No 60, 298 DLR (4th) 193, 2008 SCC 58 at [1]–[4], [16]–[17], [22]–[23], [43]–[47], per Binnie J

Personal property

Canada [Whether a fishing licence is 'personal property' for the purposes of the Nova Scotia Personal Property Security Act, SNS 1995–96, c 13 ('PPSA').] '[51] I repeat, for convenience, the relevant *PPSA* definitions [s 2]:

- (w) "intangible" means personal property that is not goods, a document of title, chattel paper, a security, an instrument or money;
- ...
- (ad) "personal property" means goods, a document of title, chattel paper, a security, an instrument, money or an intangible;

The definition of "intangible" simply describes something that otherwise constitutes "personal property" but is not one of the listed types of tangible personal property. "Intangible" would include an interest created by statute having the characteristics of a licence coupled with an interest at common law as in the case of a *profit à prendre*. Again, to repeat, I do not suggest that a fishing licence constitutes a *profit à prendre* at common law, for clearly there would be numerous conceptual objections to such a

characterization. Our concern is exclusively with the extended definitions of "personal property" in the context of a statute that seeks to facilitate financing by borrowers and the protection of creditors. In my view the grant by the Fisheries Minister of a licence coupled with a proprietary interest as described above is sufficient to satisfy the *PPSA* definition.' *Saulnier v Royal Bank of Canada* [2008] 3 SCR 166, [2008] SCJ No 60, 298 DLR (4th) 193, 2008 SCC 58 at [51], per Binnie J

PROPERTY DAMAGE

Canada '29. Each insurance policy covers property damage caused by an accident. The question, then, is what are the meanings of "property damage" and "accident" in these policies. The onus is on the insured, Progressive, to show that the pleadings fall within the initial grant of coverage.

'30. The definition of "property damage" in the first policy is:

"Property damage" means (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an accident occurring during the policy period.

In later versions of the policies, the references to destruction were removed:

"Property damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property; or
- b. Loss of use of tangible property that is not physically injured.

'31. Lombard's main argument is that "property damage" does not result from damage to one part of a building arising from another part of the same building. According to Lombard, damage to other parts of the same building is pure economic loss, not property damage. What follows from this argument is that "property damage" is limited to third-party property.

...

'35. I cannot agree with Lombard's interpretation of "property damage". The focus of insurance policy interpretation should first and foremost be on the language of the policy at issue. General principles of tort law are no substitute for the language of the policy. I see no

limitation to third-party property in the definition of “property damage”. Nor is the plain and ordinary meaning of the phrase “property damage” limited to damage to another person’s property. Indeed, the Ontario and Saskatchewan Courts of Appeal reached the same conclusion with respect to similar definitions of “property damage” in CGL policies: *Alie v Bertrand & Fère Construction Co* (2002), 222 DLR (4th) 687 (Ont CA), at paras 26, 41 and 45, and *Bridgewood Building Corp (Riverfield) v Lombard General Insurance Co of Canada* (2006), 266 DLR (4th) 182 (Ont CA), at paras 6–7; *Westridge Construction Ltd v Zurich Insurance Co*, 2005 SKCA 81, 269 Sask R 1, at para 38.

‘36. I would construe the definition of “property damage”, according to the plain language of the definition, to include damage to any tangible property. I do not agree with Lombard that the damage must be to third-party property. There is no such restriction in the definition.

‘37. The plain meaning of “property damage” is consistent with reading the policy as a whole. Qualifying the meaning of “property damage” to mean third-party property would leave little or no work for the “work performed” exclusion (discussed in more detail below). Lombard argues that the exclusion clauses do not create coverage. This is true. But reading the insurance policy as a whole is not the same as conjuring up coverage when there was none in the first place. Consistency with the exclusion clauses is a further indicator that the plain meaning of “property damage” is the definition intended by the parties.

‘38. Does the definition of “property damage” exclude defects? Or, can defective property constitute “property damage” as defined in the policies? *Progressive* concedes that the effect of the definition of “property damage” is to exclude coverage for a claim to repair a defect. Lombard agrees that defects are not included in the definition of “property damage”.

‘39. While this point was not contested and nothing turns on it in this appeal, it is not obvious to me that defective property cannot also be “property damage”. In particular, it may be open to argument that a defect could not amount to a “physical injury”, especially where the harm to the property is “physical” in the sense that it is visible or apparent (see, eg, *Annotated Commercial General Liability Policy*, vol 1, at p 10–10). Moreover, where a defect renders the property entirely useless it may be arguable that defective property may be

covered under “loss of use”, the second portion of the definition of “property damage”. *Progressive Homes Ltd v Lombard General Insurance Co of Canada* 2010 SCC 33, [2010] 2 SCR 245 at paras 29–31, 35–39, per Rothstein J

PROPORTIONALITY

‘[185] The principle of proportionality is a general principle of EU law which, as the CJEU stated for example in *Azienda Agro-Zootecnica Franchini Sarl v Regione Puglia* Case C-2/10) EU:C:2011:502, [2011] ECR I-6561 (para 73)

“requires that measures adopted by Member States in this field do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; where there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued ...”

... [188] In the present case, *Richemont* rely on trade marks, which are also intellectual property rights within art 17(2) of the Charter [the Charter of Fundamental Rights of the European Union]. The other rights which are engaged by the orders sought by *Richemont* are (i) the ISPs’ freedom to conduct business under art 16 of the Charter and (ii) the freedom of information of internet users under art 11 of the Charter: see *UPC v Constantin* [*UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* (Case C-314/12) EU:C:2014:192, [2014] IP & T 438] (para 47).

‘[189] For the reasons discussed above, I conclude that, in considering the proportionality of the orders sought by *Richemont*, the following considerations are particularly important:

- (i) The comparative importance of the rights that are engaged and the justifications for interfering with those rights.
- (ii) The availability of alternative measures which are less onerous.
- (iii) The efficacy of the measures which the orders require to be adopted by the ISPs, and in particular whether they will seriously discourage the ISPs’ subscribers from accessing the Target Websites.
- (iv) The costs associated with those

measures, and in particular the costs of implementing the measures.

(v) The dissuasiveness of those measures.

(vi) The impact of those measures on lawful users of the internet.

‘[190] In addition, it is relevant to consider the substitutability of other websites for the Target Websites.’ *Cartier International AG v British Sky Broadcasting Ltd* [2014] EWHC 3354 (Ch), [2015] 1 All ER 949 at [185], [188]–[190], per Arnold J

PROSECUTION

[For 45(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 460 see now 97 Halsbury’s Laws of England (5th Edn) (2015) para 718.]

PROSPECTUS

[The Companies Act 1985, s 744 has been repealed by the Companies Act 2006 and the definition is not reproduced in the 2006 Act.]

PROTEST

Ship’s protest

[For 33 Halsbury’s Laws of England (4th Edn) (Reissue) para 729 see now 66 Halsbury’s Laws of England (5th Edn) (2015) para 1038; and for 43(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 469 see now 93 Halsbury’s Laws of England (5th Edn) (2008) para 432.]

PROVABLE CLAIM

Canada [Companies’ Creditors Arrangement Act, RSC 1985, c C-36, s 12.] ‘1 The question in this appeal is whether orders issued by a regulatory body with respect to environmental remediation work can be treated as monetary claims under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“CCAA”).

‘2 Regulatory bodies may become involved in reorganization proceedings when they order the debtor to comply with statutory rules. As a matter of principle, reorganization does not amount to a licence to disregard rules. Yet there are circumstances in which valid and enforceable orders will be subject to an arrangement under the *CCAA*. One such circumstance is where a regulatory body makes an environmental order that explicitly asserts a monetary claim.

...

‘22 Section 12 of the *CCAA* establishes the basic rules for ascertaining whether an order is a claim that may be subjected to the insolvency process:

[Definition of “claim”]

12. (1) For the purposes of this Act, “claim” means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.

[Determination of amount of claim]

(2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:

(a) the amount of an unsecured claim shall be the amount

...

(iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; and ...

‘23 Section 12 of the *CCAA* refers to the rules of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“*BIA*”). Section 2 of the *BIA* defines a claim provable in bankruptcy:

“claim provable in bankruptcy”, “provable claim” or “claim provable” includes any claim or liability provable in proceedings under this Act by a creditor.

‘24 This definition is completed by s. 121 of the *BIA*:

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt’s discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

‘25 Sections 121(2) and 135(1.1) of the *BIA* offer additional guidance for the determination of whether an order is a provable claim:

121 ...

- (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

135 ...

- (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

‘26 These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a creditor. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. I will examine each of these requirements in turn.

‘27 The *BIA*’s definition of a provable claim, which is incorporated by reference into the *CCAA*, requires the identification of a creditor. Environmental statutes generally provide for the creation of regulatory bodies that are empowered to enforce the obligations the statutes impose. Most environmental regulatory bodies can be creditors in respect of monetary or non-monetary obligations imposed by the relevant statutes. At this first stage of determining whether the regulatory body is a creditor, the question whether the obligation can be translated into monetary terms is not yet relevant. This issue will be broached later. The only determination that has to be made at this point is whether the regulatory body has exercised its enforcement power against a debtor. When it does so, it identifies itself as a creditor, and the requirement of this stage of the analysis is satisfied.

...

‘38 Certain indicators can thus be identified from the text and the context of the provisions to guide the *CCAA* court in determining whether an order is a provable claim, including whether the activities are ongoing, whether the debtor is in control of the property, and whether the debtor has the means to comply with the order. The *CCAA* court may also consider the effect that requiring the debtor to comply with the order would have on the insolvency process. Since the appropriate analysis is grounded in the facts of each case, these indicators need not all apply, and others may also be relevant.

...

‘59 In sum, I agree with the Chief Justice that, as a general proposition, an environmental order issued by a regulatory body can be treated as a contingent claim, and that such a claim can be included in the claims process if it is sufficiently certain that the regulatory body will make a monetary claim against the debtor. Our difference of views lies mainly in the applicable threshold for including contingent claims and in our understanding of the *CCAA* judge’s findings of fact.’ *Newfoundland and Labrador v AbitibiBowater Inc* 2012 SCC 67, [2012] SCJ No 67 at paras 1–2, 22–27, 38, 59, per Deschamps J

PROVED LOSS

New Zealand [Whether ‘proved loss’ requires economic pecuniary loss or whether non-economic loss of bodily function suffices: Accident Compensation Act 1972, s 121(1); Accident Compensation Act 1982, s 80(1).] ‘[1] Can an individual who has suffered a personal injury by accident claim for compensation, under either the 1972 or the 1982 Accident Compensation Acts, for care provided by family on an unpaid basis? That is the issue in this appeal.

...

‘[16] We therefore begin with the text of the particular section and subsection and the associated heading. Section 121 appears within Part 6 of the Act, entitled “Compensation”, and has its own heading: “Compensation for pecuniary loss not related to earnings”. The relevant part of s 121 can be shortly described as conferring discretions upon ACC [Accident Compensation Corporation] to pay compensation to the injured person (s 121(1)) or to third parties (s 121(2)) in respect of certain losses and expenses resulting from the injury and also a discretion to pay for attendant care if “the injury is of such a nature [the injured person] must have constant personal attention” (s 121(3)). These are all gateway provisions, in that they create a discretion for ACC but leave ACC to decide whether and how much payment is made.

‘[17] If the words “proved losses” in s 121(1) are viewed in isolation, they are capable of encompassing damages for loss of bodily function as the Judge found. But the words gain definition from the section heading, which states the purpose of the section is to allow compensation for pecuniary loss. This is consistent with what seems to us to be a focus in

the language employed in the subsection upon loss or expenses of a concrete or quantifiable nature: the expenses have to be “actual” and the losses have to be “proved”. The express exclusions from cover contained in s 121(1)(a)–(g) all describe losses of a pecuniary nature. These are all strong textual indications that the expression “proved losses” is to be read as limited to proved losses of a pecuniary nature.

[18] There is also express provision in s 121 for payment for attendant care. Section 121(2)(b) allows ACC to pay compensation to those who provide help to an injured person while the person is suffering from incapacity, in respect of any “identifiable actual and reasonable expenses or losses incurred by the person” in giving that help. In *Estate of Simpson v Accident Compensation Corporation* [[2007] NZCA 247, [2007] NZAR 496], this Court held that to qualify for compensation under s 121(2)(b) the caregiver had to show not only that they had provided care to the injured person but also that this caused them a direct pecuniary loss through lack of opportunity. In addition to this, s 121(3) allows ACC to pay for attendant care if the injured person is in need of constant personal attention. We see these provisions as relevant as we think it unlikely that, having created a detailed and relatively constrained discretionary regime for compensation for attendant care, Parliament would have intended to also create in s 121(1) an undefined, largely unconstrained discretion for ACC to pay for attendant care.

[39] We answer the question on appeal as follows:

Was the High Court erroneous in law when it determined that a claim for payment for unpaid attendant care is permitted under s 121(1) of the Accident Compensation Act 1972 and s 80(1) of the Accident Compensation Act 1982?

Yes.’ *Accident Compensation Corp v Algie* [2016] NZCA 120, [2016] 3 NZLR 59 at [1], [16]–[18], [39], per Winkelmann J

PROVIDING FOR

Australia [Motor Accidents (Lifetime Care and Support) Act 2006 (NSW), s 6; Motor Accidents Compensation Act 1999 (NSW), s 130A.] [1] From 1 October 2006 until 25 June 2012, s 130A of the Motor Accidents Compensation Act 1999 (NSW) (the MAC Act) provided that:

No damages may be awarded to a person who is a participant in the Scheme under the Motor Accidents (Lifetime Care and Support) Act 2006 for economic loss in respect of the treatment and care needs (within the meaning of that Act) of the participant that relate to the motor accident injury in respect of which the person is a participant in that Scheme and *that are provided for or are to be provided for* while the person is a participant in that Scheme. [Emphasis added.]

[2] The Motor Accidents (Lifetime Care and Support) Act 2006 (NSW) (the LCS Act) was enacted at the same time as the MAC Act was amended by the introduction of s 130A. The LCS Act established the Lifetime Care and Support Scheme (the scheme) for the lifetime care and support of certain persons who had been catastrophically and permanently injured in motor vehicle accidents in New South Wales.

[3] In this case, the Court of Appeal of the Supreme Court of New South Wales held that s 130A of the MAC Act did not preclude an award of damages in respect of the treatment and care needs of a participant in the scheme in circumstances where those needs had been met by services rendered gratuitously. The Court of Appeal reached that conclusion by reading the words “that are provided for or are to be provided for” in s 130A of the MAC Act to mean “that are paid for or are to be paid for”. For the reasons that follow, that interpretation of the legislation cannot be accepted.

[8] By s 6(1), the LCS Act provided that the [Lifetime Care and Support Authority of New South Wales]:

... is to pay the reasonable *expenses incurred* by or on behalf of a person while a participant in the Scheme in providing for such of the treatment and care needs of the participant as relate to the motor accident injury in respect of which the person is a participant and as are reasonable and necessary in the circumstances. [Emphasis added.]

[9] The plain meaning of s 6(1) is that the reasonable expenses, if any, incurred by or on behalf of a participant in the scheme, in providing for his or her treatment and care needs from time to time, must be paid by the authority.

[36] The words “providing for” in s 6(1) of the LCS Act (and “provided for” in s 130A of

the MAC Act) should be given their ordinary and natural meaning. It is readily apparent that one may provide for services without paying for them. Thus, for example, services may be provided for an injured person pursuant to an arrangement with a charitable organisation which involves no payment to that organisation.’ *Daly v Thiering* [2013] HCA 45, (2013) 303 ALR 188 at [1]–[3], [8]–[9], [36], per Crennan, Kiefel, Bell, Gageler and Keane JJ

PROVISION

[Note that the Pastoral Measure 1983 is repealed as from 1 July 2012 by the Mission and Pastoral Measure 2011, s 111, Sch 9. The definition of ‘provision’, in the same terms as before, is now contained in the 2011 Measure, s 106(1).]

PROVOCATION

[Note that the Coroners and Justice Act 2009, s 56 abolished the common law defence to murder of provocation in England and Wales and Northern Ireland and replaced it with a new, partial defence of ‘loss of control’ in ss 54, 55.]

Sudden provocation

Australia [Criminal Code 1899 (Qld), s 304.]
 ‘[43] It will be recalled that s 304 provides:

When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person’s passion to cool, the person is guilty of manslaughter only.

‘[44] On the hearing of the appeal each of the parties submitted that “sudden provocation” under s 304 is to be understood by reference to the common law. This acceptance is fatal to the appellant’s second criticism of the fifth proposition.

‘[45] Keane JA in the Court of Appeal rejected the contention that “sudden” qualifies the deceased’s provocative conduct. His Honour explained that the expression “sudden provocation” is “necessarily concerned with, and related to, the temporary loss of self-control excited by the provocation”. This was a reference to the modern statements of the doctrine that speak of a “sudden and temporary loss of self-control”.

‘[46] Section 304 of the Code is substantially in the form in which it was enacted. Judges of the Supreme Court of Queensland have for many years interpreted the provision by reference to the common law. This is because, as McTiernan ACJ and Menzies J explained in their joint reasons in *Kapronovski v R* [(1973) 133 CLR 209; 1 ALR 296; [1973] HCA 35], s 304 does not express the conditions upon which provocation is given legal effect: it is only by reference to the common law that one can determine the circumstances in which provocation operates to reduce a killing from murder to manslaughter under the provision.

‘[47] The use of the expression “sudden provocation” was intended to import well-established principles of the common law concerning the partial defence in the law of homicide. Thus, the provision is to be understood as requiring that the provocation both involve conduct of the deceased and have the capacity to provoke an ordinary person (to form the intention to kill or to do grievous bodily harm and to act in the way the accused acted), although neither requirement is stated in terms. In interpreting the language of s 304 it is permissible to have regard to decisions expounding the concept of “sudden provocation” subsequent to the Code’s enactment.

‘[51] The concepts of suddenness and temporariness are explained by McHugh J, dissenting in the result, in *Masciantonio v R* (1995) 183 CLR 58; 129 ALR 575; [1995] HCA 67]:

The concept of suddenness negated any question of premeditation. The concept of temporariness ensured that an intentional killing would be excused as manslaughter only where it was committed while the killer’s capacity for self-control had been overwhelmed by the desire for retribution that often arises when an interest or relationship that a person values is harmed or threatened by the conduct of another person [reference omitted].

‘[52] Keane JA was correct to say that the expression “sudden provocation” in s 304 is concerned with the temporary loss of self-control excited by the provocation.’ *Pollock v R* [2010] HCA 35, (2010) 271 ALR 219 at [43]–[47], [51]–[52], per French CJ, Hayne, Crennan, Kiefel and Bell JJ

PROXIMATE CAUSE

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 356 see now 60 Halsbury’s

Laws of England (5th Edn) (2011) para 347.]

PRUDENT

Canada [Electric Utilities Act, SA 2003, c E-5.1 ('EUA'), ss 102, 121, 122; Gas Utilities Act, RSA 2000, c G-5 ('GUA'), s 36.] '29. The application by the ATCO Utilities, one of which is an electric utility and the other a gas utility, involves both the *EUA* and the *GUA*. Both statutes direct the Commission to set just and reasonable rates. The *EUA* requires the Commission to "have regard for the principle that a tariff approved by it must provide the owner of an electric utility with a reasonable opportunity to recover" various "prudent" or "prudently incurred" costs: s 122; see also s 102. A gas utility, on the other hand, is "entitled to recover in its tariffs" costs that the Commission determines to be "prudent": s 4(3) of the *Roles, Relationships and Responsibilities Regulation*, Alta Reg 186/2003 ("*RRR Regulation*"); see also s 36 *GUA*.

'34. The words of a statute are to be interpreted "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, at para 21, quoting E A Driedger, *Construction of Statutes* (2nd edn 1983), at p 87. Because, as will be discussed, the meaning of "prudence" is the focus of much of the debate in this case, it is helpful to start by examining the ordinary meaning of the word as a baseline for the subsequent analysis. Pertinent dictionary definitions give a range of meanings for "prudent", including "having or exercising sound judgement in practical affairs" (*The Oxford English Dictionary* (2nd edn 1989), at p 729), "acting with or showing care and thought for the future" (*Concise Oxford English Dictionary* (12th edn 2011), at p 1156), or "marked by wisdom or judiciousness [or] shrewd in the management of practical affairs" (*Merriam-Webster's Collegiate Dictionary* (11th edn 2003), at p 1002). While these definitions may vary in their nuance, the ordinary sense of the word is such that a prudent cost is one which may be described as wise or sound.

'35. However, these dictionary definitions are not so consistent and exhaustive as to provide a complete answer to the question of the meaning of "prudent" costs in the context of the Alberta utilities regulation statutes. As such, a contextual reading of the statutory provisions at

issue provides further guidance. In the context of utilities regulation, I do not find any difference between the ordinary meaning of a "prudent" cost and a cost that could be said to be reasonable. It would not be imprudent to incur a reasonable cost, nor would it be prudent to incur an unreasonable cost.

...
'40. In their submissions, the ATCO Utilities do not parse the different contexts in which the word "prudent" is used in s 122. They argue more generally that the references to "prudence" imply that a no-hindsight test is required, and that a utility's costs must be presumed to be prudent.

'41. However, the different uses of "prudence" in s 122 are instructive. If the statute requires the Commission to approve "prudently incurred" expenses, it may be unreasonable for the Commission to fail to apply a no-hindsight methodology in reviewing such expenses. However, the costs at issue in this case do not fall within the categories of costs for which the statute grants recovery of "prudently incurred" costs. The use of the adjective "prudent" to qualify "costs and expenses" elsewhere in s 122 does not itself imply a specific methodology. Nothing in the ordinary meaning of the word "prudent" or the use of this word in the statute as a stand-alone condition says anything about the time at which prudence must be evaluated.

'42. Further, s 121(4) of the *EUA* provides that the burden of establishing that the proposed tariffs are just and reasonable falls on the public utility. The requirement that tariffs be just and reasonable is a foundational requirement of the tariff-setting provisions of the *EUA*. Tariffs will not be just and reasonable if they do not comply with the statutory requirement of s 122 that the costs and expenses be prudent. Thus, contrary to the ATCO Utilities' proposed methodology, the utilities' burden to establish that tariffs are just and reasonable necessarily imposes on the utilities the burden of establishing that costs are prudent.

'43. In sum, neither the ordinary meaning of "prudent" nor the statutory language indicate that the Commission is bound by the *EUA* to apply a no-hindsight approach to the costs at issue, nor is a presumption of prudence statutorily imposed in these circumstances.

...
'45. While the *RRR Regulation* makes a specific reference to the recovery of "prudent" costs, I do not read this prudence requirement as implying a presumption of prudence and application of a no-hindsight rule. Regarding the "no hindsight" element, the statutory

provisions do not use “prudent” to describe the decision to incur the costs, but rather to describe the costs themselves. Although s 4(3) of the *RRR Regulation* uses the term “incurred”, it is used to indicate that the provision applies to costs incurred by the utility. No temporal inference can be drawn from the use of “incurred” in this context; it is not used in a manner that calls for examination of the prudence of the decision to incur certain costs. The inquiry under s 4(3) of the *RRR Regulation* rather asks whether the costs themselves can be said to be “prudent”. The *GUA* does not include a requirement that a no-hindsight rule must apply in assessing whether costs are prudent, nor does the text of the *GUA* or the *RRR Regulation* imply such a rule. Regarding a presumption of prudence, s 44(3) of the *GUA* stipulates that the utility has the burden to establish that the rates are just and reasonable. Like the *EUA*, this in turn places the burden of establishing the prudence of costs on the utility.

‘46. Though the statutes do contain language allowing for the recovery of “prudent” costs, the *EUA* and the *GUA* do not explicitly impose an obligation on the Commission to conduct its analysis using a particular methodology any time the word “prudent” is used. Further, reserving any opinion on whether the term “prudently incurred” might require a particular no-hindsight methodology, in this particular case the bare use of the word “prudent” does not, on its own, mandate a particular methodology.’ *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission)* [2015] SCJ No 45, [2015] 3 SCR 219 at paras 29, 34–35, 40–43, 45–46, per Rothstein J

PSYCHOPATHIC DISORDER

[For 30(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 403 see now 75 Halsbury’s Laws of England (5th Edn) (2013) para 559, n 14.]

[Note that the definition of ‘psychopathic disorder’ in the Mental Health Act 1983, s 1(1) is repealed by the Mental Health Act 2007, s 1(3) as from 3 November 2008.]

PUBLIC

[Coroners Rules 1984, SI 1984/552, r 17.] ‘[1] This application for judicial review, for which we grant permission, relates to a decision made by Hallett LJ, who is presently sitting as Assistant Deputy Coroner for West London, so as to conduct inquests (the inquests) into the

deaths of the victims of the bombings in London on 7 July 2005. I shall refer to her as “the coroner”. The single issue raised by the application is whether the coroner has power to receive sensitive evidence relating to the Security Service in a closed hearing. For these purposes, “closed” means “in the absence of properly interested persons and their legal representatives”. The closed hearing would be attended only by members of the security service and their legal representatives, together with counsel to the inquests and those instructing them. An additional possibility contemplated by the parties and referred to in the judgment of Stanley Burnton LJ is the exclusion of some but not all properly interested persons, with say an interested police force remaining at the discretion of the coroner. The issue relates wholly or mainly to the construction of r 17 of the Coroners Rules 1984, SI 1984/552, which provides:

“Every inquest shall be held in public: Provided that the coroner may direct that the public be excluded from an inquest or any part of an inquest if he considers that it would be in the interest of national security to do so.”

‘[2] The dispute centres on the words “the public” in the proviso. Do they include properly interested persons and their legal representatives who are participating in the inquests? Or are they limited to members of the public in a wider sense, meaning all those who are not “properly interested persons”? In the latter case, once the public in the wider sense had been excluded, the hearing would continue in camera, but with all properly interested persons and their legal representatives able to attend and participate.

‘[3] The case for exclusion extending to properly interested persons and their legal representatives is put on behalf of the Home Secretary and the Security Service (supported by the West Yorkshire Police and a number of the bereaved families). The contrary case is put by counsel to the inquests (also supported by a number of the bereaved families). ...

‘[8] As I have indicated, the central issue on this appeal is one of statutory construction: does r 17 empower the coroner to exclude properly interested persons and their legal representatives from part of an inquest and to receive and later take into account closed material received in their absence? In order to answer this question it is necessary to consider not only the wording of r 17 but its context and to strive to give effect to its purpose.

“[12] Rule 17 was preceded by r 14 of the Coroners Rules 1953, SI 1953/205 which was in precisely the same form. Before that, there was no statutory provision. The position at common law was represented by *Garnett v Ferrand* (1827) 6 B&C 611, [1824–34] All ER Rep 244, the ratio of which was simply that a coroner could authorise the removal of a disruptive busybody, who had no proper interest in the proceedings. Lord Tenterden CJ indicated that the position would have been the same if the man had had a proper interest. In my view, this authority provides no assistance in the present case. It is concerned with circumstances which a coroner is empowered to deal with pursuant to his inherent power to regulate the hearing.

“[13] I consider it highly probable that, in 1953, no thought was given to the question of whether a properly interested person could be excluded from part of an inquest on grounds of national security. We have become accustomed to high-profile, state-involved inquests in recent years and their scope has been significantly widened by the more generous meaning given to the questions of “how, when and where the deceased came by his death”: s 11(5)(b)(ii) of the Coroners Act 1988. Nevertheless, the first edition of *Jervis on Coroners* to be published after the enactment of the 1953 Rules (the 9th edition) and all subsequent editions have proffered an interpretation of r 14/17 in the same terms (current, 12th edn, para 1111): “Proceedings at an inquest must be held in public unless in the interest of national security the coroner is of the opinion that the inquest or any part of it ought to be held in camera.”

“[14] There is no reason to suppose that the expression “in camera” was used otherwise than with its normal meaning of a hearing from which the wider public, but not the parties or their legal representatives, are excluded. The diligent researches of counsel have unearthed only one known example of exclusion of properly interested persons under r 17 and there the brief secret hearings attracted no objection and the point of construction was not raised: see the ruling on a media application in the *Hercules* inquest, 26 March 2009.

“[15] The essence of the construction issue can be simply expressed: does “the public” in the proviso to r 17 mean “any person” or does it only apply to those who are not properly interested persons and their legal representatives? We have received numerous submissions about the adverse consequences which would flow from one or the other interpretation. At their highest they are these. If the “any person”

construction is correct, it would mean that properly interested persons might receive a decision significantly influenced by material of which they and their legal representatives know nothing. They may have seen and heard evidence tending to point to conclusion A but find that closed material has trumped that and given rise to conclusion B. The other side of the coin is that the coroner will have based her conclusion on all the evidence, with none excluded. If the “but not properly interested persons or their legal representatives” construction is correct, the result will be the exclusion of potentially significant material on the basis of PII so that the coroner bases her conclusions on incomplete material but the proceedings will not have departed from the principles of transparency and participation.

“[16] In her ruling, the coroner relied heavily on the relationship between r 17 and its place in the 1984 rules as a whole. She gained particular assistance from rr 20, 37 and 57, to which I now turn ...

“[19] The coroner was impressed by the fact that these three provisions confer “absolute rights” on properly interested persons in the sense that they are expressed in mandatory language (“shall”) with some conditions or exceptions but none in relation to national security or by reference to r 17.

“[20] I, too, find this to be cogent. Plainly, appropriate conditions and exceptions are included. Rule 20(1) is expressed to be “[w]ithout prejudice to any enactment with regard to the examination of witnesses at an inquest” and ‘there is a duty imposed on the coroner by r 20(1)(b) to disallow “any question which in his opinion is not relevant or is otherwise not a proper question”’ There is nothing in r 20 to suggest that the “[e]ntitlement to examine witnesses” (as it is headed) is circumscribed by a national security qualification. Similarly r 37(1) begins with a qualification (“[s]ubject to the provisions of paragraphs (2) to (4)”) but it is not linked to r 17.

“[21] For my part, I find r 57 to be particularly significant. The purpose of enabling a properly interested person to obtain copies of the prescribed material is to enable him to satisfy himself that the conclusions of the coroner are soundly based. Rule 57 is an adjunct to s 13 of the 1988 Act which provides for an application to the High Court (by or under the authority of the Attorney General but usually on request of a properly interested person) for another inquest to be held where it is necessary

or desirable and in the interests of justice. The grounds are described as “fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, the discovery of new facts or evidence or otherwise”. This is the route through which an aggrieved party is enabled to mount a statutory challenge to an inquest (or to a refusal to hold one). It assumes a basis for informed dialogue between such a person and the office of the Attorney General. It seems to me that it would be quite impossible for an aggrieved person even to begin to mount such a challenge in relation to unexplained conclusions founded on closed material. They would be virtually immune from challenge or scrutiny.

[22] Modern legislation has developed ways of avoiding or at least mitigating such consequences, in particular by the use of special advocates and closed judgments where closed material is permitted for national security reasons. Such procedures operate, for example, in the Special Immigration Appeals Commission and in relation to control orders. They are an imperfect compromise but have withstood judicial scrutiny. Although an unsuccessful appellant or controlee does not see the closed material or the closed judgment, he has the benefit of the special advocate to enable closed material to be tested and the closed judgment to be scrutinised for legal error. If the “any person” construction of the r 17 proviso is correct, it would mean that even that imperfect form of procedural protection would be denied. Moreover, it is common ground that a coroner has no authority to promulgate a closed decision so there would be no alternative to a single open decision including passages to the effect: “I reject that evidence (or those submissions) for reasons I am not able to disclose.”

[23] I mention all this not because it directly aids construction in a linguistic sense but because, in my judgment, the legislature would not have created a procedure with such exceptional consequences in the absence of clear language to that effect. This provides additional support for the construction adopted by the coroner. If it needs further linguistic support, it receives a limited amount from the language of r 20. Mr Eadie’s equiporation of “the public” with “any person” fails to acknowledge that the words “any person” were used by the draftsman in r 20(1) and elsewhere (including r 57). Of rather greater significance is s 8(3) of the 1988 Act by which a coroner is obliged to summon a jury in certain circumstances, including highly sensitive ones such as deaths in prison or in police custody. Rule 17 applies equally to inquests where there is or

there is not a jury. This raises the obvious question of how a closed procedure could possibly operate with a randomly-selected jury. It cannot have been contemplated that a properly interested person and his legal representative would be excluded while a jury sees and hears closed material.

[24] I accept that an inquest is by definition an inquisitorial process and is different in kind from adversarial civil and criminal litigation. The task of a coroner is to investigate and to produce answers to the questions posed by the scope of the inquest. It is usual for a coroner to do so on the basis of full information. Mr Eadie submits that these features of inquests in general call for an approach to construction which strives to ensure that a coroner is able to act on full information. In so doing he emphasises the need to ensure that inquests are effective. However, the fact that inquests are inquisitorial does not diminish their context as essentially judicial procedures which are governed by the principle of open justice except to the extent that that principle is limited by statutory provision. The inquisitorial context is a factor but it is not determinative as to construction.

[25] For all these reasons, I am satisfied that the coroner’s construction of r 17 was correct.

...

...

[36] Rule 17 of the Coroners Rules 1984, SI 1984/552, in its first sentence, recognises the fundamental principle of our legal proceedings, namely that they should be public unless there is good reason for them not to be. Quite apart from this, however, in the first part of r 17 the natural meaning of “public” is persons other than properly interested persons. There is no reason to ascribe any other meaning to “public” in the proviso. Consideration of the other rules to which Maurice Kay LJ has referred, such as r 20, confirm that this is indeed the meaning of “public”, for the reasons he gave and which were also given by the coroner.

[37] Like Maurice Kay LJ, I consider that specific and clear words would have been required to qualify the rights of properly interested persons under, for example, r 20, in order to achieve what is sought by the claimant. *R (on the application of the Secretary of State for the Home Department v Assistant Deputy Coroner for Inner West London* [2010] EWHC 3098 (Admin), [2011] 3 All ER 1001 at [1]–[3], [8], [12]–[16], [19]–[25], per Maurice Kay LJ and at [36]–[37], per Stanley Burnton LJ

Available to the public

Canada '[14] Paragraph 17(2)(d) of the *Statistics Act* [RSC, 1985, c S-19] provides that the Chief Statistician may authorize the disclosure of information "available to the public" under any statutory or other law. Paragraph 8(2)(k) of the *Privacy Act* [RSC, 1985, c P-21] allows the disclosure of personal information to "any aboriginal government, association of aboriginal people, Indian band, government institution or part thereof, or to any person acting on behalf of such government, association, band, institution or part thereof." Does this limited segment of the population amount to "public" within the meaning of paragraph 17(2)(d) of the *Statistics Act*? The applications Judge concluded that it does and I agree.

'[15] The applications Judge held that the word "public" in the phrase "available to the public" is a noun, which, according to the *Canadian Oxford Dictionary*, has three meanings, referring to either the entirety of the community, to members of the community, or to a section of the community sharing a common status or interest. The applications Judge concluded that "[e]ach of these meanings is sufficient to meet the definition of public in paragraph 17(2)(d) of the *Statistics Act*" (paragraph 53). With respect to the words "information available to the public" [underlining added], the applications Judge stated that these words denote "records capable of being obtained by the entire 'general public, or by members or sections thereof" (paragraph 54). Based on this interpretation, the applications Judge concluded that the census information requested by the Algonquin bands "is exactly the type of information which Parliament intended under [paragraph 8(2)(k) of] the *Privacy Act* may be disclosed to an Aboriginal people or Indian band" (paragraph 56).

'[16] The appellant submits that the term "available to the public" refers "to the community at large." In making this submission, the appellant argues that "disclosure in accord[ance] with paragraph 8(2)(k) — which only contemplates discretionary disclosure to certain people for a specific purpose — cannot be the same as 'public availability' within the meaning of paragraph 19(2)(b) [of the *Access to Information Act* [RSC, 1985, c A-1]]" adding that "[t]here is no reason why the concept of "available to the public" should be interpreted differently in paragraph 17(2)(d) of the *Statistics Act* than in subsection 19(2) of the [Access to Information Act]."

'[17] The respondent submits that there are compelling reasons why the concept of the public may vary in scope in these two legislative provisions. The respondent points out that the statutory language is not identical in both provisions: while paragraph 19(2)(b) of the *Access to Information Act* contemplates disclosure "if... the information is publicly available / dans les cas où [...] le public y a accès", paragraph 17(2)(d) of the *Statistics Act*, in turn, authorizes disclosure of "information available to the public under any statutory or other law / les renseignements mis à la disposition du public en vertu d'une loi ou de toute autre règle de droit." The respondent further submits that the meaning of "the public" under paragraph 17(2)(d) of the *Statistics Act* can be contrasted with subsection 2(2) of the *Access to Information Act* where the wording is "available to the general public" [underlining added] ("à la disposition du grand public") [underlining added]. This demonstrates that when Parliament intended to limit the scope of the noun "the public" to mean only the public in its entirety rather than particular segments of it, it used legislative language that clearly demonstrates this intent.

'[18] In my view, even if paragraph 19(2)(b) of the *Access to Information Act* and paragraph 17(2)(d) of the *Statistics Act* were interpreted to mean the same thing, as the appellant suggests, not much turns on the argument. What still needs to be determined is the scope intended by the use of the word "public." In that respect, I agree with the applications Judge that, to give effect to paragraph 8(2)(k) of the *Privacy Act*, the words "available to the public" under paragraph 17(2)(d) of the *Statistics Act* must be interpreted to mean a segment of the population, such as Aboriginal groups, as opposed to the entire population.

'[19] The appellant further submits that the discretion under paragraph 17(2)(b) of the *Statistics Act* can only be exercised to disclose information to which the public already has a right of access from another source. In support of this submission, the appellant compares the English and French versions of paragraph 17(2)(d): the English version refers to any "information available to the public under any statutory or other law" whereas the French versions refers to "*les renseignements mis à la disposition du public en vertu d'une loi ou de toute autre règle de droit.*" In the appellant's view, the exception, especially when considering the words "*mis à la disposition du public en vertu d'une loi*" in the French version, requires

the information to be already accessible or obtainable.

'[20] In reading the English and French versions of paragraph 17(2)(d), I can see the subtle distinction the appellant is trying to make but, from a practical point of view, the argument cannot stand. The appellant is reading the statutory provision as requiring the information to be "already" accessible, as opposed to simply being accessible. In my opinion, if a statutory provision allows for the disclosure of information to the public, as does paragraph 8(2)(k) of the *Privacy Act*, then the information is "available" to the public or "*mis à la disposition du public*". There is no requirement that the information be "already" in the public domain.' *Canada (Information Comr) v Canada (Minister of Industry)* [2008] 1 FCR 231, 284 DLR (4th) 293, [2007] FCJ No 780, 2007 FCA 212 at [14]–[20], per Richard CJ

Members of the public

[Criminal Justice Act 2003, s 226A(1)(b).] '[8] In the appeal of Gray (see para [55] and following [redacted]), the question of statutory interpretation raised was whether the phrase "members of the public" in s 226A(1)(b) of the CJA 2003 referred only to members of the public in the UK or whether it included members of the public of countries other than the UK. The subsection refers to a necessary precondition for an extended sentence as being a—

"significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences."

It does not define "members of the public".

'[9] The judge found that there was no significant risk to members of the public in the UK; there was such a risk to members of the public in Syria; and that the members of the public in Syria were within the scope of the definition.

... '[12] Specified violent offences are listed in Pt 1 of Sch 15 to the CJA 2003. From the time of its enactment, the list in Pt 1 has included offences which can be committed outside the United Kingdom: for example, offences under s 1 of the Taking of Hostages Act 1982, ss 1–4 of the Aviation Security Act 1982, ss 1 and 9–13 of the Aviation and Maritime Security Act 1990 and ss 51 and 52 of the International Criminal Court Act 2001, as well as manslaughter and

attempt or conspiracy to murder.

'[13] It would make no sense to suppose that, in a case where there is a significant risk that the offender will commit further specified offences outside the United Kingdom, Parliament intended to confine the members of the public whose safety the court may consider to people within the United Kingdom. To take an example canvassed in argument, if a man is convicted of attempting to murder a particular individual with whom he is obsessed and there is a significant risk that he will try to do so again, it is unreasonable to interpret the CJA 2003 as requiring the court when assessing whether the offender is dangerous to ignore this risk if the potential victim is living in France.

'[14] We accordingly consider that, in the context of s 226A(1)(b), although the territorial scope of "the public" is not expressly defined, the phrase must be intended to include the public in other countries. It will, nevertheless, only be relevant to consider the risk of harm to such persons where the further specified offences in contemplation are offences which, in view of their territorial scope, are capable of causing harm abroad.' *R v Abdallah*; *Note* [2016] EWCA Crim 1868, [2017] 2 All ER 795 at [8]–[9], [12]–[14], per Lord Thomas CJ

To the public

Canada [Copyright Act, RSC 1985, c C-42, s 3(1)(f).] '2. The sole issue in this appeal is the meaning of the phrase "to the public" in s 3(1)(f) of the Act. The online music services brought this appeal on the basis that their uses of music do not engage the right to communicate to the public by telecommunication in s 3(1)(f) because they do not come within the scope of the phrase "to the public". The issue of whether *downloads* can be "communication[s]" within the meaning of s 3(1)(f) was left to be determined in the companion case *Entertainment Software Assn v Society of Composers, Authors and Music Publishers of Canada* 2012 SCC 34 ("ESA"). In *ESA*, a majority of this Court determined that musical works are not "communicated" by telecommunication when they are *downloaded*. This conclusion affects this appeal. The question of whether the online music services engage the exclusive right to "communicate ... to the public by telecommunication" by offering *downloads* to members of the public has now become moot. However, the *ESA* did not contest the Board's conclusion that a *stream* constitutes a "communication" within the meaning of s 3(1)(f) of the Act. As a result,

the remaining issue here is whether, based on *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 SCR 339 (“*CCH*”), such communication of protected works nevertheless does not engage the exclusive right to communicate to the public because a point-to-point transmission from the website of an online music service to any individual customer is a *private* communication.

...
 ‘53. Although they occur between the online music provider and the individual consumer in a point-to-point fashion, the transmissions of musical works in this case, where they constitute “communications”, can be nothing other than communications “to the public”.

‘54. Online music services provide catalogues of musical works. It is open to any customer willing to pay the purchase price to download or stream the works on offer. The works in the catalogues could as a result be transmitted to large segments of the public—if not the public at large. Through the commercial activities of the online music services, the works in question have the potential of being put in the possession of an aggregation of customers. Indeed, the appellants’ business model is premised on the expectation of multiple sales of any given musical work. Achieving the highest possible number of online sales is the very *raison d’être* of online music services. The number of actual transmissions depends only on the commercial success of a given work. The necessary implication of this business model is that there will be a “series of repeated... transmissions of the same work to numerous different recipients” (*CCH* (SCC), at para 78). The conclusion that a communication “to the public” occurs is consistent with reality. As Professor Vaver explains,

If the content is intentionally made available to anyone who wants to access it, it is treated as communicated “to the public” even if users access the work at different times and places”.

(D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-Marks*, (2nd ed 2011) at p 173)’

Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada [2012] SCJ No 35, 2012 SCC 35 at paras 2, 53–54, per Rothstein J

PUBLIC AUTHORITY

[Whether a registered social landlord (RSL) under the Housing Act 1996 was a public

authority for the purposes of the Human Rights Act 1998, s 6.] ‘[25] Section 6(1) of the Human Rights Act makes it unlawful for “a public authority” to act in a way which is incompatible with a convention right. Section 6(3)(b) provides that “public authority” includes “any person certain of whose functions are functions of a public nature”; save that, by s 6(5), in relation to a particular act, a person is not a public authority by virtue only of s 6(3)(b) if the nature of the act is private.

‘[26] The claimant disavows any suggestion that LQHT [London and Quadrant Housing Trust] is a “core” public authority, as it is sometimes described, that is a body which is to be regarded as a public authority in relation to all its functions. The claimant’s case is that LQHT is a “hybrid” or “functional” public authority, *some* of whose functions are of a public nature, and that those functions include the functions it performs when providing affordable housing in the social rented sector; and the particular acts of deciding to grant or terminate tenancies of social housing are said to concern the allocation of public housing resources and not to be purely private in nature.

...
 ‘[52] I have not found this an altogether easy issue to resolve. The difficulty of drawing the dividing line between public and private functions in the context of s 6 of the Human Rights Act is illustrated by the differences of judicial view in previous cases. It seems to me, however, that there are factors which push this case further towards the public function side of the line than in *YL’s* case [*YL v Birmingham City Council* [2007] UKHL 27, [2007] 3 All ER 957, [2008] 1 AC 95]; and the overall conclusion I have reached is that the management and allocation of housing stock by LQHT is indeed a function of a public nature and that LQHT is therefore to be regarded for relevant purposes as a public authority within s 6(3)(b).

‘[53] The management and allocation of housing stock is not in itself an inherently governmental activity. A private sector landlord carrying on an ordinary commercial business in the letting of accommodation would not be a public authority. But that is not this case. It is true that LQHT is constituted and governed by its own rules, owns and manages its own housing stock and enters into private law contracts with tenants. The nature of its activities, however, and the context within which it operates make this a very different situation from an ordinary commercial business.

‘[54] LQHT is a non-profit-making charity acting for the benefit of the community in

providing housing for the poor and other disadvantaged groups. That may not point in itself to its being a public authority (see the *Poplar Housing and Regeneration Community Association* case [*Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2001] 4 All ER 604, [2002] QB 48] ...), but it does mean that the case lacks the private and commercial features which were held in *YL's* case to point against treating Southern Cross as a public authority.

'[55] LQHT operates within a particular sector, that of social rented housing, which is not simply subject to detailed regulation (held in *YL's* case not to be a pointer towards a body being a public authority) but is permeated by state control and influence with a view to meeting the government's aims for affordable housing, and in which RSLs work side by side with, and can in a very real sense be said to take the place of, local authorities.

'[56] In relation to RSLs, control and influence is exercised through the housing corporation. Although statutory guidance under s 36 of the 1996 Act is non-binding, there is clearly indirect pressure on RSLs to comply with it; and the extent of control and influence to which RSLs are subject in practice is illustrated both by the corporation's approach towards implementation of the government's policy on the setting of social rents ... and by the general statements in the corporation's *Regulatory Code and Guidance* ...

'[57] Of particular importance is the nature and extent of public subsidy of the activities of LQHT, in common with other RSLs. I leave aside the payment of rent for individual tenants by way of housing benefit, which is of no real significance. The point of significance is the receipt of capital grants from the housing corporation, especially social housing grants under s 18 of the 1996 Act. The sums involved are very large—over £268m in two recent financial years ... The fact that they are for particular development programmes rather than block grants for the general purposes of LQHT does not seem to me to affect the position. They are directed towards increasing the housing stock available in the social rented housing sector and are one of the means by which the state secures the delivery of affordable housing to those eligible for it. I bear in mind that private funding is also, and increasingly, important. I also bear in mind that RSLs are not unique in obtaining social housing grants. The fact remains, however, that LQHT's business as a whole is heavily subsidised by the state and that this funding is attributable to the role that

LQHT, like others RSLs, plays in the implementation of government policy. In the words of Lord Mance in *YL's* case [2007] 3 All ER 957 at [105], [2008] 1 AC 95, this is a clear case of "[t]he injection of capital or subsidy into an organisation in return for undertaking a non-commercial role or activity of general public interest."

'[58] Another relevant feature is the voluntary transfer of housing stock to RSLs from the public sector, which again reflects the fact that RSLs are performing functions of the same kind as local authorities in the provision of social rented housing. LQHT is, of course, not in the same position as the RSL in the *Poplar Housing and Regeneration Community Association* case, which was formed for the specific purpose of taking a transfer of a substantial part of the local authority's housing stock. But the 10% or so of LQHT's housing stock which has been transferred from the public sector is still a significant proportion.

'[59] The duty of co-operation with local authorities under s 170 of the 1996 Act is also of significance. In providing accommodation to those with priority under local authorities' allocation schemes, LQHT does not have a purely commercial relationship with the local authorities, but is operating under arrangements made within the framework of that statutory duty. It is striking that well over half of LQHT's new lettings are the result of nominations made by local authorities pursuant to such arrangements ...

'[60] *YL's* case shows that, although the question whether a body is a public authority for the purposes of the Human Rights Act is not to be equated with the question whether it is amenable to judicial review, since the rationale under the Human Rights Act is different, it may nonetheless be helpful to consider amenability to judicial review. In this case Mr Drabble [counsel for the claimant] seeks to turn that round by deriving LQHT's amenability to judicial review from its status as a public authority under the Human Rights Act. That is no doubt because he faces the difficulty that, on existing authority (the *Peabody Housing Association* case and *ex p Goldsmith*), a decision by an RSL to terminate a tenancy is considered to be a matter of private, not public, law and not to be susceptible of judicial review. Mr Drabble, at least in his skeleton argument, did advance a separate contention that LQHT is amenable to judicial review on a conventional basis, but the matters he relied on are much the same as those relied on in support of his arguments as to public authority. In the circumstances I think it

better to leave the question of amenability to judicial review out of account when considering the issue of public authority, not least to avoid a danger of circularity of reasoning.

‘[61] There is, however, one aspect of the reasoning in the judicial review cases that I should mention, which is the court’s rejection in the *Peabody Housing Association* case of the argument that in serving a notice to quit a housing association was exercising statutory powers. It remains the case that RSLs have no relevant statutory powers (leaving aside the power to apply for anti-social behaviour orders, which is not directly relevant here) and that in terminating a tenancy an RSL is relying on private law rights and on the general law concerning recovery of possession through court proceedings. The point is of limited significance: whilst the enjoyment of relevant statutory powers would have told in favour of RSLs being public authorities, the absence of such powers does not preclude their being public authorities.

‘[62] Reference to the termination of a tenancy brings me to a final point on this issue, which is that if the allocation of housing stock by LQHT is a public function, then it would in my view be wrong to separate out “management” decisions concerning the termination of a tenancy as acts of a purely private nature. The allocation and management of the housing stock are to be regarded as part and parcel of a single function or as closely related functions. It would be artificial to separate out the act of terminating a tenancy, or indeed other acts in the course of management of a property, from the act of granting a tenancy. Moreover, as Mr Drabble submitted, the termination of a tenancy leads to the withdrawal of a publicly funded or subsidised resource from the tenant and is likely to trigger fresh duties of the local authority, and has been recognised in the context of judicial review as involving decisions capable of having a public law character. If LQHT is a public authority in relation to the grant of a tenancy, then it is equally a public authority in relation to the termination of the tenancy.

‘[63] For those reasons I accept the claimant’s case that LQHT is for relevant purposes a public authority within s 6(3)(b) of the Human Rights Act. ...’ *R (on the application of Weaver) v London and Quadrant Housing Trust* [2008] EWHC 1377 (Admin), [2009] 1 All ER 17 at [25]–[26], [52]–[63], per Richards LJ

PUBLIC EXPENDITURE

[Education Act 1996, s 9: general principle that pupils are to be educated in accordance with the wishes of their parents, so far as that is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.] ‘[2] The question that lies at the heart of this appeal is how the words “public expenditure” should be interpreted. In relation to local authorities, do they mean expenditure incurred by local authorities in discharging their functions under the Education Acts as defined in s 573 of the 1996 Act (“education functions”) (the narrow meaning); or do they mean expenditure incurred by *any* public authority as a result of the discharge by the local authority of the education functions (the wider meaning)? There is also a possible intermediate meaning, namely that “public expenditure” means expenditure incurred by a local authority in the discharge of *any* of its functions (including, but not limited to, education functions). Neither party contends for this intermediate meaning. In my view, they are right not to do so.

... ‘[27] ... In my view, the correct meaning of the words “public expenditure” in s 9 is expenditure incurred by a public body, as opposed to “private expenditure” (ie expenditure incurred by a private body). There are three linguistic points to be made. First, this interpretation accords with the natural and ordinary meaning of the words. If it had been intended to limit the expenditure referred to in s 9 to expenditure incurred by the Secretary of State or local authorities *in the exercise of education functions*, the section could and would have said so. Instead, Parliament chose the general words “public expenditure”. Secondly, if the public expenditure were limited to expenditure incurred by the Secretary of State or local authorities in the discharge of their education functions, the word “public” would have been unnecessary. The Secretary of State and the local authorities *are* public bodies and expenditure incurred by them in discharging these functions is bound to be “public” rather than “private” expenditure. The word serves the important purpose of distinguishing the expenditure from private expenditure. Thirdly, the language of para 3(3) of Sch 27 should be contrasted with that of s 9. Paragraph 3(3) requires the local authority to specify the name of the school preferred by the parent unless the attendance of the child at the school would be incompatible *inter alia* with “the efficient use of

resources". As we have seen, this phrase has been interpreted as referring to the resources of the LEA (now the local authority) and no other authority. In s 9 Parliament could have used the words "so far as that is compatible with the ... avoidance of the inefficient use of resources". If it had done so, it would have been clear (in the light of the authorities on para 3(3)) that the relevant expenditure was that incurred in the discharge of education functions and no other. I accept, of course, that Sch 27 post-dated the predecessor to s 9. But the contrast in language is nevertheless striking. In enacting para 3(3), Parliament did not seek to reproduce the language of s 9.

'[28] It follows that a natural reading of s 9 clearly supports the wider interpretation. I do not accept the submission of Mr Stockwell that it is equivocal.

'[29] Nor does Mr Stockwell suggest that there is any obvious purpose that would be better served by adopting the narrow interpretation. The explicit purpose of the qualification to the s 9 duty is to avoid unreasonable public expenditure. The obligation to have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents should not be at the cost of unreasonable public expenditure. Why would Parliament have regarded it as unacceptable for a local authority to accede to a parent's preference if it would involve unreasonable expenditure in the discharge of its education functions, but acceptable if it would involve unreasonable expenditure in the discharge of any other functions of the local authority (or any other authority)? No explanation has been advanced to explain why Parliament would have wished to make such a distinction.

'[30] In my view, therefore, s 9 should be given its natural meaning unless Parliament cannot have intended this meaning because it gives rise to difficulties which are so serious as to make the statutory provision unworkable or impracticable: see *Bennion on Statutory Interpretation* (6th edn, 2013) section 313. Mr Stockwell submits that the wider meaning makes s 9 unworkable and/or gives rise to so many practical problems that it cannot have been intended by Parliament. He makes a number of points. ...

'[31] None of these points persuades me that the natural meaning cannot have been intended by Parliament. The starting point is that s 9 does not impose a duty on a local authority to act in accordance with parental wishes (provided that to do so would be compatible with the provision of efficient instruction and training and the

avoidance of unreasonable public expenditure). It is a duty to "have regard to the general principle that pupils are to be educated in accordance with the wishes of their parents" subject to those qualifications. As Denning LJ said in *Watt v Kesteven CC* [1955] 1 All ER 473 at 476, [1955] 1 QB 408 at 424:

"Section 76 [of the 1944 Act the predecessor of s 9 of the 1996 Act] does not say that pupils must in all cases be educated in accordance with the wishes of their parents. It only lays down a general principle to which the county council must have regard. This leaves it open to the county council to have regard to other things as well, and also to make exceptions to the general principle if it thinks fit to do so."

...

'[37] In summary, therefore, the reasons advanced by Mr Stockwell do not, individually or in combination, justify giving s 9 a strained and unnatural meaning. ...' *H v Warrington Borough Council* [2014] EWCA Civ 398, [2014] 3 All ER 747 at [2], [27]–[31], [37], per Lord Dyson MR

PUBLIC HOUSE

[For 24 Halsbury's Laws of England (4th Edn) (Reissue) para 1109 see now 68 Halsbury's Laws of England (5th Edn) (2016) paras 648n, 677n.]

PUBLIC INTEREST

Necessary in the public interest

Australia [Corruption and Crime Commission Act 2003 (WA), s 152; disclosure of 'official information' permitted where Corruption and Crime Commission certifies it is necessary in the public interest.] '[59]... The appellant submits that s 152(4)(c) involves a two-stage test which must be satisfied prior to the commissioner certifying that official information should be disclosed; first, that the disclosure is in the public interest, and second that the disclosure is "necessary" in the public interest. He asserts that the primary judge erred in his construction of "necessary" in s 152(4)(c), contending that it is not enough that the disclosure merely serves the public interest, but rather that it must be "essential" in the public interest. He further alleges that both the commissioner and the primary judge erred in

failing to actually determine the meaning of “necessary” in s 152(4)(c) at all.

“[61] The appellant submits that “necessary” in s 152(4)(c) means “essential” using that word in accordance with its definition in the *Macquarie Dictionary*, namely, “absolutely necessary” or “indispensible”. The appellant submits that, on a proper construction of s 152(4)(c), the commission cannot certify that the release of information is in the public interest unless it is satisfied that the release of the information is “absolutely necessary” or “indispensible” to the maintenance or advancement of the public interest.

“[67] As is apparent from the reasoning of the High Court in *Hogan* [*Hogan v Australian Crime Commission* (2010) 240 CLR 651; 267 ALR 12, ; [2010] HCA 21] and as was noted by the primary judge, the word “necessary” is capable of a range of meanings. In other contexts the word has been construed as meaning “reasonably required” or “legally ancillary” to the achievement of the purpose for which the act is said to be “necessary”: see for instance *Levi v Australian Securities Investments Commission* (No 2) [2013] NSWSC 932 at [29]–[34]; *State Drug Crime Commission (NSW) v Chapman* (1987) 12 NSWLR 447 at 452 (*Chapman*); *National Crime Authority v Gould* (1989) 23 FCR 191 at 195; 90 ALR 489 at 493–4; 18 ALD 721 at 723–4.

“[68] Of course, the meaning to be given to the word “necessary” will depend upon the particular statutory context in which the word is used, and the purpose of the legislature evident in the language of the statute as a whole: see *Elcham v Commissioner of Police* (2001) 53 NSWLR 7; [2001] NSWSC 614 at [58], where O’Keefe J conveniently summarises a number of cases demonstrating the meaning given to the word “necessary” in different statutory contexts at [49]–[55].

“[76] Their Honours’ observation [in *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435; 162 ALR 336; [1999] HCA 19 at [51]] that the word “necessary” identifies that which is “reasonably required” may aptly be applied to the construction of the word “necessary” in the context of s 152(4)(c) of the Act. That which is reasonably required is to be contrasted with that which is absolutely necessary or indispensable. Acceptance of the proposition that the commission must be satisfied that disclosure is “required” before exercising the power conferred by s 152(4)(c)

“directs the decision-maker to identify a high-threshold public interest before the power can be exercised” in *Osland v Secretary to the Department of Justice* (No 2) (2010) 241 CLR 320; 267 ALR 231; 116 ALD 1; [2010] HCA 24 at [14] (*Osland*) per French CJ, Gummow and Bell JJ. To paraphrase the dicta in *Osland*, it is not enough that disclosure could be justified in the public interest. Rather, it must be “required”, in the sense that the public interest would not be maintained or advanced unless the information is disclosed.

“[77] Nevertheless, to borrow again from the language used by their Honours in *Osland*, the terminology used in s 152(4)(c) of the Act “does not define a rule so much as an evaluative standard requiring restraint in the exercise of the power”: at [14]. The application of that evaluative standard will be “predicated on fact–value complexes, not on mere facts” (*Osland* at [14]) and “subjected to the touchstone of reasonableness” (see *Pelechowski* at [51], citing *Chapman* at 452).

“[78] Consistently with this construction of the word “necessary”, it may readily be accepted that it is “a strong word”: see *Hogan* at [30]. It can also be accepted that disclosure cannot be permitted pursuant to s 152(4)(c) merely because it is “reasonable” or “convenient” or “sensible”: *Hogan* at [31]. However, this construction of the word “necessary” falls well short of the appellant’s proposition that it means “essential” in the sense of absolutely necessary or indispensable to the maintenance or advancement of the public interest. It is significant that the appellant has been unable to identify any prior decision in which the word “necessary” has been construed as bearing the meaning “essential” in any statutory context analogous to the present, or indeed at all.

“[81] Further, the ascertainment of what is “necessary in the public interest” for the purposes of the grant of a certificate in accordance with s 152(4)(c) of the Act will be undertaken in a context in which the range of “official information” received by the commission may be extremely broad (see *Allen [Corruption and Crime Commission (WA) v Allen* [2012] WASCA 242]), and in a context in which the functions to be performed by the commission in the furtherance of the public interest are many and varied. In such a context it is difficult to envisage many, if any, circumstances in which disclosure could be said to be “essential” to the advancement of the public interest in the sense of absolutely essential or

indispensable to its maintenance or advancement. The multi-faceted nature of the public interest, and the likelihood of a discretionary judgment balancing competing considerations being required in the exercise of the power conferred by s 152(4)(c) in this statutory context are, in our view, incompatible with the proposition that a certificate can only be issued if the commission concludes that disclosure is “essential” to advance the public interest. Rather, these considerations reinforce the view that s 152(4)(c) imposes “an evaluative standard requiring restraint in the exercise of the power”, and require a value judgment to be made “subjected to the touchstone of reasonableness”.

[82] Given the protean concept of the public interest, and the context in which the commission will be required to apply the evaluative standard imposed by s 152(4)(c), it may well be that reasonable minds differ on the question of whether disclosure is “necessary” in the particular circumstances at hand. However, that evaluative judgment is entrusted to the commission, not the court.’ *A v Corruption and Crime Commissioner* [2013] WASCA 288, (2013) 306 ALR 491 at [59], [61], [67]–[68], [76]–[78], [81]–[82], per Martin CJ and Murphy JA

PUBLIC MONEY

Canada [Financial Administration Act, RSC 1985, c F-11, s 2; Indian Act, RSC 1985, c I-5, ss 61–69; oil and gas royalties.] [88] In my opinion, there is nothing preventing cash royalties from being dealt with under the FAA and the *Indian Act*. The fact that the IOGA [Indian Oil and Gas Regulations, 1995, SOR/94–753] allows for “in kind” royalties does not render these statutes inapplicable to cash royalties. The FAA and the *Indian Act* apply to cash royalties because those funds fall within the definition of “public money” in the FAA. There is nothing inconsistent between the IOGA and the application of the FAA and *Indian Act* to cash royalties.

[89] The FAA governs the administration and management of government, particularly financial management and government spending. It sets out specific rules on the collection, management and spending of public funds.

[90] Section 2 of the FAA defines “public money” as:

... all money belonging to Canada received or collected by the Receiver General or any other public officer in his official capacity or any person

authorized to receive or collect such money, and includes

...

(d) all money that is paid to or received or collected by a public officer under or pursuant to any Act, trust, treaty, undertaking or contract, and is to be disbursed for a purpose specified in or pursuant to that Act, trust, treaty, undertaking or contract;

[91] Because the royalties are money collected by Canada on behalf of the bands pursuant to the IOGA, they are “public money” within this definition and as such must be dealt with in accordance with the provisions of the FAA.’ *Ermineskin Indian Band and Nation v Canada* [2009] 1 SCR 222, [2009] SCJ No 9, 302 DLR (4th) 577, 2009 SCC 9 at [88]–[90], per Rothstein J

PUBLIC OFFICE

[Offence of misconduct in a public office: whether prison officers or prison nurses held public office. Each of the appellants was at the material time a civil servant and an employee of HM Prison Service under the umbrella of the National Offender Management Service.] [11] Whether these appellants held public office was ventilated twice during the trial. First, an application was made pursuant to para 2(2) of Sch 3 to the Crime and Disorder Act 1998 to dismiss the charges after they had been sent from the magistrates specifically on this ground. Counsel argued that Karen Cosford and Jacqueline Flynn were independent medical practitioners, no different to any registered general nurse working in a GP surgery within the NHS. Although Carolyn Falloon was a senior registered nurse within the prison, her duties did not warrant the label of public officer: reliance was placed on the need strictly to confine the position of public office.

[12] Judge Kearl rejected the applications. As for Carolyn Falloon (and Kevin Wilson), he said that prison officers were acting as public officers when carrying out their duties. He explained:

“They hold powers similar to those of a police constable in respect of arrest. They are performing their duties within a secure prison environment and are subject to the provisions of the Official Secrets Act. They are able to search prisoners and prison cells. They have access to all areas of the

prison in order to perform their duties. They are appointed by HM Prison Service and are trusted to perform their duties in the public service under the National Offender Management Service. They swear allegiance to the Sovereign.”

... [15] Judge Hatton analysed the law and the submissions. He repeated some of the features mentioned by Judge Kearl and observed:

“There is evidence before me which clearly demonstrates that each defendant was entrusted with and had responsibilities and duties which were of substantial importance to the public at large and went beyond the ordinary duties and responsibilities of nurses out of the environment in which these defendants had chosen to accept employment. They were engaged in a high security prison where dangerous men were housed. The public clearly had an acute interest in the maintenance of order and security in that establishment. Security in that place was of high priority and clear to all staff, including these defendants. The staff themselves were subjected to stringent security procedures. They held keys and had access to all parts of the prison. They had access to cells and, in the Health Care Centre at least, had powers which were exercised for locking and unlocking cells. It is of importance that there was in place a system in the prison whereby staff could and indeed had a responsibility to report matters of concern involving security and other matters, both involving prisoners and colleagues. To that end, there existed what were called security information reports; documents which were stated, on their face, as being to provide security intelligence. Something considered important to the Prison Service and something of importance, in my judgment, to the public. Each defendant was, accordingly, responsible for playing his or her important role in the maintenance of good order and security as part of their duties. Each defendant accepted that responsibility as part of their duty and three of them [including these appellants] in fact completed such reports from time to time ... I find that each accepted ‘an office of trust concerning the public’ to use the words of Lord Mansfield and ... ‘is answerable criminally to the King for misbehaviour’ in that office. In the words

of Best CJ repeated almost verbatim in *R v Whitaker* (1914) 79 JP 28, [1914] 3 KB 1283, and repeated also by Hirst LJ, each was ‘appointed to discharge public duties’ and was, in my judgment, therefore, constituted a public officer.

[16] Judge Hatton was then persuaded to leave the question of public office to the jury, which, before describing the evidence which is summarised in his ruling, he did in these terms:

“A person holding a public office for these purposes is someone who discharges a duty or who is entrusted with the discharge of a duty in which the public at large—of which you are members—have an interest. Does the public at large—of which you are representative members—have an important interest to be served such as to be entitled to place its—that is your—trust in and reliance on the person performing the role? Every person who is appointed to discharge such a public duty is constituted a public officer.”

... [36] ... In our judgment, the aphorism from the evidence adopted by Mr Stubbs that “a nurse is a nurse” does not start to do justice to the task which these appellants undertook. The responsibilities of a nurse in a general hospital are to the patients for whose care they are responsible; the responsibilities of a nurse (whether trained as a prison officer or not) in a prison setting are not only for the welfare of the prisoners (their patients); they are also responsible to the public for, so far as it is within their power to do so, the proper, safe and secure running of the prison in which they work. The duties described in para [14], above more than amply fulfil the requirements of a public office: the rulings of Judge Kearl and Judge Hatton were correct.

[37] We add this. Although counsel for the respondents in *A-G’s Ref (No 3 of 2003)* [[2004] EWCA Crim 868, [2005] 4 All ER 303, [2005] QB 73] expressed concern that there should be no distinction between those who hold a public office and those who are in private employment who do similar work, in the context of the prison system, we see no distinction. Whether the prison is run directly by the state or indirectly through a private company paid by the state to perform this function does not alter the public nature of the duties of those undertaking the work: the responsibilities to the public are identical. *R v Cosford* [2013] EWCA Crim 466, [2013] 3 All ER 649 at [11]–[12], [15]–[16], [36]–[37], per Leveson LJ

PUBLIC PERFORMANCE

[For 9(2) Halsbury's Laws of England (4th Edn) (Reissue) para 325 see now 23 Halsbury's Laws of England (5th Edn) (2016) para 723.]

PUBLIC PLACE

New Zealand [Electoral Act 1993, s 199A: whether YouTube or a political party's website is a 'public place'.] '[40] The word "publishes" appears in s 199A with "distributes, broadcasts, or exhibits". Its meaning should be considered in that context:

- (a) "*Distributes*": is the act of distributing (giving out) a statement in a public place. That would apply naturally to the delivery of pamphlets to households. A statement is distributed each time a pamphlet is delivered to a household. This would mean that pamphlets delivered on 17 September 2014 would not be caught by s 199A, but pamphlets delivered on 18 September 2014 would be (if the other requirements of the section were met). In the case of an overnight delivery those before midnight would not be caught and those delivered after midnight would be.
- (b) "*Broadcasts*": a broadcast is something transmitted in some way for reception by a person or persons. Most naturally a broadcast refers to something that can be seen or heard on the radio or television although there may be other forms of communication that also qualify as broadcasts. A statement broadcast on the radio or television before midnight on 17 September 2014 would not be caught by s 199A. But if the broadcast continued into the early hours of 18 September 2014 it would then be caught by s 199A (if the other requirements of the section were met). It would be the same position with any other forms of broadcasting.
- (c) "*Exhibits*": to exhibit something is to show or display something. A statement is being exhibited while it is on show or displayed. A statement might be exhibited by being placed on a billboard for example. A person who exhibits a statement on 17 September 2014 by placing a billboard in a public place, will still be exhibiting the

statement if the billboard remains in place on 18 September 2014.

... '[79] The Electoral Commission submits that it is not clear that online publications were intended to be captured by s 199A. It says it is doubtful that a political party's website or YouTube could be considered a "public place". It says that "public place" is defined with a particular focus on physical locations and does not appear to contemplate digital environments.

'[80] I do not agree with this submission. Section 3 defines "public place" as having the same meaning as in s 2 of the Summary Offences Act 1981. That meaning is as follows:

public place means a place that, at any material time, is open to or is being used by the public, whether free or on payment of a charge, and whether any owner or occupier of the place is lawfully entitled to exclude or eject any person from that place; and includes any aircraft, hovercraft, ship or ferry or other vessel, train, or vehicle carrying or available to carry passengers for reward.

'[81] The definition is a wide one. It begins with "a place that, at any material time, is open to or is being used by the public". It expands upon that by saying it is a public place "whether free or on payment of a charge" and "whether any owner or occupier of the place is lawfully entitled to exclude or eject any person from that place". It goes on to provide that various modes of transport are included within the definition.

'[82] The internet is a place open to the public and used by the public. It is often free of charge although a fee is payable for access to some sites. As already discussed Parliament must have had the internet in mind at the time s 199A was enacted, given s 197(2A). If Parliament did not intend to capture false statements published on the internet then it could be expected to have made this clear, as it did when deciding upon the appropriate limits to the defence under s 197 in respect of websites.' *Peters v Electoral Commission* [2016] NZHC 394, [2016] 2 NZLR 690 at [40], [79]–[82], per Mallon J

PUBLIC POLICY

[For 9(1) Halsbury's Laws of England (4th Edn) (Reissue) paras 841–843 see now 22 Halsbury's Laws of England (5th Edn) (2012) paras 429–431.]

PUBLIC SECTOR AGENCY

Australia [Health Records and Information Privacy Act 2002 (NSW); review of conduct by a public sector agency; whether Centrelink was a public sector agency.] '[17] Although the applicant focused on the precise language of the definitions, it is convenient to note first some aspects of the structure which underlies them. First, the term "public sector agency" includes some juristic persons, some entities which the law would not recognise as persons and some individual persons. Any government department (which falls within the term "public sector agency") will operate by individual agents and officers: these might themselves be within the definition of "private sector person" although they will also be within the term "public sector official". The term "public sector official" is not expressly found in either of the other defined terms which constitute together an "organisation". The operative provision dealing with public sector officials is s 68, which prohibits disclosure of health information about individuals, otherwise than in the lawful exercise of official functions. The note to that section is in the following terms:

Note. Corrupt conduct by employees or agents of private sector persons in relation to health information may be dealt with under Part 4A (Corruptly receiving commissions and other corrupt practices) of the Crimes Act 1900.

'[18] The second structural factor is to be found within the definition of "private sector person". The chapeau to the definition excludes any of the following that is a public sector agency. That is not in itself remarkable: clearly there are natural persons and bodies corporate which fall within the definition of "public sector agency". However, it is significant that the final words of the definition of "private sector person" exclude any body which is "an agency" within the meaning of the Privacy Act (Cth). The definition thus expressly addresses the operation of the Privacy Act (Cth), and on an assumption that such agencies might fall within the definition of "private sector person" because they would not have been excluded as public sector agencies. In other words, the definition of "private sector person" assumes that a Commonwealth agency is not a "public sector agency" as defined, notwithstanding that the definition includes a "government department" and "a statutory body representing the Crown".

'[19] Two inferences can be drawn from these structural considerations. First, it is

necessary to address the language used bearing in mind the functions which the defined terms serve in the operative provisions. Thus, while public sector officials could fall within the definition of "private sector person" because they are all natural persons, it seems unlikely that that was intended. Second, the express assumption that Commonwealth agencies are not public sector agencies, contained in the definition of "private sector person", speaks strongly against any approach which would conclude that Commonwealth agencies could, on a literal reading, constitute public sector agencies.' *AGU v Commonwealth (No 2)* [2013] NSWCA 473, (2013) 306 ALR 42 at [17]–[19], per Basten JA

PUBLIC SECURITY

Imperative grounds of public security

[European Parliament and Council Directive (EC) 2004/38, art 28, transposed by the Immigration (European Economic Area) Regulations 2006, SI 2006/1003, reg 21. Regulation 21(4) provides that 'A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or (b) is under the age of 18, unless the relevant decision is necessary in his best interests, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989'. Whether an Italian national resident in UK and found guilty of manslaughter could be deported.] '[129] Pill LJ has set out the relevant passages of the two key CJEU decisions (of the Grand Chamber) in *Tsakouridis*'s case [*Land Baden-Württemberg v Tsakouridis* Case C-145/09 [2013] All ER (EC) 183, [2010] ECR I-11979, ECJ] and *P*'s case [*I v Oberbürgermeisterin der Stadt Remscheid* Case C-348/09 [2013] All ER (EC) 218] on the interpretation of art 28(3) of the Directive relating to the scope of the phrase "imperative grounds of public security". In *Tsakouridis*'s case the CJEU characterised the test to be applied at para 48 of its judgment: does the person concerned represent a "genuine and present threat to a fundamental interest of society or of the member state concerned". In the same paragraph the court noted that previous criminal convictions were not, in themselves, enough to satisfy the test; nor could a member state rely on general justifications

isolated from the facts of the case or on “considerations of general prevention”. Thus, the court held, the facts of the particular case have to be closely examined to see if the only way that those fundamental interests could be protected was by expulsion. In this regard, the tribunal considering whether or not there should be expulsion had to consider the length of time that the person had resided in the member state and any negative consequences expulsion may have for the person concerned: see para 49.

‘[130] On the basis of *Tsakouridis*’s case (para 49), I accept that there is a link between the length of time that the EEA national who is being considered for deportation has legally resided in the United Kingdom and whether it is appropriate to deport under reg 21(4)(a). I also accept that, in para 50 of *Tsakouridis*’s case, the CJEU emphasised that the tribunal deciding on whether to deport is entitled to take into account the personal conduct of the person concerned, the nature and extent of the crime committed (if any), the penalties that could have been imposed and those that were and also the possibility of re-offending. Against those factors, the tribunal has to balance “the risk of compromising the social rehabilitation of the Union citizen in the state in which he has become genuinely integrated, which... is not only in his interest but also in that of the European Union in general”.

‘[131] In *PT*’s case the CJEU emphasised (paras 19, 20) that the concept of “imperative grounds of public security” within art 28(3) of the Directive was “considerably stricter” than that of “serious grounds” within art 28(2). The former presupposed a threat to “public security” of a “particularly high degree of seriousness”. Member states were free to determine the requirements of public policy and security in accordance with their national needs, which can vary from state to state, but those requirements had to be “interpreted strictly” and were subject to control by the institutions of the EU (see para 23).

‘[132] In paras 24–28 of *PT*’s case, the court considered factors that must be taken into account when deciding whether offences such as those committed by I in that case were covered by the concept of “imperative grounds of public security”. The court said that criminal offences that are within the second subparagraph of art 83(1) of what is now called the Treaty on the Functioning of the European Union (TFEU—ie the amended Treaty of Rome) could reach the threshold of art 28(3) of the Directive, if the manner in which such an

offence had been committed disclosed “particularly serious” characteristics. The offences listed in that sub-paragraph have a cross-border dimension. Murder and manslaughter are not on the list. However, the court also stated that, to come within the scope of art 28(3), the crime of the particular individual must constitute a “particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population”. Thus, it seems to me, that the threat has to be more general than a threat to a particular individual.

...
‘[134] On the basis of my analysis above, I must therefore respectfully agree with Pill LJ that the 2007 tribunal plainly erred in law in its approach to “imperative grounds of public security” and the 2008 tribunal was correct so to conclude. The question for this court on this issue is whether the 2008 tribunal itself then erred in law in arriving at its decision that the circumstances of FV did not come within the phrase “imperative grounds of public security” in reg 21(4)(a) so that the [Secretary of State for the Home Department] was not entitled to deport him.

...
‘[137] I agree with Pill LJ that the 2008 tribunal made a finding of fact that FV’s circumstances do not fall within the ambit of “imperative grounds of public security”. If that finding had been based upon a wrong view of the scope of “imperative grounds of public security” then, clearly, this issue would have to be remitted to the [Upper Tribunal]. But, for the reasons I have attempted to give, I have concluded that there was no material error by the 2008 tribunal. In my view the 2008 tribunal’s conclusion that, whatever the true ambit of “imperative grounds of public security” might be, the facts of this case did not come within it, was correct.’ *FV (Italy) v Secretary of State for the Home Department* [2012] EWCA Civ 1199, [2013] 1 All ER 1180 at [129]–[132], [134], [137], per Aikens LJ

PUBLICATION—PUBLISH

[Public Order Act 1986, s 19: whether publication of racially inflammatory material on the internet was caught by s 19.] ‘[34] Before us Mr Davies put publication at the forefront of his argument submitting that if, as he contended was the case, there was no publication that was the end of the case. His argument is that one cannot have a publication without a publishee

(or rather sufficient publishees) to constitute a section of the public as required by s 19(3) of the 1986 Act. The judge noted that the only direct evidence of there being a publishee was that of the police officer, DC Brown, and that in one sense he was a self-publishee. In our view, however, the judge put it correctly when he said that what the Crown had to show was that there was publication to the public or a section of the public in that the material was generally accessible to all or available to or was placed before or offered to the public and that that could be proved by the evidence of one or more witnesses. This accords with the definition of publish and publication in the *Shorter Oxford Dictionary*. As Kennedy LJ put it in *R v Perrin* [2002] EWCA Crim 747, [2002] All ER (D) 359 (Mar), a case under the Obscene Publications Act 1959 ...), “the publication relied on in this case is the making available of preview material to any viewer who may chose to access it ...” The material in the present case was available to the public despite the fact that the evidence went no further than establishing that one police constable downloaded it. It is also to be noted that the natural meaning of publication, as applied by the judge gives effect to the two distinct offences under s 19 of publication and distribution of racially inflammatory material. It also fits neatly with the scheme of Pt III of the 1986 Act which creates a comprehensive range of offences in respect of racially inflammatory written material namely s 18—displaying, s 19—publishing or distributing and s 23—possession with a view to the material being displayed published distributed etc.

[35] The point that there cannot be publication without a publishee is in our judgment fundamentally misconceived. It is based on an irrelevant comparison with the law of libel. Libel is a tort or civil wrong where it is necessary for the claimant to prove that the words complained of were published of him and were defamatory of him. Nor does criminal libel assist, for reading out socially inflammatory words will amount to an offence under s 18(1). Further, the offences of displaying, distributing or publishing racially inflammatory written material do not require proof that anybody actually read or heard the material.’ *R v Sheppard* [2010] EWCA Crim 65, [2010] 2 All ER 850 at [34]–[35], per Scott Baker LJ

[Contempt of Court Act 1981, s11.] [41] Section 11 of the Contempt of Court Act 1981 is as follows:

“In any case where a court (having power to do so) allows a name or other matter to

be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld.”

... [44] The claimant accepts that Ouseley J had the power to hold part of the hearing in camera. Nonetheless he denies that s 11 conferred on the judge the power to do what he did. The argument turns on the meaning of “publication” in the 1981 Act. By s 19 this has the meaning assigned by s 2(1) which is as follows:

“The strict liability rule applies only in relation to publications, and for this purpose ‘publication’ includes any speech, writing, or other communication in whatever form, which is addressed to the public at large or any section of the public.”

[45] The strict liability rule is in turn concerned only with contempts tending to interfere with the course of justice.

[46] The claimant submits that a publication to the staff members of the Strasbourg Court is not properly to be described as a publication to the public or a section of the public. He submits, citing a paragraph from a leading text on the subject, *Arlidge, Eady and Smith on Contempt* (4th edn, 2011) para 4–54, that a distinction needs to be drawn between a public and a private communication, and this would be the latter. Moreover, it is relevant to consider the context of the communication and the way in which it is controlled. The claimant has indicated a willingness to co-operate in ensuring that special measures are put in place by the Strasbourg Court to ensure the security of sensitive material and there is every reason to suppose that the court would agree to this, even although they cannot be compelled to do so. Applying this approach, the only proper inference is that the lodging of a claim which includes the sensitive material is not a publication within the meaning of s 2(1).

[47] Ouseley J disagreed ...

[48] In essence the reasoning of Ouseley J is that the concept of “the public or a section of the public” must take its meaning from the purpose for which the order has been made. Where it is to protect an important matter of state security, the purpose would be wholly defeated if the communication were made even to just a single person. The section must

therefore be interpreted so as to treat a communication to even a single individual as a relevant publication within the meaning of the section.

‘[49] I have sympathy with that approach and see the force of it, but I confess that I have considerable difficulty with giving the words such an elastic interpretation, however desirable that may be. Moreover, even on the judge’s analysis, I would have thought it highly arguable that the Strasbourg Court would be *prima facie* entitled to receive the information if that is necessary in order to enable the claimant properly to advance his case, even if the domestic court considered that there were good reasons for requiring the information to be withheld in the particular circumstances. And if Parliament intended that the definition should be read in that very broad way, it used very curious and convoluted language to express that intention. I have difficulty with the notion that a private disclosure to one person can be said to constitute a publication even though I accept that in a case where security interests are at risk it might well frustrate the purpose of s 11 not to interpret it in that way. I suspect that the problem arises because when considering the concept of “publication” the draftsman had principally in mind contempts which involve an interference with the course of justice by improperly influencing the judge or, more significantly, the jury. Hence s 2(1)(a) is in terms defining the concept for that purpose. In that context, if a publication is not at least to a section of the public it is highly unlikely to come to the notice of a judge or jury and thereby interfere with justice. But where the purpose of the order is to protect some other interest, such as the names of blackmailers or national security, more limited communications including entirely private ones may need to be prohibited. The concept of “publication” is inapt; it is not the language of private conversation. But it is the concept used in s 11 and by s 19 it is given precisely the same meaning as for contempts involving an interference with the course of justice.

‘[50] However, even accepting that there must be a communication to at least a section of the public, I am inclined to think that the court staff and judges in Strasbourg as a body could properly be so described within the meaning of s 11.’ *R (on the application of Yam) v Central Criminal Court* [2014] EWHC 3558 (Admin), [2015] 3 All ER 354, DC, at [41], [44]–[50], per Elias LJ

New Zealand [Criminal Procedure Act 2011, s 200: order forbidding publication of the name, address, or occupation of a defendant.] ‘[2] ... In interpreting s 200 of the Criminal Procedure Act, did the Employment Court err at [47]–[49] of its judgment, in holding that, where an order forbidding publication of information has been made, it is not a “publication” to make disclosure of that information to that person’s employer where the employer has a genuine interest in that information? ...

‘[42] This legislative history demonstrates that the meaning of publication is flexible and depends on the circumstances.

‘[43] Second, the case law. In the judgment under appeal, the Employment Court cited several cases that held the word “publish” means publication to the world at large, or putting material “in a public arena”. That is not to say that word-of-mouth communications or communications to one or very few other persons cannot amount to publication. But what emerges from these few relevant cases is that “publication” refers to dissemination to the public at large rather than to persons with a genuine interest in conveying or receiving the information. Although he accepted there must be a “genuine interest” exception to the prohibition on publication, Mr Cranney submitted this must be limited to cases of necessity. He referred also to s 209 of the Criminal Procedure Act, which provides that information may be passed on to the police and certain persons involved in the justice process even where publication of it is prohibited. We do not accept the exception is so limited; it extends to permitting the passing on of information to persons who either need to know or have a genuine interest in knowing. And, here, the University did need to know about ASG’s offending in order to investigate properly his continuing ability to perform his role and in order to fulfil its obligations to its other employees and to its students. ...

‘[52] For all those reasons, we answer [the Issue]: “No”.’ *ASG v Hayne* [2016] NZCA 203, [2016] 3 NZLR 289 at [2], [42]–[43], [52], per Wild J

New Zealand [Electoral Act 1993, s 199A.] ‘[1] The issue before me is the meaning of “publishes” in s 199A of the Electoral Act 1993 (the Act). Under that section a person who “publishes” a statement of fact that he or she knows is false, with the intention of influencing the vote of any elector, commits an offence if they do so at any time on polling day or the two

days immediately preceding polling day.

‘[2] The issue arises in the context of the 2014 general election which was held on 20 September 2014. It concerns two political party advertisements which were available on the internet on 18 and 19 September 2014 and earlier. The particular issue is whether “publishes” means first published in the prohibited period (that is, on polling day or the two preceding days), or whether it includes advertisements which were first published earlier than the prohibited period but which continue to be published during that period.

...

‘[31] Counsel for Mr Peters submits that the words of s 199A are clear and unambiguous. A statement that is on the internet during the prohibited period (polling day and the two preceding days) is published and will breach s 199A if the other requirements of that section are met. He submits that the Electoral Commission’s interpretation requires the word “first” to be inserted in the section, so that it would read “first publishes”. He says there is no basis on which that should be done.

‘[32] The Electoral Commission refers to the dictionary definition of “publish”, namely “to make public or generally known; to declare openly; to announce.” It submits that the prohibited period adds a temporal qualification to this. Publication must occur on polling day or on the preceding two days. It says a natural reading of s 199A indicates the section only applies to publications first occurring within the prohibited period. The verbs constituting the *actus reus* require some positive action to be taken on the relevant days before an offence can be committed. The Commission says that simply leaving material on display in whatever medium — the passive continuation of a prior publication — could not be said to constitute publication on the relevant days.

‘[33] I start with the definition of “publish” provided in the Act itself. That definition is as follows:

3D Meaning of publish — In this Act, unless the context otherwise requires, **publish**, in relation to an election advertisement, means to bring to the notice of a person in any manner—

- (a) including—
 - (i) displaying on any medium;
 - (ii) distributing by any means;
 - (iii) delivering to an address;
 - (iv) leaving at a place;
 - (v) sending by post or otherwise;

- (vi) printing in a newspaper or other periodical;

- (vii) broadcasting by any means;

- (viii) disseminating by means of the Internet or any other electronic medium;

- (ix) storing electronically in a way that is accessible to the public;

- (x) incorporating in a device for use with a computer;

- (xi) inserting in a film or video; but

- (b) excluding addressing one or more persons face to face.

‘[34] The definition refers to “election advertisement”, which is also defined in the Act, whereas s 199A refers to “a statement of fact” which is intended to influence a voter. There is likely to be considerable overlap. The statements at issue here, for example, were electoral advertisements.

‘[35] In s 199A the present tense “publishes” is used. The offence is committed by a person who “publishes” the statement in the prohibited period. Applying the s 3D definition, in the case of a statement on the internet it is the act of:

bring[ing] to the notice of a person in any manner ... including ... displaying on any medium: ... disseminating by means of the Internet or any other electronic medium: storing electronically in a way that is accessible to the public:

‘[36] Applying that definition the question is whether a person is disseminating a statement by means of the internet on 18 and 19 September 2014 if they have placed the statement on the internet on an earlier date, and have left it there so that it remains on the internet on 18 and 19 September 2014? In my view it is the natural meaning of those words to answer that question “yes”. Similarly, is a person storing a statement electronically in a way that is accessible to the internet on 18 and 19 September 2014 if they put the statement on the internet on an earlier date and have not removed it by 18 and 19 September 2014. In my view it is the natural meaning of those words to answer that question “yes”.

‘[37] On the other hand it is also possible to read those words in the way the Electoral Commission contends. That is, a person is not disseminating a statement by means of the internet or storing the statement electronically on polling day, because the disseminating or storing occurred earlier. However that reading seems to me to be the less natural and ordinary one. When something is put on the internet it is

accessible to the public each moment that someone is accessing the internet. It is a continuing dissemination or storing of the statement until it is removed.

[38] The definition in s 3D is consistent with the dictionary definition of “publish”. In addition to the dictionary definition referred to by the Electoral Commission above, other dictionary definitions include:

1. v.t. Make generally known; declare or report openly; announce; disseminate (a creed or system); ... 6.b v.t. Make (a work, information, etc.) generally accessible or available; place before the public [New Shorter Oxford English Dictionary];
2. (tr) to announce formally or in public [Collins English Dictionary];
3. vt to issue to the public; ... to put into circulation [*The Chambers Dictionary*].

[39] Applying the dictionary definition, where a statement is on the internet on 18 and 19 September 2014, having been put there on an earlier date and not removed by 18 September 2014, the statement is generally accessible or available, and is placed before the public. It is a natural and ordinary meaning of “publishes” to say that when a person accesses the internet and reads the statement, the statement is brought to their notice at that time. On the other hand, I accept that it is possible to read “publishes” as meaning the time at which the statement is put on the internet (that is, a single publication). Which meaning is to be preferred must be determined in light of the purpose of the section, as may be derived from its immediate and general legislative context and objectives.

...

[77] The mischief of a republication in the prohibited period is that it brings the false statement to the notice of members of the public for a second time. It may not be the same members of the public that see or hear the republished false statement as those who saw or heard the false statement the first time. Nor may they be the same members of the public who heard any response to the first publication of the false statement from the candidate or party which was the subject of the false statement. Each time a false statement is brought to the notice of a member of the public the harm to a fair election, which s 199A is intended to address, arises. This is the same with a continuing publication. The harm continues to arise for so long as the false statement continues to be brought to the notice of the public.

[78] I therefore conclude that the legislative

history does not support the Electoral Commission’s view that s 199A applies only to statements that are first published in the prohibited period.’ *Peters v Electoral Commission* [2016] NZHC 394, [2016] 2 NZLR 690 at [1]–[2], [31]–[39], [77]–[78], per Mallon J

Defamation

[For 28 Halsbury’s Laws of England (4th Edn) (Reissue) paras 62, 79 see now 32 Halsbury’s Laws of England (5th Edn) (2012) paras 562, 579.]

PUBLISHER

[Whether an internet search engine was a publisher in relation to alleged defamatory material on the a website.] [48] I turn to what seems to me to be the central point in the present application; namely, whether the third defendant is to be regarded as a publisher of the words complained of at all. The matter is so far undecided in any judicial authority and the statutory wording of the [Defamation Act 1996] does nothing to assist. It is necessary to see how the relatively recent concept of a search engine can be made to fit into the traditional legal framework (unless and until specific legislation is introduced in this jurisdiction).

[49] It has been recognised, at common law, that for a person to be fixed with responsibility for publishing defamatory words, there needs to be present a mental element. I summarised the position in *Bunt v Tilley* [[2006] 3 All ER 336, [2007] 1 WLR 1243]:

“[21] In determining responsibility for publication in the context of the law of defamation, it seems to me to be important to focus on what the person did, or failed to do, in the chain of communication. It is clear that the state of a defendant’s knowledge can be an important factor. If a person knowingly permits another to communicate information which is defamatory, when there would be an opportunity to prevent the publication, there would seem to be no reason in principle why liability should not accrue. So too, if the true position were that the applicants had been (in the claimant’s words) responsible for ‘corporate sponsorship and approval of their illegal activities’.

“[22] I have little doubt, however, that to impose legal responsibility upon anyone under the common law for the publication of words it is essential to demonstrate a

degree of awareness or at least an assumption of general responsibility, such as has long been recognised in the context of editorial responsibility. As Lord Morris commented in *McLeod v St Aubyn* [1899] AC 549 at 562:

‘A printer and publisher intends to publish, and so intending cannot plead as a justification that he did not know the contents. The appellant in this case never intended to publish.

In that case the relevant publication consisted in handing over an unread copy of a newspaper for return the following day. It was held that there was no sufficient degree of awareness or intention to impose legal responsibility for that ‘publication’.

“[23] Of course, to be liable for a defamatory publication it is not always necessary to be aware of the defamatory content, still less of its legal significance. Editors and publishers are often fixed with responsibility notwithstanding such lack of knowledge. On the other hand, for a person to be held responsible there must be knowing involvement in the process of publication of *the relevant words*. It is not enough that a person merely plays a passive instrumental role in the process. (See also in this context *Emmens v Pottle* (1885) 16 QBD 354 at 357 per Lord Esher MR.)”

The passage to which I referred in *Emmens v Pottle* concerned defendants who were said by Lord Esher MR to have been *prima facie* liable, on the basis that they had handed to other people the newspaper in which there was a libel on the plaintiff. Lord Esher MR continued:

“I am inclined to think that this called upon the defendants to shew some circumstances which absolve them from liability, not by way of privilege, but facts which shew that they did not publish the libel. We must consider what the position of the defendants was. The proprietor of a newspaper, who publishes the paper by his servants, is the publisher of it, and he is liable for the acts of his servants. The printer of the paper prints it by his servants, and therefore he is liable for a libel contained in it. But the defendants did not compose the libel on the plaintiff, they did not write it or print it; they only disseminated that which contained the libel. The question is whether, as such disseminators, they

published the libel? If they had known what was in the paper, whether they were paid for circulating it or not, they would have published the libel, and would have been liable for so doing. That, I think, cannot be doubted. But here, upon the findings of the jury, we must take it that the defendants did not know that the paper contained a libel. I am not prepared to say that it would be sufficient for them to shew that they did not know of the particular libel. But the findings of the jury make it clear that the defendants did not publish the libel. Taking the view of the jury to be right, that the defendants did not know that the paper was likely to contain a libel, and, still more, that they ought not to have known this, which must mean, that they ought not to have known it, having used reasonable care—the case is reduced to this, that the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain a libel. That being so, I think the defendants are not liable for the libel. If they were liable, the result would be that every common carrier who carries a newspaper which contains a libel would be liable for it, even if the paper were one of which every man in England would say that it was not likely to contain a libel. To my mind the mere statement of such a result shews that the proposition from which it flows is unreasonable and unjust. The question does not depend on any statute, but on the common law, and, in my opinion, any proposition the result of which would be to shew that the Common Law of England is wholly unreasonable and unjust, cannot be part of the Common Law of England.”

‘[50] When a search is carried out by a web user via the Google search engine it is clear, from what I have said already about its function, that there is no human input from the third defendant. None of its officers or employees takes any part in the search. It is performed automatically in accordance with computer programs.

‘[51] When a snippet is thrown up on the user’s screen in response to his search, it points him in the direction of an entry somewhere on the web that corresponds, to a greater or lesser extent, to the search terms he has typed in. It is for him to access or not, as he chooses. It is fundamentally important to have in mind that the third defendant has no role to play in formulating the search terms. Accordingly, it

could not prevent the snippet appearing in response to the user's request unless it has taken some positive step in advance. There being no input from the third defendant, therefore, on the scenario I have so far posited, it cannot be characterised as a publisher at common law. It has not authorised or caused the snippet to appear on the user's screen in any meaningful sense. It has merely, by the provision of its search service, played the role of a facilitator.

[52] Analogies are not always helpful, but there will often be resort to analogy when the common law has to be applied to new and unfamiliar concepts. Here, an analogy may be drawn perhaps with a search carried out in a large conventional library. If a scholar wishes to check for references to his research topic, he may well consult the library catalogue. On doing so, he may find that there are some potentially relevant books in one of the bays and make his way there to see whether he can make use of the content. It is hardly realistic to attribute responsibility for the content of those books to the compiler(s) of the catalogue. On the other hand, if the compilers have made an effort to be more informative, by quoting brief snippets from the book, the position may be different. Suppose the catalogue records that a particular book contains allegations of corruption against a living politician, or perhaps it goes further and spells out a particular activity, such as 'flipping' homes to avoid capital gains tax, then there could be legal liability on the part of the compiler under the "repetition rule": see eg *Gatley on Libel and Slander* (11th edn, 2008) paras 11.4 and 32.8.

[53] No doubt it would be said here too, by analogy, that the third defendant should be liable for repeating the "scam" allegations against the claimant. Yet, whereas a compiler of a conventional library catalogue will consciously at some point have chosen the wording of any "snippet" or summary included, that is not so in the case of a search engine. There will have been no intervention on the part of any human agent. It has all been done by the web-crawling "robots".

[54] The next question is whether the legal position is, or should be, any different once the third defendant has been informed of the defamatory content of a "snippet" thrown up by the search engine. In the circumstances before *Morland J*, in *Godfrey v Demon Internet Ltd* [1999] 4 All ER 342, [2001] QB 201, the acquisition of knowledge was clearly regarded as critical. That is largely because the law recognises that a person can become liable for the publication of a libel by acquiescence; that

is to say, by permitting publication to continue when he or she has the power to prevent it. As I have said, someone hosting a website will generally be able to remove material that is legally objectionable. If this is not done, then there may be liability on the basis of authorisation or acquiescence.

[55] A search engine, however, is a different kind of internet intermediary. It is not possible to draw a complete analogy with a website host. One cannot merely press a button to ensure that the offending words will never reappear on a Google search snippet: there is no control over the search terms typed in by future users. If the words are thrown up in response to a future search, it would by no means follow that the third defendant has authorised or acquiesced in that process.

[56] There are some steps that the third defendant can take and they have been explored in evidence in the context of what has been described as its "take down" policy. There is a degree of international recognition that the operators of search engines should put in place such a system (which could obviously either be on a voluntary basis or put upon a statutory footing) to take account of legitimate complaints about legally objectionable material. It is by no means easy to arrive at an overall conclusion that is satisfactory from all points of view. In particular, the material may be objectionable under the domestic law of one jurisdiction while being regarded as legitimate in others.

[57] In this case, the evidence shows that Google has taken steps to ensure that certain identified URLs are blocked, in the sense that when web-crawling takes place, the content of such URLs will not be displayed in response to Google searches carried out on Google.co.uk. This has now happened in relation to the "scam" material on many occasions. But I am told that the third defendant needs to have specific URLs identified and is not in a position to put in place a more effective block on the specific words complained of without, at the same time, blocking a huge amount of other material which might contain some of the individual words comprising the offending snippet.

[58] It may well be that the third defendant's "notice and take down" procedure has not operated as rapidly as Mr Browne and his client would wish, but it does not follow as a matter of law that between notification and "take down" the third defendant becomes or remains liable as a publisher of the offending material. While efforts are being made to achieve a "take down" in relation a particular

URL, it is hardly possible to fix the third defendant with liability on the basis of authorisation, approval or acquiescence.

[59] These practical difficulties also impact upon the feasibility and effectiveness of injunctive relief. That is obviously a separate issue from that of responsibility for publication, but it is another illustration of the powerlessness of the third defendant to control what is thrown up by Google searches. ...

[62] The third defendant has blocked access from www.google.co.uk to the specific URLs identified on behalf of the claimant. This would not stop somebody, however, from searching on www.google.com. Nor would it prevent a third party who is responsible for the content of the site in question from moving it to a different web page, while giving it a different URL and avoiding the block. Thus, submits Mr White, it is practically impossible, and certainly disproportionate, to expect the third defendant to embark on a wild goose chase in order to determine where the words complained of, or some of them, might from time to time 'pop up' on the web.

[63] On the other hand, the evidence suggests that it would be possible for the first defendant to alter the code on its own website, either for the purpose of ensuring that the offending search results are not picked up by search engines generally or, of course, to remove the snippet from its own website. It is submitted, accordingly, that if the claimant is to have an effective remedy it must lie against the first defendant. For the reasons identified, an injunction against the third defendant would be a hopelessly inadequate substitute.

[64] Against this background, including the steps so far taken by the third defendant to block the identified URLs, I believe it is unrealistic to attribute responsibility for publication to the third defendant, whether on the basis of authorship or acquiescence. There is no doubt room for debate as to what further blocking steps it would be open for it to take, or how effective they might be, but that does not seem to me to affect my overall conclusion on liability. This decision is quite independent of any defence provided by s 1(1) of the 1996 Act, since if a person is not properly to be categorised as the publisher at common law, there is no need of a defence: see eg *Bunt v Tilley* [2006] 3 All ER 336 at [37], [2007] 1 WLR 1243. *Metropolitan International Schools Ltd (t/a SkillsTrain and/or Train2Game) v Designtech Corp (t/a Digital Trends)* [2009] EWHC 1765 (QB),

[2010] 3 All ER 548 at [48]–[59], [62]–[64], per Eady J

PUFFING

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 42 see now 76 Halsbury's Laws of England (5th Edn) (2013) paras 713–714.]

PUNISHED ... AGAIN

Canada [Canadian Charter of Rights and Freedoms, s 11(h): right not to be "punished ... again" for an offence; retrospective abolition of accelerated parole by Abolition of Early Parole Act, SC 2011, c 11, s 10(1).] '1. In this appeal, the Court revisits the definition of the term "punishment" in the context of s. 11(h) of the *Canadian Charter of Rights and Freedoms*. The criminal law distinguishes between the sentence imposed on an offender and the conditions of the sentence. Changes to the conditions of a sentence, such as eligibility for parole, do not alter the sentence itself. This Court must decide whether retrospective changes to the conditions of a sentence may in some circumstances constitute "punishment" in violation of the s. 11(h) right not to be punished twice for the same offence.

'9. This appeal affords the Court the opportunity to revisit the purpose of s. 11(h) and to define its scope. For the reasons that follow, I find that s. 11(h) applies to the respondents' claim. The retrospective application of delayed day parole eligibility violated the respondents' s. 11(h) right not to be "punished ... again", and that violation was not justified under s. 1 of the *Charter*.

'28. The respondents submit that the retrospective application provision, s. 10(1) of the *AEPA*, violates their right under s. 11(h) of the *Charter* not to be "punished ... again". They urge a broad reading of the term "punishment" that is not limited to the duplication of criminal or quasi-criminal proceedings. In their view, the retrospective application of the repeal, which eliminated the eligibility for early day parole of offenders who had already been sentenced, was punitive in its effect. The respondents also argue, parting ways with the Court of Appeal on this point, that it was punitive in its purpose.

'29. The Crown urges a narrow, textual reading of s. 11(h) that would exclude the elimination of early day parole eligibility from the definition of "punishment". It argues that the

retrospective application of the repeal was adopted in furtherance of the goals of rehabilitation, reintegration, public safety and confidence in the administration of justice, not that of punishment. The effect of that application reflects this non-punitive purpose. In this Court, the Crown further argues that s. 11(h) is not engaged, because being “punished ... again” requires a duplication of proceedings that are criminal in nature in respect of the same matter.

...
 ‘36. In my view, it is not necessary to resort to a different *Charter* provision. The language of s. 11(h), the academic literature and this Court’s jurisprudence support a reading of s. 11(h) according to which the right not to be “punished ... again” applies where an offender has been sentenced, even if no separate proceeding has taken place.

‘37. Let me begin by addressing the plain meaning of s. 11(h). The introductory words to s. 11 indicate that the subject of the entire section is a “person charged with an offence”. Paragraph (h) then provides that this person has the right, “if finally found guilty and punished for the offence, not to be tried or punished for it again”. The disjunctive language of the words “tried or punished” clearly indicates that s. 11(h)’s protection against additional punishment is independent of its protection against being tried again. In other words, as Stuart [Don Stuart, *Charter Justice in Canadian Criminal Law*, 5th ed. Toronto: Carswell, 2010] notes in respect of double jeopardy more generally, the protection applies to both the harassment of multiple trials and the harassment of additional punishment (p. 464). The conjunctive language of the words “found guilty and punished” further accentuates the disjunctive language of “tried or punished”. It is thus clear from the plain meaning of the words that either being tried again *or* being punished again is sufficient to engage s. 11(h).

‘38. The plain meaning of s. 11(h) is supported by common sense. It would be far more questionable to punish someone without a proceeding than to punish him or her with a proceeding. The purpose of s. 11(h) cannot be to protect against punishment imposed following a trial in which due process has been observed, but not against punishment imposed without the protections afforded by a trial.

...
 ‘43. The scope of “punishment” in the context of s. 11(h) has expanded over the years as new cases have pushed the limits of old definitions. It has always been clear that

criminal or quasi-criminal proceedings trigger the protection against double jeopardy. Thus, a second criminal or quasi-criminal charge with respect to the same act engages s. 11(h) even if the consequence is slight.

...
 ‘60. I will not articulate a formula that would apply to every case, because such a formula is not needed to resolve this appeal and the effect of every retrospective change will be context-specific. That said, the dominant consideration in each case will in my view be the extent to which an offender’s settled expectation of liberty has been thwarted by retrospective legislative action. It is the retrospective frustration of an expectation of liberty that constitutes punishment. At one extreme, a retrospective change to the rules governing parole eligibility that has the effect of automatically lengthening the offender’s period of incarceration constitutes additional punishment contrary to s. 11(h) of the *Charter*. A change that so categorically thwarts the expectation of liberty of an offender who has already been sentenced qualifies as one of the clearest of cases of a retrospective change that constitutes double punishment in the context of s. 11(h).

...
 ‘62. The fact that delayed parole eligibility can be imposed in the sentencing process confirms my view that retrospectively imposing delayed parole eligibility on offenders who have already been sentenced constitutes punishment. Where Parliament imposes through retrospective legislation a consequence that sentencing judges may themselves impose for the purpose of punishment, the s. 11(h) protection against double punishment applies.

...
 ‘70. The effect of the retrospective application provision, s. 10(1) of the *AEPA*, was to deprive the three respondents of the possibility of being considered for early day parole, which was an expectation they had had at the time they were sentenced. This amounts to a lengthening of the minimum period of incarceration for persons—like the respondents—who would have qualified for early day parole under the *APR* system.

‘71. In my view, s. 10(1) had the effect of punishing the respondents again. It retrospectively imposed a delay in day parole eligibility in relation to offences for which they had already been tried and punished. The effect—extended incarceration—was automatic and without regard to individual circumstances.’
Canada (Attorney General) v Whaling 2014

SCC 20, [2014] 1 SCR 392 at paras 1, 9, 28–29, 36–38, 43, 60, 62, 70–71, per Wagner J

PUNISHMENT

[For 11(3) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 3 see now 25 Halsbury's Laws of England (5th Edn) (2016) para 3.]

Canada [Canadian Charter of Rights and Freedoms, s 11(i): if the punishment for an offence is varied after a person commits the offence, but before sentencing, the person is entitled to the benefit of the lesser punishment.] '3. When offenders are convicted of certain sexual offences against a person under the age of 16 years, s 161(1) of the *Criminal Code*, RSC 1985, c C-46, gives sentencing judges the discretion to prohibit them from engaging in a variety of everyday conduct upon their release into the community, subject to any conditions or exemptions the judge considers appropriate. In 2012, Parliament expanded the scope of s 161(1), empowering sentencing judges to prohibit sexual offenders from having any contact with a person under 16 years of age (s 161(1)(c)) or from using the Internet or other digital network (s 161(1)(d)).

'4. In doing so, Parliament intended to give sentencing judges the discretion to impose the expanded prohibition measures on all offenders, even those who offended *before* the amendments came into force. In other words, Parliament intended the 2012 amendments to operate retrospectively.

'5. The issue in this appeal is whether the *retrospective* operation of the 2012 amendments to s 161(1)(c) and (d) of the *Criminal Code* is constitutional. This issue engages two subsidiary questions. First, do the prohibition measures contained in s 161(1)(c) and (d) constitute "punishment" such that their retrospective operation limits s 11(i) of the *Charter*? Second, if so, is the limit a reasonable one as can be demonstrably justified under s 1 of the *Charter*? The application of these expanded prohibition measures to offenders who committed their offences *after* the amendments came into force is not at issue.

'6. I conclude that the 2012 amendments to s 161(1)(c) and (d) qualify as punishment based on both the objective and impact of the prohibitions. The retrospective imposition of these prohibitions therefore limits s 11(i) of the *Charter*.

...

'41. Thus, I would restate the test for punishment as follows in order to carve out a clearer and more meaningful role for the consideration of the impact of a sanction: a measure constitutes punishment if (1) it is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either (2) it is imposed in furtherance of the purpose and principles of sentencing, or (3) it has a significant impact on an offender's liberty or security interests.

...

'49. Applying the reformulated test, I conclude that the 2012 amendments constitute punishment.' *R v KRJ* [2016] SCJ No 31, 2016 SCC 31 at paras 3–6, 41, 49, per Karakatsanis J

New Zealand [Bill of Rights 1688, art 10; claim that Director-General of Social Welfare was liable for breach of fiduciary duty and for cruel and unusual punishment under art 10; whether 'punishment' is limited to judicially imposed punishment.] '[31] First, the plaintiff must establish that the ill treatment he alleges he was subjected to was "punishment" within the meaning of art 10.

'[32] The two cases in point are squarely against the plaintiff. The first case is *R v Shand* (1976) 70 DLR (3d) 395, a decision of the Ontario Court of Appeal. The issue was whether the minimum sentence of seven years' imprisonment for importing a narcotic was a "cruel and unusual" punishment within the meaning of s 2(b) of the Canadian Bill of Rights RSC 1970 App III. After noting that art 10 of the 1688 Bill of Rights was the genesis of s 2(b), the Court at 402 remarked:

"The Bill was directed at the Courts, not at Parliament ..."

'[33] That art 10 was directed at judicially imposed penalties emerges also from American case law. There is a substantial body of it, since the Eighth Amendment to the Constitution of the United States of America adopted the precise language of art 10. The case fastened upon by counsel is *Ingraham v Wright* 430 US 651 (1977), a decision of the United States Supreme Court. In issue was whether corporal punishment in a junior high school in Florida violated the students' rights under the Eighth Amendment. The students had been "paddled" — spanked on the buttocks with a wooden paddle. Delivering the opinion for the majority of five Judges, Powell J said this at 664:

"The Eighth Amendment provides: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted'. Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government. An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes. We adhere to this longstanding limitation and hold that the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools."

"[34] The minority of four Judges considered the Eighth Amendment encompassed the school corporal punishment in question, but they nevertheless limited the scope of the amendment to punishment. The judgment of White J for the minority contains this passage at 686:

"The Court would have us believe from this fact that there is a recognised distinction between criminal and noncriminal punishment for purposes of the Eighth Amendment. This is plainly wrong. 'Even a clear legislative classification of a statute as non-penal would not alter the fundamental nature of a plainly penal statute.' *Trop v Dulles* 356 US 86, 95 (1958), (plurality opinion). The relevant inquiry is not whether the offense for which a punishment is inflicted has been labelled as criminal, but whether the purpose of the deprivation is among those ordinarily associated with punishment, such as retribution, rehabilitation, or deterrence. *Id* at 96. cf *Kennedy v Mendoza-Martinez* 372 US 144 (1963)."

If this purposive approach were followed in the present case, it would be clear that spanking in the Florida public schools is punishment within the meaning of the Eighth Amendment. The District Court found that "corporal punishment is one of a variety of measures employed in the school system for the correction of pupil behaviour and the preservation of order." App 146. Behaviour correction and preservation of order are purposes ordinarily associated with punishment.

"[35] Mr Elliott referred also to the decision

of the Canadian Supreme Court in *Rodriguez v British Columbia (Attorney General)* [1993] 3 SCR 519. The issue there was whether the provision in Canada's Criminal Code prohibiting assistance to commit suicide was unconstitutional. Ms Rodriguez contended it breached, amongst other provisions, s 12 of the Canadian Charter of Rights and Freedoms:

"12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

"[36] Ms Rodriguez was dying of amyotrophic lateral sclerosis. She wanted a physician to set up a technological means whereby she could end her own life when she ceased to have any further capacity to enjoy it. She argued that s 12 of the Charter gave her that right. Section 12 (mirrored in s 9 of the BORA) provides:

"12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

"[37] The passage Mr Elliott focused on is this one in the judgment of Sopinka J at 611:

"For the purposes of the present analysis, I am prepared to assume that 'treatment' within the meaning of s 12 may include that imposed by the state in contexts other than that of a penal or quasi-penal nature."

"[38] I do not see the relevance of this; the present case concerns alleged punishment, not treatment.

"[39] I respectfully align myself with the two cases I have referred to which hold that art 10 is directed at judicially imposed punishments. The historical context of the 1688 Bill of Rights reinforces this. It is explained at 664-665 in the majority's judgment in *Ingraham v Wright* thus:

"The history of the Eighth Amendment is well known. The text was taken, almost verbatim, from a provision of the Virginia Declaration of Rights of 1776, which in turn derived from the English Bill of Rights of 1689. The English version, adopted after the accession of William and Mary, was intended to curb the excesses of English judges under the reign of James II. Historians have viewed the English provision as a reaction either to the 'Bloody Assize,' the treason trials conducted by Chief Justice Jeffreys in 1685 after the abortive rebellion of the Duke of Monmouth, or to the perjury prosecution of Titus Oates in the same year. In either case, the exclusive concern of the English version was the conduct of judges in enforcing the criminal law."

‘[40] Should I hold that the 1688 Bill of Rights applies only to judicially imposed penalties Mr Elliott contended it nevertheless encompassed the plaintiff because:

- (a) he was placed under the guardianship of the Director-General of the Department of Social Welfare by a judicial order; and
- (b) the living conditions and residences “enjoyed” by the plaintiff at Melville and at Hokio so closely resembled a prison as to be akin to a penal sentence or quasi-penal in nature: the resident compulsorily resided in these institutions, including being required to live in the secure unit on occasion.

‘[41] I reject this submission. Guardianship is not a “punishment”. Even if tough living conditions at Melville and/or Hokio could be termed a “punishment”, they were not judicially imposed.

‘[42] I hold the ill-treatment alleged by the plaintiff was not a “punishment” in terms of art 10 of the Bill of Rights 1688.’ *Marsh v Attorney-General* [2010] 2 NZLR 683 at [31]–[42], per Wild J

PURCHASE PRICE OF ACCOMMODATION

Canada ‘2. The appeal turns on the question of whether hotel charges for daily housekeeping services are part of the “purchase price of accommodation”, which is subject to hotel room tax pursuant to the HRTA [Hotel Room Tax Act, RSBC 1999, c 207]. If not, then the hotel operator will be successful on this appeal in overturning the tax assessment against it. If the cost of these services is part of the “purchase price of accommodation”, then the tax assessment against the hotel operator will stand and the petition will be dismissed.

‘60. In summary, ... I conclude that the nature of the services for which the Budget Inn charged an extra fee—housekeeping services—are ordinarily understood, as a matter of common sense and as borne out by the practice of the guests of the Budget Inn, as being an inherent characteristic of the use of a hotel room as accommodation. Housekeeping services are a standard hotel room amenity, expected by purchasers of hotel rooms as part of the accommodation.

‘61. I am not persuaded that the Budget Inn offered different options to weekly guests for the frequency of housekeeping services, but

even if it did, the option applied throughout the guest’s stay and use of the hotel room. Regardless of whether the charge was for daily or weekly housekeeping services, the charge was part of the “purchase price” of that room.

‘62. I conclude that the cost of daily housekeeping services charged by the Budget Inn to weekly guests was part of the “purchase price of accommodation” within the meaning of the HRTA. This means that the total weekly room charge of \$169.25 was the “purchase price of accommodation”. ...’ *338186 BC Ltd (cob Budget Inn—Patricia Hotel) v British Columbia* [2010] BCJ No 306, 2010 BCSC 231, [2010] 4 CTC 57 at paras 2, 60–62, per S A Griffin J

PURPOSE

For all purposes

Australia [Easement granted ‘to go, pass and repass at all times and for all purposes with vehicles to and from the said lots benefited or any such part thereof across the lots burdened’.] ‘[19] In its submissions, Westfield stressed the significance for the construction of the instrument of the phrase therein “for all purposes”. This was said to be plainly apt to encompass the purpose of accessing Skygarden, the dominant tenement, and from there travelling to some further property.

‘[20] The phrase “for all purposes” appears also in the statutory formulation which has been included in the Conveyancing Act since the commencement of the 1930 Act [Conveyancing (Amendment) Act 1930 (NSW)]. Before 1930 it had appeared in easements the construction of whose terms had come before the courts.

‘[21] One such case was *Thorpe v Brumfitt* [(1873) LR 8 Ch App 650]. There, a grant of a right of way “for all purposes” across the servient tenement did not plainly identify any dominant tenement. Did the grant fail as being an attempt to create an easement in gross? As a matter of construction James LJ and Mellish LJ avoided that result. Mellish LJ construed the phrase “for all purposes” as identifying all purposes which made it necessary to pass between the servient tenement and a triangular parcel of land indicated in the conveyance creating the easement. This decision is significant in two respects. First, it illustrates the importance of the legislative requirement imposed in New South Wales by s 88 of the Conveyancing Act (also introduced by the 1930 Act) for identification of the lands comprising the dominant and servient tenements. Second, it

emphasises that the “purposes”, extensive as they may be, must confer what the law regards as a benefit on the dominant tenement, by making it “a better and more convenient property”; this is something more than a “personal advantage” to the owner of the tenement for the time being.

[22] More recently, in *Peacock v Custins* [[2002] 1 WLR 1815; [2001] 2 All ER 827] the English Court of Appeal considered the phrase “a right of way at all times and for all purposes” in favour of the dominant tenement (the red land) the owners of which also owned adjacent land (the blue land). After reviewing many authorities, including *Harris v Flower* [(1904) 74 LJ Ch 127], Schiemann LJ (delivering the judgment of the court also comprising Mance LJ and Smith J) concluded that the terms of the grant did not permit the extended user in favour of the blue land and, further, that this user could not reasonably be described as “ancillary” to the use of the red land.

[23] The reference in *Peacock* to user which could be described as “ancillary” to the grant appears to have identified the line of cases holding that, on general principles of conveyancing, the grant of an easement carries with it those ancillary rights which are necessary for the enjoyment of the rights expressly granted. For example, Warner J held in *National Trust for Places of Historic Interest or Natural Beauty v White* [[1987] 1 WLR 907] that use by visitors of a car park adjacent to an Iron Age hill fort in Wiltshire known as the Figsbury Ring was an “ancillary” user in the required sense. However, it is not necessary for the enjoyment of the rights granted for access to the Skygarden land that those using that access be at liberty to pass beyond Skygarden to other land.

[24] It should be added that if the construction of the instrument urged by Westfield were accepted, and the grant extended to permit use of Glasshouse to pass across Skygarden to other parcels of land, then a further question would arise. This would be whether a grant in those terms would be appurtenant to Skygarden in the sense of the authorities, or be but a personal advantage accruing to Westfield as the present owner of Skygarden. It is unnecessary to determine such a question. This is because the easement, upon the proper construction of the terms of the grant, does not extend to user of the type for which Westfield contends.

[25] The most recent edition of *Gale on Easements* [17th ed, Sweet & Maxwell, London, 2002, p 334 [9–27]] states:

The general rule is that a right of way may only be used for gaining access to the land identified as the dominant tenement in the grant.

There follows a detailed analysis of the English authorities, which begins with remarks to that effect by Romer LJ in *Harris* [at 132].

[26] The decision in that case has been much discussed in later authorities both in England and Australia, a number of which were reviewed by Brereton J at first instance. His Honour concluded that *Harris* stands for the proposition that:

... use of an easement cannot be extended, beyond the scope of the grant, to impose a burden greater than that which the servient owner agreed to accept.

[27] That statement accords with the following analysis of *Harris* which is offered in *Gale on Easements* [p 470 [12–79]] and which we would adopt:

In *Harris v Flower & Sons* the excessive user by which it was attempted to impose an additional burden on the servient tenement consisted in the use of a right of way for obtaining access to buildings erected partly on the land to which the right of way was appurtenant and partly on other land. A claim was put forward on behalf of the plaintiffs that the right of way had been abandoned, on the ground that, as it was practically impossible to separate the lawful from the excessive user, the right of way could not be used at all. This contention failed, however, the court holding that there had been no abandonment, but that the user of the way for access to the buildings so far as they were situate upon land to which the right of way was not appurtenant was in excess of the rights of the defendants, and a declaration was made accordingly, with liberty to apply. [Footnote omitted.]

[28] However, Brereton J went on to hold:

[62] ... It is not in excess of the grant to use a right of way to access the dominant tenement for those purposes that were contemplated at the time of the grant.

The difficulty is in the phrase “that were contemplated”. Contemplated by whom? By what evidentiary means is this contemplation later to be revealed to the court? How do these steps accommodate the Torrens system? To these matters it will be necessary to return.

[29] At this stage in the reasons it is important to remark that care certainly must be taken lest the statement in *Gale on Easements* set out above be elevated to the status of a “rule”, whether of construction or substantive law. What the statement does provide is a starting point for consideration of the terms of any particular grant. The statement is consistent with an understanding that the broader the right of access to the dominant tenement granted by the easement, the greater the burden upon the proprietary rights in the servient tenement.

[30] We return to the terms of the easement. The access is to go, pass and repass to and from Skygarden and across Glasshouse. The terms do not speak of going, passing and repassing to and from and across Skygarden, and across Glasshouse. The term “for all purposes” encompasses all ends sought to be achieved by those utilising the easement in accordance with its terms.’ *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2007] HCA 45, (2007) 239 ALR 75, BC200708402 at [19]–[30], per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ

For the purposes of the mediation

New Zealand [Under the Employment Relations Act 2000, s 148, any statement, admission, or document created or made ‘for the purposes of the mediation’ must be kept confidential.] [21] The [Employment] Court concluded that Mr Jesudhass was entitled to adduce evidence to establish that communications between the parties at mediation, other than those made in an attempt to resolve his employment relationship problem, should be admissible at the hearing of his personal grievance. Whether or not the communications adduced were “for the purposes of the mediation” was a matter for the trial judge to determine, and the onus would be on the plaintiff to satisfy the judge that the evidence should be admitted.

[22] Mr Gilkison submitted that the Employment Court misinterpreted the intention of Parliament in enacting s 148 of the Employment Relations Act. Counsel contended that the words of the section mean what they say, and that the legislative intention was to remove, rather than preserve, the limited exceptions to the principle of confidentiality in mediation created by *Crummer* [*v Benchmark Supplies Ltd* [2000] 2 ERNZ 22].

[27] For the respondent, Mr Corkill QC

submitted that the Employment Court’s interpretation was correct. To promote the purposes of the Act as a whole and for reasons of public policy, s 148(1) should be construed as protecting only communications for the “proper” purposes of a mediation. Because it is not proper to act illegally, any evidence of illegal conduct (whether criminal or otherwise) is outside the scope of s 148 and therefore not protected by it.

[31] We do not see any ambiguity in the words of s 148(1). All communications “for the purposes of the mediation” attract the statutory confidentiality, except possibly ... where public policy dictates otherwise.

[32] In accordance with the ordinary meaning of the word “purpose”, that of the intended object of an activity, a communication (written or oral) is protected unless it is created or made independently of the mediation.

[33] Documents which are prepared for use in or in connection with a mediation therefore come within the ambit of s 148(1). So do statements and submissions made orally at the mediation, or a record thereof. Only documents which come into existence independently of the mediation are excluded.

[34] There is nothing surprising in this conclusion. To the contrary, it reflects the desirability of encouraging the parties to a mediation to speak freely and frankly, safe in the knowledge that their words cannot be used against them in subsequent litigation if the dispute does not prove capable of resolution at mediation.

[37] Section 148(6)(a) provides that nothing in s 148 prevents the discovery or affects the admissibility of evidence which exists “independently of the mediation process”. This wording strongly supports the interpretation of s 148(1) which we are adopting. The obvious implication of s 148(6)(a) is that communications at a mediation which do not exist independently of it will not be discoverable or admissible. There is no reason why such evidence should not be discoverable or admissible unless it attracts the confidentiality conferred by subs (1). All evidence which does not exist independently of the mediation process is therefore evidence created or made “for the purposes of the mediation”.

[38] As we noted at paras [17] and [18], the Employment Court held that s 148(1) only protected communications that were “genuinely” for the purposes of settling an employment dispute (at para [56]), or for the

“legitimate” purposes of the mediation (at para [59]). In defending that position, Mr Corkill submitted that the section should be read as referring to the “proper” purposes of the mediation and argued that this imposed a high threshold for scrutiny. We disagree. Such concepts could be applied only after a detailed examination of what occurred at a mediation. Such a retrospective examination, based on a mere allegation of illegitimate or improper purpose or of non-genuine use, would effectively defeat the protection that s 148(1) seeks to provide.’ *Just Hotel Ltd v Jesudhass* [2007] NZCA 582, [2008] 2 NZLR 210 at [21]–[22], [27], [31]–[34], [37]–[38], per Wilson J

For the purposes of this Act and the Regulations

Australia [Under the Petroleum Pipelines Act 1969 (WA), s 63, an inspector, may, ‘for the purposes of this Act and the regulations’ inter alia require the production of documents, etc. Investigation into gas explosions.] ‘[3] Earlier this year the Commonwealth Government, together with the state announced the final form of a further inquiry (the 2009 inquiry). In March and April 2009, apparently without consent or approval of Apache, the state provided to the first respondents (the panel) for the purposes of the 2009 inquiry, the information which had been provided (under compulsion) by Apache to state inspectors who had been appointed under s 62 of the 1969 State Act [the Petroleum Pipelines Act 1969 (WA)] and who had issued the various s 63 notices (the s 63 information).

‘[4] The 2009 inquiry had no power to compel the production of documents.

‘[5] The panel were not, at the time, state inspectors.

‘[6] Apache complain that the state’s release to the panel of the s 63 information was unauthorised. The information was provided by Apache to the state only “for the purposes of the 1969 State Act”.

‘[7] Apache contends that the purposes of the 2009 inquiry have always gone well beyond the purposes of the 1969 State Act both as to its subject matter and as to the intended ultimate recipients of its reports. Those reports will, in part, rely on the s 63 information. The respondents contend otherwise.

...
‘[48] The sole issue is whether the release of the s 63 information to the panel is for the purposes of the 1969 State Act or Regulations. The reason this issue is central to Apaches’

complaint is because of the statement of principle articulated in *Johns v ASC* (1993) 178 CLR 408 at 424; 116 ALR 567 at 574–5; 31 ALD 417 at 423; 11 ACSR 467 at 474; [1993] HCA 56 (*Johns*).

...
‘[53] In my view, a question arises as to whether the broader purpose expressed in s 63, namely that of the 1969 State Act opens the scope for greater usage of the s 63 information.

‘[54] In considering the purposes, Apache stresses that the powers under s 63 of the 1969 State Act are vested in an inspector and not in any other person. (By s 4(1) of the 1969 State Act, unless the contrary intention appears “inspector” means “a person appointed an inspector under this Act”). The powers of inspectors so appointed to compel production of documents are limited to those powers expressed in s 63 of the 1969 State Act. In the second reading speech of the 1969 State Act it was explained that the inspectors would be invested with the usual powers which are given to petroleum inspectors, that is, they would have “access to relevant areas in order to inspect and test equipment and to inspect and take extracts from relevant documents”.

‘[55] However, the respondents point out and, in my view correctly, that the role of inspectors under the 1969 State Act and Regulations is quite limited. Certainly in the context of s 63, the role is limited to gathering information. The power conferred under s 63 is constrained only by the power being exercised “for the purposes of this Act and the Regulations”. Those purposes are broad. If it be Apaches’ argument that the purposes, where referred to in s 63, are confined to the inspectors’ own purposes at the time of service of a notice, then, in my view, that argument can only be correct if the inspectors’ purposes are understood to be the general purposes of the Act and Regulations. The powers and functions conferred in many of the provisions of the 1969 State Act go well beyond those that may be exercised by an inspector. There would be little point in gathering the information if it could not be put to the purposes of the Act.

‘[56] I have attempted in these reasons to identify the purposes of the 1969 State Act and Regulations in order to ascertain whether the release of the information to the 2009 inquiry was done for the purposes of the 1969 State Act and Regulations. In doing so, it has also been necessary to examine the purposes of the 2009 inquiry.

‘[57] The 1969 State Act is one of many which provide that a power may be exercised

“for the purposes of this Act”. Yet it does not, in terms, spell out the “purposes of the Act”. Some statutes now spell out in express terms their purposes. This is particularly helpful when a provision of the Act is said to be applicable for the purposes of the Act. Once the purpose can be ascertained, there are other clear rules of construction such as the rule from *Mills v Meeking* (1990) 169 CLR 214; 91 ALR 16; 10 MVR 257; [1990] HCA 6 per Dawson J that a literal approach will give way to a construction which would promote the purpose of the Act over one which would not.

[58] By force of statute, it is now generally accepted that the purposive approach has universal application. It is not confined to situations of ambiguity or inconsistency.

[59] Courts have had for many years to attempt to identify the purpose of a statute. Of the tools used in such statutory interpretation (consideration of text, structure and context), it is now accepted that context is the first matter to be considered. In *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; 141 ALR 618 at 634–5; [1997] HCA 2 in a joint judgment, the court said:

... the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses “context” in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as [the reports of law reform bodies], one may discern the statute was intended to remedy.

[60] The respondents rely heavily on context in their arguments concerning the need to administer the 1969 State Act so that it may interact with other legislative instruments and regulatory frameworks.

[61] Although the context in which the purposes of the 1969 State Act are to be construed include the interactive legislative and regulatory matrix with which the 1969 State Act must work, nowhere in the Act is there express reference of the purpose or intention that functions exercised for the purpose of the 1969 State Act are also intended to be functions for the purpose of the other elements of the legislative and regulatory matrix in which the 1969 State Act operates. As I have observed elsewhere in these reasons, that stands to some degree, in contrast to the provisions of the 2006 Commonwealth Act where some such recognition does appear.

...
[65] In my view, the question posed by the parties must be answered against two important background features. The first is to recognise the significant breadth of apparent purposes in the 1969 State Act; notwithstanding that it does not expressly recognise the interaction of the state’s role under the 1969 State Act with the surrounding statutory and regulatory regime. Those other statutes regulate usage of the same pipeline or pipelines owned by the same company in the same broad geographic location.

[66] The second significant feature is that on any reading of the terms of reference of the 2009 inquiry, they appear to go beyond (perhaps well beyond) the immediate purposes of the 1969 State Act.

...
[75] The object of the 1969 State Act, apparent from its long title, is to make provision “relating to the construction, operation and maintenance of pipelines for the conveyance of petroleum and for purposes connected therewith”. (The definition of petroleum in s 4 embraces gas).

...
[82] The state submits that the purposes of the 1969 State Act do not necessarily exclude provision of information obtained under s 63 of that Act to the Commonwealth. According to the state, it depends on the relevant factual context. If, for example, information provided under s 63 revealed a Commonwealth offence which was totally unrelated to the business of regulating the gas pipeline, (say price-fixing) then release of that information to the Commonwealth would not be authorised. Quite to the contrary in this situation, however, the state argues the s 63 information is integral to the sharing of responsibilities by the state and the Commonwealth in respect of the same pipeline or pipelines traversing the same broad geography but regulated by three different statutes and two different governments.

[83] The state contends that the 1969 State Act expressly recognises its interaction with the offshore regime in the definition of pipeline (s 4) where there is a reference to pipes or system of pipes which excludes a pipeline defined in the 1982 State Act in para (a) of the definition. However if this, as I apprehend it, is the best available example of the 1969 State Act recognising the contextual statutory framework, such that the s 63 information given by Apache was given, in effect for the purposes of all of the relevant legislative instruments, then, taken alone, in my view it falls well short of doing so.

[84] There is specific power in the 1969

State Act (s 25) for the minister at the request of a minister of the state or a minister of the Commonwealth to direct to a licensee to make changes in the route or position of the licensee's pipeline. A common feature of all legislation regulating pipeline use is that the pipeline licences will describe the route that a pipeline takes so that the exercise of the power to direct a change of route would necessarily, particularly in the present case, involve the exercise of an equivalent power under the 1982 State Act but quite possibly under the 2006 Commonwealth Act. So, accordingly, changes to the regulatory requirements imposed by or under the 1969 State Act may have to take into account what happens offshore under a different legislative regime. It may, as a matter of practical reality, be necessary to communicate with persons responsible for the administration of the offshore legislation in order to determine whether or not it would be feasible to make a direction under s 25 of the 1969 State Act. Such a communication would be meaningless, it is argued, unless each of the parties had access to relevant information which could have a bearing upon the consequences of such a direction being given. Accordingly, a communication in that context, the state argues for example, to the Commonwealth Minister or to NOPSA which has administrative responsibilities under the 1982 State Act and the 2006 Commonwealth Act must be within the purposes of the 1969 State Act. Although Apache appears to disagree with this submission, in my view it appears to be correct. But even if the submission is correct, it only goes part of the way to supporting the state's argument.

'[85] Although the 1969 State Act does not expressly acknowledge the role it and the state plays in the legislative and administrative matrix, it has been amended on a number occasions including by Pt III of the Acts Amendment (Petroleum) Act 1990 (WA). That Act was designed to "rationalise the requirements of State and Federal laws for petroleum production and exploration". That is reflected in Hansard, 2 November 1989 at pp 4201-4 and on 3 July 1990 within pp 3121-9, 4 July 1990 within pp 3232-5 and 11 July 1990 within pp 3616-7. There is little doubt that the legislative intention was and remains that the purpose of the 1969 State Act (including where that purpose is referred to in s 63), is that it be part of a broader scheme. In the case of offshore petroleum mining operations, the 1969 State Act will apply to only one component of a larger operation in one part of a pipeline running from

an offshore production facility to the Western Australian mainland. The other components and other parts of the pipeline will be regulated by other state and Commonwealth legislation and the administration will be shared between Commonwealth and state authorities. These features all underlie the importance of cooperation between the respective governments, agencies and regulators. But the existence of these common features may not necessarily be sufficient to answer in the affirmative the question posed by the parties.

...
'[88] Accordingly, it follows that while the 1969 State Act can apply only to one part of the pipeline, it is a component of the larger operation. Thus the regulation requirements imposed by or under one Act may effect the requirements of another. For all these reasons, the respondents stress that there is a real practical, legislative and administrative interdependency and integration between the regimes.

'[89] The short response to this submission appears to me, once again, to be that the content of the 1969 State Act does support a conclusion that it has a broad purpose. But even that purpose, in the context of the pleaded issues, has to be tested against the release of the s 63 information in light of the principle in *Johns'* case.

...
'[129] The rule described in *Johns'* case precludes information obtained for a particular purpose under statutory compulsion to be used for another purpose unless authorised to do so by statute. The rule has application as much in commercial activities as in criminal law. Further the rule of law does not, for that purpose, distinguish between the position of an individual citizen and a sophisticated multinational. Although the purposes of the 1969 State Act may well be broad and may necessitate co-operative federalism, the purposes of the 2009 inquiry went significantly beyond the purposes of the 1969 State Act.

'[130] The information provided under compulsion by Apache was provided pursuant to powers exercised by state inspectors. The release of the s 63 information to the panel was to persons whose function and purposes went well beyond those of the 1969 State Act. The release of the s 63 information cannot, in my view, be said to be for the purposes of the 1969 State Act.

'[131] It follows that it cannot be said that the disclosure by officers of the state to the panel for the purposes of the 2009 inquiry by the panel of documents provided to officers of

the state by Apache under notices issued pursuant to s 63 of the 1969 State Act compelling production of the documents was for the purposes of the 1969 State Act and the regulations within the meaning of s 63 of the 1969 State Act. ...’ *Apache Northwest Pty Ltd (ABN 58 009 140 854) v Agostini and Bills (in their capacity as panel members of the Offshore Petroleum Regulatory Inquiry)* [2009] FCA 534, (2009) 256 ALR 56 at [3]–[7], [48], [53]–[61], [65]–[66], [75], [82]–[85], [88]–[89], [129]–[131], per Mckerracher J

Purpose or effect

New Zealand [Goods and Services Tax Act 1985, s 76.] ‘[36] A natural and sensible reading of s 76, as it stood prior to 2000, is to read it as requiring the Commissioner to be satisfied that an arrangement has been entered into between persons “so as to” defeat the intent and application of the Act or any provision of the Act. That requires the Commissioner and the Court to ask what objectively was the purpose of the arrangement, which in turn requires examination of the effect of the arrangement. Section 76, even in its pre-2000 version, therefore requires an examination of the purpose or effect of the arrangement, and in this respect the current version of the section has merely stated expressly what was implicit in the former version.

‘[37] In *Newton v Commissioner of Taxation for the Commonwealth of Australia* [[1958] AC 450 at 465, PC], in giving the advice of the Judicial Committee, Lord Denning said that in the phrase “purpose or effect” in the Australian general anti-avoidance provision of that time the word “purpose” meant not motive but the effect which it was sought to achieve — the end in view. The word “effect” meant the end accomplished or achieved. It was necessary, his Lordship said, to look at the arrangement itself and see its effect irrespective of the motives of the person who made it.

‘[38] What Lord Denning was emphasising was that the general anti-avoidance provision was concerned not with the purpose of the parties, but with the purpose of the arrangement. That is a crucial distinction. Once you put the purpose of the parties to one side and seek by objective examination to find the purpose of the arrangement, you must necessarily do that by considering the effect which the arrangement has had — what it has achieved — and then, by working backwards as it were from the effect, you are able to determine what objectively the

arrangement must be taken to have had as its purpose. That approach is inevitable once any subjective purpose or motive is ruled out of contention, as the authorities say it must be. The position is summed up in a passage from the advice of the Privy Council in *Ashton v Commissioner of Inland Revenue* [[1975] 2 NZLR 717 at 722], where Viscount Dilhorne said:

“If an arrangement has a particular purpose, then that will be its intended effect. If it has a particular effect, then that will be its purpose and oral evidence to show that it has a different purpose or different effect to that which is shown by the arrangement itself is irrelevant to the determination of the question whether the arrangement has or purports to have the purpose or effect of in any way altering the incidence of income tax or relieving any person from his liability pay income tax.”

This passage may at first sight appear somewhat circular but must be read as a whole. Viscount Dilhorne was clearly ruling out evidence of subjective purpose or motive and requiring the objective purpose to be determined from the effect of the arrangement. He went on immediately to approve what Lord Denning had also said in *Newton* [*Ashton* at 722 citing *Newton* at 466]:

“In order to bring the arrangement within the section you must be able to predicate — by looking at the overt acts by which it was implemented — that it was implemented in that particular way so as to avoid tax.”

It is because the objective purpose is deduced from the effect that the phrase “purpose or effect” in general anti-avoidance provisions has been said to be a composite term.

‘[39] The present case is unusual because evidence was given that the taxpayer did not consider GST. Whether or not evidence of that character is accepted, any such finding is not determinative. Just as the taxpayer’s state of mind concerning taxation is not determinative of purpose when the taxpayer is known to have been aware of taxation considerations, so it cannot be determinative if he or she was unaware of them. The purpose of the arrangement may be deduced entirely from the arrangement and its effect.’ *Glenharrow Holdings Ltd v Comr of Inland Revenue* [2008] NZSC 116, [2009] 2 NZLR 359 at [36]–[39], per Blanchard J

Purpose for which the land is taken

Australia [Acquisition of Land Act 1967 (Qld), s 20.] '[18] The present case turns upon the requirement in s 20(3) of the Acquisition Act that in assessing compensation account be taken, by way of set-off or abatement, of any enhancement of the value of the interest of the Springfield companies in any land adjoining the transfer land by the carrying out of the purpose for which the transfer land was taken.

'[19] Of the reasoning by the arbitrator, McMurdo J correctly observed:14

[19] In considering s 20(3), the arbitrator was required to identify the works or purpose for which the land was taken. He identified the purpose as "the very narrow purpose ... to realign in minor respects an existing proposed road corridor". In one sense at least, that was undoubtedly true. But the question is whether that could be regarded as the purpose which is relevant in the operation of s 20(3). As already noted, the purpose within s 20(3) would appear to correspond with the purpose for which there is a power of compulsory acquisition. That indicates that the purpose was to be understood as the public benefit or end to be achieved, rather than some means to that end, and that the arbitrator's identification of the purpose was incorrect.

It also should be noted that the arbitrator looked to "the reason why [the s 7 notices] were given" and found that what had led the chief executive to give the s 7 notices was the decision to realign the proposed road corridor "in minor respects".

'[20] The relevant "purpose" is that for which the transfer land would have been taken had the statutory processes set in train by the s 7 notices not been supplanted by the Agreement. These were future transport purposes including the facilitation of transport infrastructure, being road and busway, rail or light rail for the South West Transport Corridor. This was the statutory purpose and the determinative purpose.' *Springfield Land Corp (No 2) Pty Ltd v Queensland* [2011] HCA 15, (2011) 276 ALR 485 at [18]–[20], per French CJ, Gummow, Hayne and Crennan JJ

PURSUANCE

In pursuance or intended pursuance of any of the provisions of this Act

New Zealand [Mental Health Amendment Act 1935, s 6 and Mental Health Act 1969, s 124 each contained immunity, leave and time bar provisions which provided that there was no liability for acts done 'in pursuance or intended pursuance of any of the provisions of' the Act unless the person had acted in bad faith or without reasonable care.] '[24] It is common ground, based on the wording of the leave provision, that the leave provision applies only if an act was "in pursuance or intended pursuance of any of the provisions of this Act". At the risk of stating the obvious, this means that, if the acts or omissions complained of were not in pursuance or intended pursuance of the provisions of the Act, then leave is not required and the time bar in s 124(4) is also inapplicable. The leave provisions and the time bar would therefore provide no impediment to bringing the proceedings. By contrast, if leave was required, the claims cannot proceed. The claimants do not have leave. They are far too late now to apply for it and they were far too late to do so even at the time the proceedings were first filed.

...
'[48] Starting with acts in pursuance of the legislation, I have already indicated that these would cover acts or omissions in the course of the committal process as well as acts and omissions relating to care and treatment of all patients (including voluntary and informal patients). It would also include all acts and omissions *reasonably incidental* to the committal process, to the running of the institution and to the care and treatment of patients. This would include any issues of control of patients or the protection of others, both within and outside the institution. I do not consider, however, that the phrase could include acts or omissions that constitute an offence under the legislation. To hold otherwise would be akin to holding that the legislation authorises offending against the legislation.

'[49] Moving now to acts in intended pursuance of the legislation, the first point is that in this respect the test in New Zealand is not the same as the test that was at issue in *Pountney v Griffiths* [[1976] AC 314; [1975] 2 All ER 881, HL]. This limits the applicability of that decision in New Zealand. The immunity provision at issue in *Pountney v Griffiths* protected "any act purporting to be done in pursuance of this Act". This phrase appears to

contemplate that actions or omissions are covered, as long as they appear to be in the course of carrying out functions under the legislation, even if there is some ulterior motive or the actions in question are quite clearly excessive and outside the contemplation of the legislation. Indeed, this was the interpretation put on the provision by the House of Lords.

[50] In *Pountney v Griffiths*, the House of Lords, at p 319, accepted the submission of Mr Slynn QC that the words used were wide and unqualified and that the test was whether the nurse was on duty and carrying out duties as a nurse. It was only where a nurse was not on duty or where the actions of the nurse could not be justified as an act of control in the course of his or her duties as a nurse that they would come outside the immunity and leave provisions. This meant that any actions relating to the control of patients or purportedly for the control of patients were protected by the section. Mr Slynn had, in answer to a question from the Bench, submitted that even blows, if struck in the course of trying to persuade a patient to return to a house (the fact scenario at issue in the case), were one aspect of control and detention (see p 316). This submission must have been accepted by the House of Lords. I do not consider that the case would necessarily have been decided the same way under the New Zealand wording.

[51] In my view, the New Zealand wording, "intended pursuance of the Act", creates a subjective test. To adapt the words quoted by Mason, Deane and Dawson JJ in *Webster v Lampard* (1993) 177 CLR 598 at p 605, the cases on similarly worded immunities suggest a clear conception of a person intending and trying to do his or her duty. See also *Duport Steels Ltd v Sirs* [1980] 1 WLR 142 (HL). In that case, the immunity applied to acts done in contemplation or furtherance of a trade dispute. It was held that, provided the doer of the act honestly thought that it might help one of the parties to a trade dispute and he or she did the act for that purpose, the immunity provided protection.

[52] In this case, therefore, the immunity and associated leave provisions would include all acts and omissions honestly (even if mistakenly) thought to be in pursuance of the legislation. In this context, acts or omissions that are offences against the legislation could be in intended pursuance of the legislation. This would apply if such actions or omissions were undertaken in good faith (or if good faith predominated in the case of mixed motives) and in an honest (even if mistaken) belief that they

were in pursuance of the committal, protection, care or treatment of patients and the necessary auxiliaries such as control or protection. I consider that, depending on the circumstances, it is possible for a person to be acting honestly even if the person may know that he or she is acting without statutory authority or even that he or she was committing an offence against the legislation. The person could still honestly consider that he or she was acting in the interests of patients or for the protection of others.

[53] I do not consider, however, that a person could honestly believe that sexual abuse, serious physical assaults (unless in self-defence or in defence of others) or torture or cruel or degrading punishment were necessary for the care, treatment or control of a patient. Even if a defendant maintained that he or she had such an honest belief, that assertion could not be countenanced for public policy reasons. In the case of torture and degrading punishment, this would, in any event, be contrary to s 9 of the Bill of Rights. All legislation must, according to s 6 of the Bill of Rights, be interpreted to accord with the Bill of Rights if possible. In this regard, there may be an issue with forced medical treatment in the case of voluntary or informal patients (see s 10 of the Bill of Rights).

...

[55] So how is the test applied? I have already accepted the CHFA's submission that the provisions should be interpreted in a manner that does not rob them of all force. I have also indicated sympathy for the proposition that a claimant should not be able to avoid the leave provisions and the associated time bar merely by adding an adjective, such as "gratuitous", to describe an action that would otherwise clearly be within the legislation.

...

[62] In deciding whether or not leave is required, the actions, any accompanying words, the circumstances in which they allegedly occurred and any motivation ascribed must be examined. The first question is whether those actions or omissions were in pursuance of the legislation, being acts or omissions that related to the committal process, to the running of the institution, to the care and treatment of patients or to necessary auxiliaries, such as control and protection of those both inside and outside the institution. This would not include acts or omissions that constitute an offence under the legislation. The second question is whether the acts or omissions could be in intended pursuance of the legislation. This requires an assessment of whether a person could honestly,

even if mistakenly, believe that the acts or omissions related to the committal process, to the running of the institution, to the care and treatment of patients or to necessary auxiliaries such as control and protection of those both inside and outside the institution.’ *Crown Health Financing Agency v P* [2008] NZCA 362, [2009] 2 NZLR 149 at [24], [48]–[53], [55], [62], per Glazebrook J

PURSUANT

Pursuant to a demand

Canada [Criminal Code, RSC 1985, c C-46, s 258(1)(c), (g).] ‘21. The central question in this appeal is whether the opening words of each s 258 evidentiary shortcut—“where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3)”—refer specifically to a lawful demand made under s 254(3), which among other things, is predicated on the police having reasonable grounds to make the demand.

‘25. Beginning with the text of ss 258(1)(c) and 258(1)(g), Mr Alex argues that the phrase “pursuant to a demand made under subsection 254(3)” in the opening clause of each provision unambiguously supports his position that the evidentiary shortcuts apply only where a lawful demand is made under s 254(3). When this phrase is viewed in isolation, I acknowledge that his position is arguable. However, two considerations cast doubt on Mr. Alex’s plain reading of the text.

‘26. First, Parliament could easily have specified that the sample had to be taken “pursuant to a lawful demand”. There are many examples throughout the *Code* where Parliament has done just that. For instance, in s 127(1) of the *Code*, Parliament has made it clear that to convict a person for disobeying a court order, the underlying order must be “lawful” ...

‘27. Second, Mr Alex’s interpretation is in tension with the structure of the provisions. Each includes an opening part followed by a specific list of preconditions that must be met before the evidentiary shortcuts can apply

(ss 258(1)(c)(i) to (iv) and 258(1)(g)(i) to (iii)). These preconditions share a common theme of ensuring that certain procedures are followed in the taking and recording of a breath reading, all of which bear directly on the reliability of the evidentiary shortcuts. In particular, they set out requirements pertaining to the timing, method, instrument type and operator qualifications. The lawfulness of a breath demand does not mesh with this theme. It has no bearing on the reliability of the evidentiary shortcuts. Moreover, there is nothing in the text of the provisions to indicate that the various reliability-related preconditions listed in each are meant to be non-exhaustive. Mr. Alex’s interpretation does not conform to this basic structure of the provisions. Instead, it calls for fragmented preconditions in separate clauses.

‘28. In view of these considerations, it is not clear to me that a plain reading of the provisions supports Mr Alex’s position that the evidentiary shortcuts depend on a lawful demand.

‘30. ... In my view, the phrase “pursuant to a demand made under subsection 254(3)” simply identifies the bodily sample to which the provisions apply—that is, a breath sample. This reading finds support in the legislative history of the provisions. At the time of their initial enactment in 1969, they contained references to blood, urine, breath and other bodily samples. The opening words therefore played a meaningful role in clarifying the specific sample to which the provisions were meant to apply.

‘51. In this case, the trial judge, the British Columbia Supreme Court and the Court of Appeal correctly concluded that a lawful demand was not a precondition to the s 258 evidentiary shortcuts (albeit for different reasons than I have set out). ...’ *R v Alex* [2017] SCJ No 37, 2017 SCC 37 at paras 21, 25–28, 30, 51, per Moldaver J

PYX (TRIAL OF THE)

[For 32 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 112, para 112n see now 49 Halsbury’s Laws of England (5th Edn) (2015) para 12, 12n.]

Q

QUALIFIED

[The Companies Act 1985, s 291 has been repealed by the Companies Act 2006 and is not reproduced in the 2006 Act.]

QUALIFYING BODY

‘[4] On 26 February 1998 Mr Ahsan made a complaint to an employment tribunal, alleging that the Labour Party had discriminated against him on racial grounds, contrary to s 12(1) of the Race Relations Act 1976:

“It is unlawful for an authority or body which can confer an authorisation or qualification which is needed for, or facilitates, engagement in a particular profession or trade to discriminate against a person—(a) in the terms on which it is prepared to confer on him that authorisation or qualification; or (b) by refusing, or deliberately omitting to grant, his application for it; or (c) by withdrawing it from him or varying the terms on which he holds it.”

‘[5] By s 3, “discriminate” means to discriminate on racial grounds and by s 78(1), “profession” is defined to include “any vocation or occupation”. Mr Ahsan says that being a councillor is a profession, or at any rate an occupation, and that the Labour Party is able to confer its authorisation to stand as a Labour candidate, which he needs to be elected or which will facilitate his election.

‘[6] The Labour Party objected that s 12 did not apply to them. They said they did not confer authorisations or qualifications within the meaning of the Act. Section 12 is headed “Qualifying bodies” and appears in Pt II of the Act, which is headed “Discrimination in the Employment Field”. It is, they said, concerned with vocational or professional qualifications and not with politics.

...
‘[18] My Lords, it seems to me that logically the first question to be answered is whether the Labour Party is a qualifying body for the

purposes of s 12. In my opinion, for the reasons given by Peter Gibson LJ in *Triesman v Ali* [[2002] EWCA Civ 93, [2002] IRLR 489], it is not. The notion of an “authorisation or qualification” suggests some kind of objective standard which the qualifying body applies, an even-handed, not to say “transparent”, test which people may pass or fail. The qualifying body vouches to the public for the qualifications of the candidate and the public rely upon the qualification in offering him employment or professional engagements. That is why s 12 falls under the general heading of discrimination “in the Employment Field”. But that is far removed from the basis upon which a political party chooses its candidates. The main criterion is likely to be the popularity of the candidate with the voters, which is unlikely to be based on the most objective criteria. That will certainly be true of selection by vote of the branch and I doubt whether greater objectivity can be expected of a selection committee. The members or selection panel want to choose the candidate who, for whatever reason, seems to them most likely to win or at least put up a respectable showing in the election.

‘[19] That does not mean that a political party is entitled to discriminate on racial grounds in choosing its candidates. It would be most surprising if it could lawfully do so. But the relevant prohibition is to be found, not in s 12, but in s 25, which deals with discrimination by associations against members or prospective members ...’ *Ahsan v Watt (formerly Carter) (sued on behalf of the Labour Party)* [2007] UKHL 51, [2008] 1 All ER 869 at [4]–[6], [18]–[19], per Lord Hoffmann

QUANTUM MERUIT

[For 9(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 1155 see now 88 Halsbury’s Laws of England (5th Edn) (2012) para 408.]

QUARRY

[For 31 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 6 see now 76 Halsbury’s Laws of England (5th Edn) (2013) para 4.]

QUARTER DAYS

[For 45(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 206 see now 97 Halsbury’s Laws of England (5th Edn) (2015) para 306.]

QUARTER SESSIONS

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

QUASH

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

QUASHING ORDER

[For 1(1) Halsbury's Laws of England (4th Edn) (2001 Reissue) para 123 see now 61 Halsbury's Laws of England (5th Edn) (2010) para 689.]

QUASI CONTRACT

[For 9(1) Halsbury's Laws of England (4th Edn) (Reissue) para 618 see now 88 Halsbury's Laws of England (5th Edn) (2012) para 401.]

QUASI EASEMENT

[For 12(1) Halsbury's Laws of England (4th Edn) (Reissue) para 629, 629n see now 32 Halsbury's Laws of England (5th Edn) (2012) para 29.]

QUAY

[For 20(1) Halsbury's Laws of England (4th Edn) (Reissue) para 511 see now 52 Halsbury's Laws of England (5th Edn) (2014) para 673.]

QUESTION OF LAW

Australia [Administrative Appeals Tribunal Act 1975 (Cth), s 44: appeal on a question of law.] '[19] The first question to be determined is whether the finding made by the AAT that the

respondent's premium income was not sourced from Australia raises a question of law.

'[20] It is often not easy to discern whether an issue raised is a question of law, a mixed question of law and fact, or a question of fact. The difference can be subtle and the distinction obscure: *Grealy v Commissioner of Taxation* (1989) 24 FCR 405 at 407 (*Grealy*).

'[21] Notwithstanding the difficulty in determining whether the question raised on appeal is a question of law, the court must address the issue because its very jurisdiction depends upon the appeal being on a question of law.

...
'[39] When the statute under consideration has no technical meaning, but is understood in its plain ordinary meaning, a question of law will arise if the facts found must necessarily have come within the statutory description, but only a question of fact will arise if the facts found are capable of coming within the statutory description. In that second case, no question of law arises because, as Hill J said (at 16) in *Sharp [Sharp Corp of Australia Pty Ltd v Collector of Customs* (1995) 59 FCR 6], the decision "will generally involve weight being given to one or other element of the facts and so involve matters of degree". To put it another way, a choice between two conclusions open on a consideration of the facts is a question of fact.' *Commissioner of Taxation v Crown Insurance Services Ltd* [2012] FCAFC 153, (2012) 294 ALR 522 at [19]–[21], [39], per Lander and Foster JJ

QUIET ENJOYMENT

[For 27(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) paras 508–509 see now 62 Halsbury's Laws of England (5th Edn) (2016) paras 404–405.]

R

RANSOM

[Note that 36(2) Halsbury's Laws of England (4th Edn) (Reissue) para 841 is not reproduced in 85 Halsbury's Laws of England (5th Edn) (2012).]

RATIFICATION

[For 2(1) Halsbury's Laws of England (4th Edn) para 84 see now 1 Halsbury's Laws of England (5th Edn) (2008) para 57.]

RATIO DECIDENDI

[For 37 Halsbury's Laws of England (4th Edn) (Reissue) para 1237 see now 11 Halsbury's Laws of England (5th Edn) (2015) para 25.]

REAL ESTATE

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

REAL PROPERTY

[For 39(2) Halsbury's Laws of England (4th Edn) (Reissue) para 1 see now 87 Halsbury's Laws of England (5th Edn) (2017) para 1.]

REASONABLE

Reasonable endeavours

Australia '[40] Contractual obligations framed in terms of "reasonable endeavours" or "best endeavours (or efforts)" are familiar. Argument proceeded on the basis that substantially similar obligations are imposed by either expression. Such obligations are not uncommon in distribution agreements, intellectual property licences, mining and resources agreements and planning and construction contracts. Such clauses are ordinarily inserted into commercial contracts between parties at arm's length who have their own independent business interests.

'[41] Three general observations can be

made about obligations to use reasonable endeavours to achieve a contractual object. First, an obligation expressed thus is not an absolute or unconditional obligation. Second, the nature and extent of an obligation imposed in such terms is necessarily conditioned by what is reasonable in the circumstances, which can include circumstances that may affect an obligee's business. This was explained by Mason J in *Hospital Products [Hospital Products Ltd v United States Surgical Corp]* (1984) 156 CLR 41 at 92; 55 ALR 417 at 450–451], which concerned a sole distributor's obligation to use "best efforts" to promote the sale of a manufacturer's products. His Honour said:

The qualification [of reasonableness] itself is aimed at situations in which there would be a conflict between the obligation to use best efforts and the independent business interests of the distributor and has the object of resolving those conflicts by the standard of reasonableness... It therefore involves a recognition that the interests of [the manufacturer] could not be paramount in every case and that in some cases the interests of the distributor would prevail.

'[42] As Sellers J observed of a corporate obligee in *Terrell [Terrell v Mabie Todd & Co Ltd]* (1952) 69 RPC 234 at 236], an obligation to use reasonable endeavours would not oblige the achievement of a contractual object "to the certain ruin of the company or to the utter disregard of the interests of the shareholders". An obligee's freedom to act in its own business interests, in matters to which the agreement relates, is not necessarily foreclosed, or to be sacrificed, by an obligation to use reasonable endeavours to achieve a contractual object.

'[43] Third, some contracts containing an obligation to use or make reasonable endeavours to achieve a contractual object contain their own internal standard of what is reasonable, by some express reference relevant to the business interests of an obligee.' *Electricity Generation Corp (ABN 58 673 830 106) (t/as Verve Energy) v Woodside Energy Ltd (ABN 63 005 482 986) (Matter No P47/2013)* [2014] HCA 7, (2014) 306 ALR 25 at [40]–[43], per French CJ, Hayne, Crennan and Kiefel JJ

Reasonable grounds

[Freedom of Information Act 2000, s 53. Certificate by Attorney General stating that he

had ‘on reasonable grounds’ formed the opinion that departments had been entitled to refuse requests for disclosure.] ‘[9] Section 53(2) confers a power on an “accountable person” to override certain decision notices or enforcement notices served under the FOIA. It provides that a notice:

“shall cease to have effect if, not later than the twentieth working day following the effective date, the accountable person in relation to that authority gives the Commissioner a certificate signed by him stating that he has on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure falling within subsection (1)(b) [ie a failure to comply with s 1(1)(a) or (b)].”

The “effective date” is defined in s 53(4). The “accountable person” is defined in s 53(8).

...
 ‘[36] I respectfully disagree with Mr Swift’s analysis and the reasoning of the Divisional Court [[2013] EWHC 1960 (Admin), [2014] 1 All ER 23]. It is (rightly) common ground that what constitutes “reasonable grounds” must be determined objectively. Section 53(2) does not, however, provide any guidance as to how to judge what constitutes “reasonable grounds”. To say (per Lord Judge CJ at [14] and Davis LJ at [90]) that the reasons given in a s 53(2) certificate must engage with the reasons of the tribunal and be subject to close scrutiny by the court does not tell us how the reasonableness of the grounds relied on by the accountable person is to be judged. But as we have seen, Davis LJ did say that ‘reasonable grounds’ are grounds that are rational and make sense and that it is no bar to the grounds being reasonable that they differ from other reasoning which also is rational and makes sense.

‘[37] In my view, whether a decision is “reasonable” depends on the context and the circumstances in which it is made. I agree with the Divisional Court that two opposing decisions or opinions may both be objectively reasonable. But whether it is reasonable for X to disagree with the reasonable decision or opinion of Y depends on the context and circumstances in which X and Y are acting. That is well illustrated by the three authorities on which Miss Rose relies. In each case, the court asked whether it was *reasonable* for Y to make a decision which was contrary to the earlier decision of X. In each case there was a judicial review challenge to the *reasonableness* of the later decision. In my view the cases provide a

helpful analogy. In each of them, the context in which the reasonableness of Y’s decision was to be judged was that it was contrary to the earlier decision of X, which was an independent and impartial body that had conducted a full examination of the very issues that Y later had to determine. In each case, the court emphasised as being of particular importance the fact that the earlier decision had been made by an independent and impartial body, after a thorough consideration of the issues. In these circumstances, the court held that there had to be something more than a mere disagreement on the same material for it to be reasonable for Y to disagree with X. In the present case, the Attorney General disagreed with the decision of the UT [Upper Tribunal] (an independent court chaired by a High Court judge) on the very question which the UT had examined in meticulous detail. The Attorney General did not have any additional material and it has not been suggested that the UT made any error of law or fact. It is accepted that the UT’s decision was a reasonable decision.

‘[38] I do not consider that it is reasonable for an accountable person to issue a s 53(2) certificate merely because he disagrees with the decision of the tribunal. Something more is required. Examples of what would suffice are that there has been a material change of circumstances since the tribunal decision or that the decision of the tribunal was demonstrably flawed in fact or in law. This was the approach suggested by Simon Brown LJ in *Danaei [R v Secretary of State for the Home Department, ex p Danaei]* [1998] INLR 124] in relation to the Secretary of State’s decision which contradicted the earlier decision of the special adjudicator. It seems to me to be particularly apt in relation to s 53(2). I do not agree with the reasons given by Davis LJ for distinguishing the three cases (see [32], above). The fact that a s 53(2) certificate involves making an evaluative judgment (rather than a finding of primary fact) is not material to whether the accountable person has reasonable grounds for forming a different opinion from that of the tribunal. Nor do I consider that the basis for the decision in *Powergen [R v Warwickshire County Council, ex p Powergen plc]* (1997) 96 LGR 617] was that the decision of the highway authority was “subversive of the legislative scheme”.

‘[39] On the approach of the Divisional Court to s 53(2), the accountable person can override the decision of an independent and impartial tribunal which (i) is reasonable, (ii) is the product of a detailed examination (fairly conducted) of the issues after an adversarial

hearing at which all parties have been represented and (iii) is not challenged on appeal. All that is required is that the accountable person gives sensible and rational reasons for disagreeing with the tribunal's conclusion. If s 53(2) has that effect, it is a remarkable provision not only because of its constitutional significance (the point emphasised by the Divisional Court), but also because it seriously undermines the efficacy of the rights of appeal accorded by ss 57 and 58 of the FOIA.'

...
 '[81] For the reasons that I have given, the s 53(2) certificate must be quashed. The Attorney General did not have reasonable grounds for forming the opinion on which the certificate was based. The mere fact that he reached a different conclusion from the UT in weighing the competing public interests involved was not enough. He had no good reason for overriding the meticulous decision of the UT reached after six days of hearing and argument. He could point to no error of law or fact in the UT's decision and the government departments concerned did not even seek permission to appeal it. The certificate is also unlawful because it is incompatible with EU law.' *R (on the application of Evans) v AG* [2014] EWCA Civ 254, [2014] 3 All ER 682 at [9], [36]–[39], [81], per Lord Dyson MR

Reasonable time

[For 45(2) Halsbury's Laws of England (4th Edn) (Reissue) para 248 see now 97 Halsbury's Laws of England (5th Edn) (2015) para 349.]

All reasonable steps

Australia [Corporations Act 2001, s 344.]
 '[135] It is necessary to say something more about s 344. Section 344 provides for contravention of directors for failing to take "all reasonable steps to comply with, or to secure compliance with" Pts 2M.2 or 2M.3 of the Act. There are two limbs.

...
 '[143] Insolvency cases have considered specifically what was meant by the words "reasonable steps to comply with". Although in another context the considerations raised in those cases are instructive. From those cases, the standard of "all reasonable steps" is determined objectively by reference to the particular circumstances of the case. However, the standard requires, at a minimum, that directors take a diligent and intelligent interest

in the information either available to them or which they might appropriately demand from the executives or other employees and agents of the company: see *Australian Securities Commission v Fairlie* (1993) 11 ACLC 669 at 681–682 (*Fairlie*); and *Morley v Statewide Tobacco Services Ltd (No 1)* (1993) 1 VR 423 at 448–9; (1992) 8 ACSR 305.

'[144] Determination of contravention of the financial reporting provisions requires consideration of formulations contained in the two principal provisions:

- (a) "take all reasonable steps to comply with, or to secure compliance with, Part 2M.2 or 2M.3" as provided in s 344; and
- (b) "whether, in the directors' opinion, the financial statement and notes are in accordance with this Act" including compliance with the accounting standards and true and fair view, as provided in s 294(4)(d).

'[145] The provisions of the Act should be construed in a manner that considers the words used within a particular provision, in the context of the purpose of the particular regime—which underpins the discrete parts of the Act, and, in the context of the Act as a whole.

...
 '[149] As I have indicated, as a result of the 1998 amendments, the obligation to prepare a financial report and a directors' report was placed on the entity, and the obligations of the directors became, under s 344, to take all reasonable steps to comply with or to secure compliance with Pts 2M.2 and 2M.3 of the Act. Whether the 1998 amendments have raised or lowered the compliance standard for directors, I need not determine. Of course, any assessment of "reasonable steps" must be made in the circumstances as they were at the time, rather than with the benefit of hindsight.

...
 '[162] Based upon the view of Doogue J and the antecedent legislation, it cannot be denied that directors have been and are entitled to rely upon specialist advice. However, everything will depend upon the circumstances of the case, and whether a director has taken all reasonable steps will depend upon an analysis of the facts before the court. Undoubtedly, what is encompassed by taking all "reasonable steps" will differ depending upon the entity, the complexity of the entity's business and the internal reporting procedures within the entity. However, it will also depend on the nature of the task

the director is obliged to undertake. I do not take the view, contended for before Doogue J, that the directors should have done it all themselves and become familiar with the complexities of various accounting standards. Of course, they cannot and are not required to take on that task. ...' *Australian Securities and Investments Commission v Healey* [2011] FCA 717, (2011) 278 ALR 618 at [135], [143]–[145], [149], [162], per Middleton J

Reasonable endeavours

Australia [31] Subject to one qualification, I consider that the undertakings proffered by the remaining respondents sufficiently meet the case for interlocutory injunctive relief that ACMA has established. That qualification relates to Winning's undertaking only that it will "use reasonable endeavours" to remove or otherwise deactivate, or cause to be removed or deactivated, any fictitious profiles on dating websites or social networking websites it has registered or otherwise placed on those websites, whether by itself, its servants or agents. Winning seems, *prima facie*, to have control in respect of such websites. ACMA, in my opinion, has established a case for an interlocutory order that Winning remove or deactivate the websites concerned. If it transpires, for some unforeseen reason, that Winning cannot, notwithstanding what it shows to be endeavours which the court regards as reasonable effect removal or deactivation, it and its officers would not be found guilty of a contempt. That though is to anticipate. Further, what, prospectively, amounts to "reasonable endeavours" may be a subject upon which reasonable people might reasonably differ. It is undesirable, in my opinion, that that degree of imprecision attend either an interlocutory injunction or an undertaking which upon acceptance will have the same practical effect.' *Australian Communications and Media Authority v Mobilegate Ltd a Company Incorporated in Hong Kong* [2009] FCA 539, (2009) 256 ALR 85 at [31], per Logan J

REBUILD

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 816 see now 91 Halsbury's Laws of England (5th Edn) (2012) para 716 et seq.]

RECEIVED

Canada [Income Tax Act 1985, s 56(1)(a)(i): any amount received by the taxpayer in the year

as a pension benefit is to be included in computing the income of a taxpayer for a taxation year.] '8. In this Court, the appellant made submissions similar to those that he made in the Tax Court of Canada. In particular, he submitted that while pension amounts "received" are to be included in his income in the year of receipt, "received" in subparagraph 56(1)(a)(i) can include "constructive receipt". The appellant submitted that he "constructively received" pension amounts in earlier years, in the sense that he was legally entitled to them in those years. From this, the appellant says that those amounts that he "constructively received" in earlier years should be added into his income for those earlier years.

'9. We do not accept the appellant's submissions. In our view, the Tax Court of Canada did not err. We agree with its conclusion that the relevant provisions of the Act do not support the appellant's submissions.

'10. Our starting point in interpreting the relevant provisions of the Act is the Supreme Court of Canada's decision in *Canada Trustco Mortgage Co v Canada* [2005] 2 SCR 601, 2005 SCC 54, especially at paragraphs 10 and 13. The provisions of the Act are to be interpreted in a "textual, contextual and purposive" way. The ordinary meaning of words that are "precise and unequivocal" plays a "dominant role in their interpretive process". In all cases, "the court must seek to read the provisions of an Act as a harmonious whole". The Act "remains an instrument dominated by explicit provisions dictating specific consequences, inviting a largely textual interpretation".

'11 The ordinary meaning of subsection 56(1)(a)(i) is that all of the pension payments are added into income in the year it is "received". This ordinary meaning is well supported by the existence of other provisions in the Act. Subsection 56(1)(a)(i) does not stand in splendid isolation in the Act; rather, it is part of an interconnected, harmonious web of provisions.

'12. As described in paragraph 5, above, subsections 56(1)(a)(i), section 110.2 and section 120.31 together create a coherent, harmonious scheme. If the appellant were correct and subsection 56(1)(a)(i) permits the inclusion into the income of earlier years amounts that were "constructively received" in those earlier years, then there would have been no need for Parliament to enact sections 110.2 and 120.31, discussed above. In my view, the appellant's position runs contrary to the evident and coherent scheme in the Act.' *Burchill v*

Canada [2010] FCJ No 726, 2010 FCA 145, Fed CA, at paras 8–12, per Stratas JA

Seas Claim Group v Commonwealth [2013] HCA 33 (2013) 300 ALR 1 at [8]–[9], per French CJ and Crennan J

RECEIVER

[For 39(2) Halsbury's Laws of England (4th Edn) (Reissue) para 301 see now 88 Halsbury's Laws of England (5th Edn) (2012) para 1.]

RECOGNISE

Australia [Native Title Act 1993 (Cth).] '[8] Section 223 of the NT Act relevantly provides:

Native title

Common law rights and interests

- (1) The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
 - (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
 - (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
 - (c) the rights and interests are recognised by the common law of Australia.

Hunting, gathering and fishing covered

- (2) Without limiting subsection (1), *rights and interests* in that subsection includes hunting, gathering, or fishing, rights and interests.

'[9] Section 223 defines the rights and interests which can be the subject of a determination of native title made under s 225 of the NT Act. They include usufructuary rights of the kind set out in s 223(2). It is a necessary condition of their inclusion in a determination that the rights and interests are recognised by the common law of Australia. That condition flows from s 223(1)(c). "Recognise" in this context means that the common law "will, by the ordinary processes of law and equity, give remedies in support of the relevant rights and interests to those who hold them" [*Commonwealth v Yarmirr* (2001) 208 CLR 1; 184 ALR 113; [2001] HCA 56 at [42] (*Yarmirr*) per Gleeson CJ, Gaudron, Gummow and Hayne JJ].² *Akiba (on behalf of the Torres Strait Regional*

Recognised by the common law of Australia

Australia '[155] The ultimate issue in the appeal is whether the rights and interests possessed by the Bar-Barrum People under their traditional laws and customs "are recognised by the common law of Australia" within the meaning of s 223(1)(c) of the Native Title Act 1993 (Cth). The common law "recognises" native title rights and interests in the sense that "by the ordinary processes of law and equity, [it will] give remedies in support of the relevant rights and interests to those who hold them". Native title rights and interests once but no longer so recognised by the common law are said to be "extinguished".

'[156] It must now be treated as settled that the common law ceases to recognise a native title right at the point in time of the creation of an "inconsistent" right by or pursuant to legislation. The common law test is one of "logical antinomy" of rights. The test involves asking whether the existence of the right created by or pursuant to legislation necessarily implies the non-existence of the native title right. The test is not adequately captured merely by asking whether the two rights could be exercised concurrently. The test is more appropriately captured by asking whether the existence of the right created by or pursuant to legislation is "inconsistent with the native title holders continuing to hold any of the rights or interests which together make up native title".

'[157] There is no reason in principle why the common law should adopt any different approach when it comes to consideration of the effect of legislation imposing a prohibition on the continued recognition of native title rights. The only question should be whether a particular prohibition is necessarily inconsistent with the continued existence of a particular native title right. That would not ordinarily be so in the case of a prohibition of the exercise of the native title right which is partial, temporary or conditional.' *Queensland v Congoo* [2015] HCA 17, (2015) 320 ALR 1 at [155]–[157], per Gageler J (footnotes omitted)

RECONSTRUCTION

[For 7(2) Halsbury's Laws of England (4th Edn) (2004 Reissue) para 1482 see now 15A

Halsbury's Laws of England (5th Edn) (2016) para 1615.]

RECORDS

Canada [Whether police occurrence reports prepared in the investigation of unrelated incidents involving a complainant or witness are "records" within the meaning of the Criminal Code, RSC 1985, c C-46, s 278.1.] '1. In sexual offence cases, the *Criminal Code*, R.S.C. 1985, c. C-46, limits the disclosure of private records relating to complainants and witnesses. The relevant provisions, ss. 278.1 to 278.91, known as the *Mills* regime, permit disclosure only where a record is likely relevant and its disclosure is necessary in the interests of justice. The regime applies to "records" that contain personal information for which there is a reasonable expectation of privacy, unless they are made by persons responsible for the investigation or prosecution of the offence. The issue on appeal is whether these provisions apply to police occurrence reports prepared in the investigation of previous incidents involving a complainant or witness and not the offence being prosecuted. The question is whether these unrelated police occurrence reports count as "records" as defined in s. 278.1, such that the statutory disclosure limits apply.

'2. I conclude that the *Mills* regime applies to police occurrence reports that are not directly related to the charges against the accused. Privacy is not an all or nothing right. Individuals involved in a criminal investigation do not forfeit their privacy interest for all future purposes; they reasonably expect that personal information in police reports will not be disclosed in unrelated matters. Moreover, while the regime exempts investigatory and prosecutorial records, that exemption applies only to records made in relation to the particular offence in question.

'3. Accordingly, I agree with the trial judge that the unrelated police occurrence reports at issue were "records" within the definition of s. 278.1 and thus subject to the *Mills* regime. The trial judge was entitled to conclude that the reports should not be disclosed. ...' *R v Quesnelle* 2014 SCC 46, [2014] SCJ No 46 at paras 1–3, per Karakatsanis J

REDUCE

Reduce or remove the danger

New Zealand [Building Act 2004, s 124: if a territorial authority is satisfied that a building is

earthquake prone it can issue a notice requiring work to be carried out on the building to 'reduce or remove' the danger.] '[17] The focus of the present appeal is s 124(2)(c), under which a territorial authority is empowered to require work to be carried out on building to "reduce or remove the danger" or to "prevent the building from remaining insanitary".

...
'[50] Section 124(1) provides that the section deals with the powers of territorial authorities in relation to dangerous, affected, earthquake-prone and insanitary buildings. It is notable that s 124(1) refers to a building that is "dangerous, affected, earthquake-prone or insanitary" whereas s 124(2)(c) refers only to "the danger" and "insanitary". The power in s 124(2) to require the owner to carry out work is relatively easy to interpret in relation to dangerous buildings (as defined in s 121): under s 124(2)(c)(i), the territorial authority can require work to reduce or remove "the danger", that is, the characteristics of the building that make it a dangerous building. The same can be said in relation to an insanitary building (as defined in s 123): the work required under s 124(2)(c)(ii) will be what is necessary to "prevent the building from remaining insanitary".

'[51] The position is less clear in relation to an earthquake-prone building, hence the present dispute. The work required under s 124(2)(c)(i) will be "to reduce or remove the danger". If s 124(2)(c) had been drafted so as to refer to each category of building specified in s 124(1), one would have expected to see a subparagraph dealing with "earthquake-proneness". There is none. It cannot have been intended that territorial authorities had no power to address the safety risks of earthquake-prone buildings. So it must have been thought that the reference to "the danger" in s 124(2)(c)(i) could also apply to earthquake-prone buildings.

'[52] That raises the obvious question: what "danger" is to be removed or reduced in the case of an earthquake-prone building? Mr Goddard argued that the danger was the characteristics of the building that make it earthquake-prone in terms of s 122. The work that could be required by a territorial authority could be that the capacity of the building in a moderate earthquake be increased to a level above the 34 per cent of NBS [new building standard] level or that the building be altered to make it unlikely to collapse in a moderate earthquake (even if it remained below the 34 per cent of NBS level). In either event, the result of the work would be that the building no longer came

within the definition of an earthquake-prone building in s 122. Mr Goddard accepted, however, that if the only practical way of strengthening a building so that it exceeds 34 per cent of NBS or is no longer likely to collapse in a moderate earthquake involves making improvements that strengthen it to a higher level than 34 per cent of NBS, then that is what will be required in order to ensure the building is no longer earthquake-prone.

‘[53] Mr Weston said the only “danger” arising from an earthquake-prone building was the risk that it would collapse in an earthquake. So s 124(2)(c)(i) should be interpreted as referring to that danger, rather than to the overall characteristics making the building earthquake-prone as defined in s 122(1). It was in light of this submission that he reiterated the need to interpret the reference to the likelihood of collapse in s 122(1)(b) in a broad way, encompassing the likelihood of collapse in any earthquake, not just in a moderate earthquake.

‘[54] Mr Weston argued that interpreting the reference to “the danger” in s 124(2)(c)(i) as referring to the likelihood of collapse and interpreting s 122(1)(b) as referring to the likelihood of collapse in *any* earthquake, rather than just a *moderate* earthquake, reflected the safety focus of the Building Act. He said the interpretation upheld in the Courts below effectively left little or no work for the second limb of s 122(1) to do. He said that if s 122(1)(b) is defined as relating to the likelihood of collapse in a moderate earthquake, all the territorial authority would be able to do is to require that a building be strengthened to 34 per cent of NBS, when the engineering evidence before the Court shows that this does not make a building safe in relation to all earthquakes. He said the DBH guidelines, the NZSEE Recommendations and the report of the Royal Commission all recognised that reducing earthquake risk can usefully be considered in a qualitative sense, that is, without comparing it to a specific earthquake benchmark.

‘[55] Mr Weston said that if the likelihood of collapse is assessed on the broader basis he supports, territorial authorities can make individual assessments in relation to any building that is earthquake-prone in terms of s 122. That will allow them to determine in each case what work is required to reduce or remove the risk of collapse in a manner that best meets the objectives of the Building Act of ensuring that buildings are safe for those who occupy them. Thus, the requirement in s 124(2)(c)(i) can be seen as providing a degree of leeway to territorial authorities to address the danger (the

likelihood of collapse) in a way which the territorial authority considers best meets the safety requirements, given the likelihood or otherwise of earthquakes in the area governed by the territorial authority.

‘[56] We accept that the engineering evidence provides support for that proposition, but the likelihood of collapse will always depend on the intensity and duration of the earthquake at the location of the building. It is true that the City Council’s policy of requiring that buildings be upgraded up to a maximum of 67 per cent of NBS would make the building less likely to collapse whether in a moderate earthquake or a more serious earthquake. It is also true that this would provide a safer option from the point of view of the people in the building at the time of the earthquake. But we do not consider that this interpretation reflects the wording of the relevant provisions. Nor do we consider it is consistent with the limited role given to territorial authorities in relation to the setting of standards under the Building Act.

‘[57] In our view, if Parliament had intended that the likelihood of collapse referred to in s 122(1)(b) was a likelihood of collapse in any earthquake, including an earthquake more serious than a moderate earthquake, Parliament would have made specific reference to this in s 122(1)(b). We think it is much more logical that, as Mr Goddard put it, s 122(1) should be interpreted as one complete sentence, which has been divided into components for ease of reading. When read on that basis, it is clear that the standard set by s 122(1) is whether the building meets the 34 per cent of NBS benchmark in a moderate earthquake and whether it is likely to collapse in a moderate earthquake. The fact that this standard is not a standard that meets all safety objectives does not, in our view, count against that interpretation. Rather, it demonstrates that Parliament has provided that the power given to a territorial authority under s 124 is limited in its application to buildings that fail to meet the minimum standard set out in s 122(1) and is exercisable only to the extent necessary to bring a building up to that minimum standard.

‘[58] It is unlikely that Parliament would have intended to choose a threshold of 34 per cent of NBS (and likely to collapse) but then provide that the remedial power of a territorial authority can require a very significant upgrading of the building to a level up to 67 per cent of NBS (or, conceivably, even higher). We do not think Parliament could have intended that a territorial authority could require a building that is at 30 per cent of NBS to be

upgraded to 67 per cent of NBS (or an even higher standard) while no remedial action at all could be required in relation to a building that is at 35 per cent of NBS. Mr Weston acknowledged that this could be seen as unusual, but argued that it may simply reflect an intention on the part of Parliament to target the very worst buildings for remedial action, while at the same time allowing a territorial authority to ensure that the remedial action was of sufficient scope to make buildings safe not just in a moderate earthquake but in any earthquake. We consider that to be unlikely.

...
 '[62] We consider the better view is that the danger referred to in s 124(2)(c)(i) is the characteristics of the building that make it an earthquake-prone building as defined in s 122(1). We consider that reflects the scheme of s 124(2)(c), which we see as providing for measures to be taken to address the situation that has triggered the availability of the powers conferred by s 124. Where a building is a dangerous building in terms of s 121(1), the required work is to ensure it ceases to be a dangerous building. Where the building is an insanitary building in terms of s 123, the required work is to ensure it ceases to be an insanitary building. And, where the building is an earthquake-prone building in terms of s 122(1), the required work is to ensure it ceases to be an earthquake-prone building.

'[63] We also consider this reflects Parliament's adoption of the 34 per cent of NBS benchmark as the standard at which a building is considered sufficiently safe to take it outside the scope of the power given to territorial authorities by s 124 to require strengthening work to be undertaken.' *University of Canterbury v Insurance Council of New Zealand Inc* [2014] NZSC 193, [2015] 1 NZLR 261 at [17], [50]–[58], [63], per O'Regan J

REFUGEE

Canada '[10] State protection is an issue that arises from the very definition of a refugee. A refugee is a person who has "a well-founded fear of persecution" and is "unable or, by reason of that fear, unwilling" to obtain protection from their country of nationality (paragraph 96(a), *Immigration and Refugee Protection Act*, SC 2001, c 27 ...). The definition contains both subjective and objective elements: the claimant must actually fear persecution and that fear must be well founded.

'[13] The burden of proof lies on claimants to show that they meet the definition of a refugee. To do so, they must prove that they actually fear persecution and that their fear is "well founded." To establish a well-founded fear, refugee claimants must show that there is a "reasonable chance," a "serious possibility" or "more than a mere possibility" that they will be persecuted if returned to their country of nationality (*Adjei v Canada (Minister of Employment and Immigration)* [1989] 2 FC 680 (CA)). (By contrast, a person who claims to be in danger of being tortured, killed or subjected to cruel and unusual treatment must establish his or her claim on the balance of probabilities: *Li v Canada (Minister of Citizenship and Immigration)* [2005] 3 FCR 239 (FCA).) In respect of particular underlying facts, the claimant shoulders a burden of proof on the balance of probabilities (*Adjei*, above, at page 682).' *Carrillo v Canada (Minister of Citizenship and Immigration)* [2008] 1 FCR 3, 2007 FC 320, [2007] FCJ No 439 at [10], [13], per O'Reilly J (decision revsd *Carrillo v Canada (Minister of Citizenship and Immigration)* [2008] FCJ No 399, 2008 FCA 94, 69 Imm LR (3d) 309, FCA)

REGISTER

Of members of company

[For 7(1) Halsbury's Laws of England (4th Edn) (2004 Reissue) para 777 et seq see now 14 Halsbury's Laws of England (5th Edn) (2016) para 336 et seq.]

REGULAR SCHOOL DAY

Canada [Motor Vehicle Act, RSBC 1996, c 319, s 147(1): offence of speeding in a school zone on a 'regular school day'.] '11. In my view, "regular school day" has a broader meaning in section 147(1) than whether on the specific day, there were students in attendance. I conclude "regular school day" has a statutory meaning, not a factual meaning. That expression is not defined in either the *Interpretation Act* or the *Motor Vehicle Act*. So I have taken my guidance from the *School Act*, RSBC 1996, c 412, and its Regulations. Section 1 of the *School Act* defines *school day* as "any one of the days in session" and *days in session* (abridged) as "the days in a school year in which teachers are scheduled, in the school calendar, to be available". I found the *School Calendar Regulation*, BC Reg 114/2002, to be of greatest

assistance. Section 6 of that *Regulation* requires a Board to operate each school in accordance with the school calendar. Schedule I (Supplement) to the *Regulation* sets out the school calendar for 2008/2009 and it lists March 23 as the day that school reopens after Spring Vacation and, with the exception of 3 single-day holidays not relevant to this matter, June 26 as the day school closes.

'12. I conclude from this legislation that a regular school day within the meaning of the *Motor Vehicle Act* in the 2008/2009 school year is any weekday between September 2, 2008 and June 26, 2009 other than the periods listed as Winter Vacation and Spring Vacation or the 5 listed statutory holidays. I therefore conclude that Thursday, June 11, 2009 was a regular school day.' *R v Ashir* [2010] BCJ No 948, 2010 BCPC 56, BC Provincial Court, at paras 11–12, per H W Gordon JP

REGULARLY

'[1] This case is all about the meaning of the word "regularly" when describing the attendance of a child at school. Under s 444(1) of the Education Act 1996, if a child of compulsory school age "fails to attend regularly" at the school where he is a registered pupil, his parent is guilty of an offence. There are at least three possible meanings of "regularly" in that provision: (a) evenly spaced, as in "he attends Church regularly every Sunday"; (b) sufficiently often, as in "he attends Church regularly, almost every week"; or (c) in accordance with the rules, as in "he attends Church when he is required to do so". When does a pupil fail to attend school regularly? Is it sufficient if she turns up regularly every Wednesday, or if she attends over 90% of the days when she is required to do so, or does she have to attend on every day when she is required to do so, unless she has permission to be absent or some other recognised excuse?

'[29] I turn, therefore, to the three possible meanings of "regularly" mentioned in para [1] above and ask which was the meaning intended by Parliament when enacting s 444(1).

(a) At regular intervals

'[30] We speak of a person going "regularly" to church or to Sunday school when he goes every Sunday or almost every Sunday. But this cannot have been the intended meaning in the case of school attendance. It would enable attendance

every Monday to count as "regular" even though attendance every day of the week is required. It would enable a child's attendance to be regular even if he was regularly late, yet in *Hinchley v Rankin* [1961] 1 All ER 692, [1961] 1 WLR 421, the Divisional Court held that a father had been rightly convicted when his son had been recorded as absent because he had not been at school when the register was closed, for "it must be regular attendance for the periods prescribed by the person upon whom the duty to provide the education is laid" ([1961] 1 All ER 692 at 694, [1961] 1 WLR 421 at 425).

(b) Sufficiently frequently

'[31] This might well be the meaning assumed by many people at first reading, as it was by the Divisional Court in *Bromley [Bromley London Borough Council v C* [2006] EWHC 1110 (Admin), [2006] ELR 358, [2006] All ER (D) 80 (Mar)] and in this case. This is what we mean when we talk about a person being a "regular" at the pub or a "regular" at church services. But there are many reasons to think that this was not what Parliament intended, either in 1944 or in 1996.

'[32] First, attendance at the pub or at church is not compulsory. There are no rules about when a customer should attend the pub. Such rules as there are about church attendance are not rules of law. School attendance is compulsory and there are rules about when it is required.

'[33] Second, the purpose of the Education Act 1944 was to increase the scope and character of compulsory state education. Parents were required to cause their children to receive efficient "full-time" education suitable to their age, ability and aptitude, no longer just efficient education in the three Rs. The compulsory school age was to be raised and a wider range of educational opportunities provided free of charge. It is implausible to suggest that Parliament intended to relax the previous obligations placed on parents to secure their children's attendance to take advantage of those opportunities.

'[34] Third, other features of the 1944 Act indicated an intention to tighten rather than to relax the parental liability. The open-ended defence of "reasonable excuse" was replaced in such a way as to make it clear that only the statutory excuses were acceptable. Allowing parents the flexibility inherent in this interpretation would mean that their excuses did not even have to be reasonable. Taking a child to football or failing to get up in time to get the child to

school would do, provided that it did not happen too often.

‘[35] Fourth, s 444(3), in providing that a child is not to be taken to have failed to attend regularly by reason of his absence “on any day exclusively set apart for religious observance” suggests that otherwise his absence on a single day would be a failure to attend regularly.

‘[36] Fifth, in s 444(6), dealing with children of no fixed abode, the parent has a defence if he can show that he has an itinerant trade or business, that his child had attended “as regularly as the nature of that trade or business permits”, and in any event for the minimum number of attendances prescribed during the previous school year. “Regularly” in this provision does not suggest a matter of fact and degree; rather that the child has attended as often as he can. The provision also illustrates that when Parliament wishes to indicate what, in its view, is sufficiently frequent, it can and does do so.

‘[37] Sixth, by s 444(7) of the 1996 Act, a boarder is taken to have failed to attend regularly at the school if he is absent from it without leave during *any* part of the school term, unless the parent proves that he was prevented by sickness or any unavoidable cause. If 100% attendance is expected of boarders, why should it not also be expected of day pupils? Both the school and the parents are *in loco parentis*.

‘[38] Seventh, although subsequent amendments should not be used to assist in interpreting what was already there, it is not without interest that s 444(7A), dealing with excluded children for whom alternative provision has been made, proceeds on the basis that absences are to be counted by the day.

‘[39] Eighth, and above all, this interpretation is far too uncertain to found a criminal offence. Over what period is the sufficiency of attendance to be judged? How much is sufficient? Does one take into account how good or bad the reasons for any previous absences were? If attendance over the whole school year, or over the period before the information is laid, is taken into account, how can the parent know whether taking the child out of school on any particular day will be an offence? How is a parent like Mrs C, contemplating taking her children on holiday, to know whether the local authority and the magistrates will consider that it was (a) acceptable because there were no other absences, (b) acceptable because the other absences were for good cause, or (c) unacceptable because of the length of the holiday, or (d)

unacceptable because, given the number of days the child had already missed for good reasons, he should not have been taken on holiday too? (No doubt other permutations are available.) The point is that, on this interpretation, the parent will not know on any given day whether taking his child out of school is a criminal offence.

‘[40] Ninth, and this is the reason why the local authority have appealed and the Secretary of State has intervened in support, there are very good policy reasons why this interpretation simply will not do. It is not just that there is a clear statistical link between school attendance and educational achievement. It is more the disruptive effect of unauthorised absences. These disrupt the education of the individual child. Work missed has to be made up, requiring extra work by the teacher who has already covered and marked this subject matter with the other pupils. Having to make up for one pupil’s absence may also disrupt the work of other pupils. Group learning will be diminished by the absence of individual members of the group. Most of all, if one pupil can be taken out whenever it suits the parent, then so can others. Different pupils may be taken out at different times, thus increasing the disruptive effect exponentially.

‘[41] Finally, given the strictness of the previous law, Parliament is unlikely to have found it acceptable that parents could take their children out of school in blatant disregard of the school rules, either without having asked for permission at all or, having asked for it, been refused. This is not an approach to rule-keeping which any educational system can be expected to find acceptable. It is a slap in the face to those obedient parents who do keep the rules, whatever the cost or inconvenience to themselves.

In accordance with the rules ‘[42] All the reasons why “sufficiently frequently” cannot be right also point towards this being the correct interpretation. The Divisional Court was clearly worried about the consequence that a single missed attendance without leave or unavoidable cause could lead to criminal liability. However, there are several answers to this concern.

‘[43] First, there are many examples where a very minor or trivial breach of the law can lead to criminal liability. It is an offence to steal a milk bottle, to drive at 31 miles per hour where the limit is 30, or to fail to declare imported goods which are just over the permitted limit. The answer in such cases is a sensible prosecution policy. In some cases, of which this

is one, this can involve the use of fixed penalty notices, which recognise that a person should not have behaved in this way but spare him a criminal conviction. If such cases are prosecuted, the court can deal with them by an absolute or conditional discharge if appropriate.

‘[44] Second, this had not been thought an objection under the pre-1944 law. It was recognised that this sometimes produced harsh results, but the aim was to bring home to parents how important it was that they ensured that their children went to school. The offence in s 444(1) is an offence of strict liability, whereas the offence in s 444(1A) is not.

‘[45] Third, while the general rule is that statutes imposing criminal liability should be construed strictly, so as not to impose it in cases of doubt, it is an even more important rule that statutes imposing criminal liability should do so in a way which enables everyone to know where they stand, to know what is and is not an offence. The alternative interpretations discussed above do not do this, whereas this interpretation does.

‘[46] This interpretation is also consistent with the provision in s 444(3)(a) and (9) that a child is not to be taken to have failed to attend regularly if he is absent with the leave of a person authorised by the governing body or proprietor of the school to give it. Unlike sickness or unavoidable cause, leave is not a defence. It is part of the definition of the offence. Your child is required to attend in accordance with the normal rules laid down by the school authorities for attendance but the school can make an exception in your case. As noted above, it is also consistent with s 444(3)(b).

‘[47] There is another pointer in the link between the parent’s obligation in s 7, to cause the child to receive “full-time” education, and the offence committed under s 444(1), if the child fails to attend school regularly. “Full-time” indicates for the whole of the time when education is being offered to children like the child in question.

Conclusion ‘[48] I conclude, therefore, that in s 444(1) of the Education Act 1996, “regularly” means “in accordance with the rules prescribed by the school”. I would therefore make a declaration to that effect. To the extent that earlier cases, in particular *Crump v Gilmore* and *Bromley London London BC v C*, adopted a different interpretation, they should not be followed.’ *Isle of Wight Council v Platt* [2017] UKSC 28, [2017] 3 All ER 623 at [1], [30]–[48], per Lady Hale DP

REGULATORY CHARGE

Canada ‘[1] The issue in this appeal is whether the annual business licence fee for the right to sell alcoholic beverages imposed on hotels, restaurants and bars in Jasper National Park is a regulatory charge or a tax. This business licence fee is imposed under the authority granted to the Minister of Canadian Heritage pursuant to s 24 of the *Parks Canada Agency Act*, SC 1998, c 31, to “fix the fees or the manner of calculating fees in respect of products, rights or privileges provided by the [Parks Canada] Agency”.

‘[2] Pursuant to s 53 of the *Constitution Act, 1867*, only Parliament may impose a tax. If the business licence fee is, in pith and substance, a tax, it is *ultra vires* and beyond the jurisdiction of the Minister to impose. If the fee is, in pith and substance, a regulatory charge, it may validly be imposed under the authority of the Minister pursuant to s 24 of the *Parks Canada Agency Act* (“*Parks Agency Act*”).

‘[3] Both Snider J in the Federal Court and Evans JA in the Federal Court of Appeal found that the fee was a regulatory charge and therefore was validly imposed: (2005) 274 FTR 311; aff’d [2007] 2 FCR 446. I am of the same view and would therefore dismiss this appeal.

1. Analysing Whether a Government Levy is a Tax or a Regulatory Charge

‘[16] The task for the Court is to identify whether the fees paid by the appellants are, in pith and substance, a tax or a regulatory charge. The pith and substance of a levy is its dominant or most important characteristic. The dominant or most important characteristics are to be distinguished from its incidental features (P W Hogg, *Constitutional Law of Canada* (5th ed 2007), vol 1, at pp 433–36). The fees in this case have characteristics of both a tax and regulatory charges. The Court must ascertain which is dominant and which is incidental.

‘[17] In the context of whether a government levy is a tax or a regulatory charge, it is the *primary purpose* of the law that is determinative. Although the law may have incidental effects, its primary purpose will determine whether it is a tax or a regulatory fee. In *Westbank First Nation v British Columbia Hydro and Power Authority* [1999] 3 SCR 134, Gonthier J described the pith and substance of a government levy in terms of its primary purpose. At para 30, he stated:

In all cases, a court should identify the primary aspect of the impugned levy ...

Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or (3) to charge for services directly rendered, i.e., to be a user fee. [Emphasis deleted.]

There is no suggestion in this case that the levy is a user fee for the provision of government services or facilities. The sole question is whether in pith and substance the levy is a tax or a regulatory charge.

'[18] The issue of whether a levy is a tax or a regulatory charge has been considered on prior occasions by this Court. The issue was relevant when determining the constitutionality of a provincial levy that had indirect tendencies (*Allard Contractors Ltd v Coquitlam (District)* [1993] 4 SCR 371, and *Ontario Home Builders' Association v York Region Board of Education* [1996] 2 SCR 929). If it was a tax, it would be *ultra vires* the province whose taxing authority under s 92(2) of the *Constitution Act, 1867* is restricted to direct taxes within the province. However, if it was a regulatory charge, the province was constitutionality competent to impose such charge. It was also relevant when deciding if a by-law of an Indian band enacted a system of taxation under the purported authority of the *Indian Act*, for if it was, it could not be applied to an agent of the provincial Crown by reason of s 125 of the *Constitution Act, 1867* (*Westbank*). However, determining whether a government levy is *ultra vires* a Minister's delegated power has not yet been addressed by this Court.

2. Regulatory Charges Distinguished From User Fees

'[19] It will be useful to first differentiate a regulatory charge from a user fee. A user fee, by definition, is a fee charged by the government for the use of government services or facilities. In the case of user fees, as stated by this Court in *Eurig* [*Re Eurig Estate* [1998] 2 SCR 565], there must be a clear nexus between the quantum charged and the cost to the government of providing such services or facilities. The fees charged cannot exceed the cost to the government of providing the services or facilities. However, "courts will not insist that fees correspond precisely to the cost of the

relevant service. As long as a reasonable connection is shown between the cost of the service provided and the amount charged, that will suffice" (see *Eurig* at para 22).

'[20] By contrast, regulatory charges are not imposed for the provision of specific services or facilities. They are normally imposed in relation to rights or privileges awarded or granted by the government. The funds collected under the regulatory scheme are used to finance the scheme or to alter individual behaviour. The fee may be set simply to defray the costs of the regulatory scheme. Or the fee may be set at a level designed to proscribe, prohibit or lend preference to a behaviour, e.g. "[a] per-tonne charge on landfill waste may be levied to discourage the production of waste [or a] deposit-refund charge on bottles may encourage recycling of glass or plastic bottles" (see *Westbank*, at para 29, referring to *Re Ottawa-Carleton (Regional Municipality) By-law 234-1992*, [1996] OMBD No 553 (QL), and *Cape Breton Beverages Ltd v Nova Scotia (Attorney General)* (1997) 144 DLR (4th) 536 (NSSC) (aff'd (1997), 151 DLR (4th) 575 (NSCA), leave to appeal refused, [1997] 3 SCR vii), [1997] SCCA No 403).

'[21] There is no suggestion that the business licence fees in this case are user fees and the government does not take the position that the fees are set at a level so as to proscribe, prohibit or lend preference to certain conduct. Consequently, the question is whether, in pith and substance, the licence fees constitute a tax or a regulatory charge which is used to defray the costs of a regulatory scheme.

3. The Characteristics of a Tax

'[22] In *Lawson v Interior Tree Fruit and Vegetable Committee of Direction* [1931] SCR 357, Duff J (as he then was) identified the characteristics of a tax (pp 362-63). In *Eurig*, Major J summarized the *Lawson* characteristics of a tax at para 15:

Whether a levy is a tax or a fee was considered in *Lawson*, *supra*. Duff J for the majority concluded that the levy in question was a tax because it was: (1) enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; and (4) intended for a public purpose.

'[23] These characteristics will likely apply to most government levies. The question is whether these are the dominant characteristics of the levy or whether they are only incidental.

4. Distinguishing a Regulatory Charge From a Tax

'[24] The distinction between a tax and a regulatory charge was not the way in which the Court in *Lawson* dealt with the matter before it. To address that issue, Gonthier J in *Westbank* added a fifth consideration to those articulated by Duff J in *Lawson*: that the government levy would be in pith and substance a tax if it was "unconnected to any form of a regulatory scheme" (para 43). This fifth consideration provides that even if the levy has all the other indicia of a tax, it will be a regulatory charge if it is connected to a regulatory scheme.

'[25] In *Westbank*, Gonthier J established a two-step approach to determine if the governmental levy is connected to a regulatory scheme. The first step is to identify the existence of a relevant regulatory scheme. To do so:

[A] court should look for the presence of some or all of the following indicia of a regulatory scheme: (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to affect some behaviour; (3) the presence of actual or properly estimated costs of the regulation; (4) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation. [para 44]

The first three considerations establish the existence of a regulatory scheme. The fourth consideration establishes that the regulatory scheme is relevant to the person being regulated.

'[26] Although this list of factors provides a useful guide, it is not to be treated as if the factors were prescribed by statute. As stated by Gonthier J, at para 24:

This is only a list of factors to consider; not all of these factors must be present to find a regulatory scheme. Nor is this list of factors exhaustive.

Nonetheless, there must be criteria establishing a regulatory scheme and its relevance to the person being regulated.

'[27] Provided that a relevant regulatory scheme is found to exist, the second step is to find a relationship between the charge and the scheme itself.

This [relationship] will exist when the revenues are tied to the costs of the regulatory scheme, or where the charges themselves have a regulatory purpose, such

as the regulation of certain behaviour. (*Westbank*, at para 44)

'[28] In summary, if there is a regulatory scheme and it is found to be relevant to the person being regulated under step one, and there is a relationship between the levy and the scheme itself under step two, the pith and substance of the levy will be a regulatory charge and not a tax. In other words, the dominant features of the levy will be its regulatory characteristics. Therefore, the questions to ask are: (1) Have the appellants demonstrated that the levy has the attributes of a tax? and (2) Has the government demonstrated that the levy is connected to a regulatory scheme? To answer the first question, one must look to the indicia established in *Lawson*. To answer the second question, one must proceed with the two-step analysis in *Westbank*.' 620 *Connaught Ltd v Canada (Attorney General)* [2008] 1 SCR 131, [2008] SCJ No 7, 290 DLR (4th) 385, 2008 SCC 7 at [1]–[3], [16]–[28], per Rothstein J

REINSTATEMENT

[New Roads and Street Works Act 1991 ss 70 (duty to reinstate), 71 (standard of reinstatement). Hertfordshire County Council laid a large number of informations against National Grid Gas plc (the defendant) alleging various breaches of duty under the New Roads and Street Works Act 1991 in respect of the reinstatement of the street following the replacement of a gas main, including 23 informations alleging breaches of the duty under s 71(2) to ensure that the reinstatement conforms to prescribed performance standards.] '[46] In the case stated the judge sets out her conclusion as follows:

"I was of the opinion that s 70 should be seen to refer to reinstatement to the required standard and would therefore continue to apply after a 'works closed' notice has been served if further works are required by the authorities following inspection by them. I was of the opinion therefore that the summonses under s 70(2) were properly brought and that the section applied to works required to be done by [the council] after the service of a 'works closed' notice; that there was no distinction to be drawn between works done prior to the notice being served and works later required by the authorities and described by [the defendant] as 'remedial' works."

‘[47] The question she has posed for the opinion of this court is:

“Was I right to conclude that there was a case for [the defendant] to answer in respect of three alleged contraventions of s 70(2) of the New Roads and Street Works Act 1991 on dates between 11 February 2005 and 8 November 2005 on the ground that s 70(2) can relate to delay in commencing ‘remedial’ works in the street?”

‘[48] Before us, Mr Bradnock has repeated the defendant’s submissions to the judge. He says that the council has conflated the two separate concepts of reinstatement and remedial works. Reinstatement refers purely to the act of finishing street works so that the street is left in useable condition: it may be applied to the original works or to remedial works as the case may be. It is an essential part of any street works involving an excavation and cannot exist independently of such works. Remedial works, by contrast, are street works in themselves. They are necessitated by a failure of reinstatement, as s 72(2) makes clear. It is apparent from Mr Castleman’s witness statement that the council’s allegation is that the defendant failed to begin remedial works with appropriate dispatch, not that reinstatement (whether as part of the substantive works or the remedial works) was delayed. Reinstatement of the substantive works was carried out in 2004. Once a purported reinstatement has been completed, as indicated by the filing of a “works closed” notice under s 70(3), the authority is at liberty to inspect it; and if it does not meet the required standard, an offence will have been committed under s 71. That section creates a continuing offence and any delay can be reflected by the authority laying a suitable number of s 71 informations to cover the entire period for which the undertaker fails to remedy the defects in reinstatement.

‘[49] Mr Bradnock further submits that if the judge’s interpretation of s 70(2) were correct, reinstatement could never be said to be complete until the “guarantee” period (ie the prescribed period under s 71(2)) for the work carried out had expired without further works being required—in the case of failure to meet required performance standards, two years after the “works closed” notice or two years after the authority’s requirement for further works to be undertaken, whichever is the later. Any requirement to carry out further work would prolong the guarantee period and therefore the

period of reinstatement. Such an interpretation would render the “works closed” notice meaningless and would make s 71 allegations all but impossible for prosecutors to prove: if street works remained open for the purposes of s 70 even after purported reinstatement had been concluded, an allegation that the relevant standards of workmanship and materials had not been met could be successfully defended by the argument that the defects were merely temporary and reinstatement was not yet complete.

‘[50] For the council, Mr Reed submits that the judge was right to consider that “reinstatement” means proper reinstatement or reinstatement not requiring remedial works; and if she was right on that, then the defendant’s case falls down, since on that basis delays in remedial works are necessarily delays in the overall reinstatement under s 70(2). First, “reinstatement” is defined in s 105(1) as including “making good”, which indicates that reinstatement is not achieved until remedial works are carried out. Second, in the *British Telecommunications* case [*British Telecommunications plc v Nottinghamshire CC* [1998] All ER (D) 478, DC] it was held that “reinstatement” means “reinstatement properly” (and the same decision undermines the defendant’s argument based on the existence of the guarantee period). Third, the purpose of the section is to ensure that the completion of the relevant works is carried out in a manner to enable the proper use of the street in good time, and it is consistent with that aim that “reinstatement” should include the totality of the works required to be carried out to achieve it. Further, the issue of a “works closed” notice does not mean that reinstatement is completed, which is a question of fact. The requirement to give notice under s 70(3) is simply a mechanism to ensure that the authority is aware of the progress of the works. As to the possibility of a prosecution under s 71 for delays in remedial works, that is a tortuous means of interpreting the legislation so as to achieve a result which can be achieved more simply under s 70(2).

‘[51] For my part, if I had come to this issue free from existing authority, I would have been doubtful about the correctness of the judge’s decision. In my view there is much to be said for the view that the 1991 Act provides in Pt 3 a staged approach. The first stage, so far as relevant to the present dispute, relates to the execution of the street works of which notice has been given under s 54 or s 55. Where those street works are of a kind mentioned in s 66(1), there is a duty to carry on and complete the works with all such dispatch as is reasonably

practicable. The next stage is the reinstatement of the street, pursuant to the duty under s 70(1). That duty is engaged as the street works are completed: the undertaker is required by s 70(2) to begin the reinstatement as soon after the completion of any part of the street works as is reasonably practicable, and then to carry on and complete the reinstatement with all such dispatch as is reasonably practicable. When the reinstatement is completed, there is a duty to inform the street authority pursuant to s 70(3). The completed reinstatement is required to meet the standards in s 71. If it fails to do so, the undertaker is liable to prosecution under that section. The street authority can carry out the investigatory works referred to in s 72(1), with the costs consequences referred to in that subsection and in s 72(2). By notice under s 72(3) the authority can also require the undertaker to carry out any necessary remedial works; and if the undertaker fails to comply with the notice, the authority can carry out the necessary works and recover from the undertaker the costs reasonably incurred in doing so. On the face of it, that is an intelligible and workable scheme, and it does not require "reinstatement" in s 70 or s 71 to be interpreted as meaning proper reinstatement or reinstatement not requiring remedial works. If the completed reinstatement is defective, remedies are available both in the form of prosecutions and in the form of the street authority's power to get remedial works carried out.

'[52] That is not, however, the approach that has been taken in the decided cases. Of particular importance is *British Telecommunications plc v Nottinghamshire CC* [1998] All ER (D) 478, in which the essential question for decision was whether the duty to reinstate in accordance with the specification under s 71(1) continues indefinitely so that failure to reinstate in accordance with the specification constitutes a continuing offence for which the undertaker may be prosecuted at any time until the street is reinstated in accordance with the specification. Lord Bingham of Cornhill CJ said that he had found this a difficult question and that his mind had altered more than once in the course of argument. On balance, however, he had concluded that there was a continuing offence, for these reasons:

"It seems to me important that the overriding duty to reinstate in s 70(1) of the Act is expressed in wholly general terms and without any qualification whatever as to time, albeit the undertaker is required to

give notice to the street authority. Furthermore, the duty laid on an undertaker in s 71(1) is again an obligation to reinstate properly, there being no limitation of time whatever attached to that duty. Mr Treacy is, I think, entitled to submit that 'reinstate' means 'reinstate properly', both because the definition section refers to the street being made good and because the code of practice which is incorporated by reference indicates that compliance with proper standards is inherent in the concept of reinstatement. It does not appear to me that s 71(2) undermines that conclusion since, although it refers to what is in effect a guarantee period, that would be applicable in a case where the work had initially been done properly but had developed defects during the two-year period.

Furthermore it seems to me very difficult, as it seemed to Henry LJ in [*Camden London BC v Marshall* [1996] 1 WLR 1345], to give any effect to s 95(2) if there is not, in fact, a continuing duty. It was the language of s 376(2) that was the crucial factor leading to his decision. It seems to me difficult to construe s 95(2) on the premise that a duty ends on the completion of reinstatement, even if that reinstatement is defective. It is scarcely possible as it seems to me to envisage any prosecution being begun before purported completion of the reinstatement, but on BT's argument the duty to reinstate properly would have come to an end on purported completion, yet here in s 95(2) we find reference to a failure to comply with a duty being continued after conviction and that seems to me to point strongly towards the continuation of the duty ...

I would accordingly conclude that the failure to reinstate in accordance with the Act and prescribed standards and the specification creates a continuing offence which may be the subject of prosecution unless and until the time comes when the reinstatement is properly carried out. If further proceedings are brought after a conviction then the matter is covered by s 95(2)."

'[53] Collins J agreed, stating that the duty in s 71(1) is to reinstate properly and that "a reinstatement which is not done properly, and in respect of which there is a breach of s 71(1), can be the subject of a prosecution, notwithstanding that the contractor in question has purported to complete the reinstatement".

‘[54] In *Thames Water Utilities Ltd v Bromley London BC* [2000] All ER (D) 459 the undertaker had informed the street authority of the completion of an interim reinstatement but had thereafter done nothing. Informations alleging failure to complete the permanent reinstatement as soon as practicable and in any event within six months, as required by s 70(4), were laid over a year later. The issue was whether they were out of time. The court followed the reasoning in the *British Telecommunications* case in holding that they were not. A suggestion that Lord Bingham had perhaps overlooked the significance of s 72(3) was rejected, and the reasoning of Lord Bingham in relation to s 95(2) was described as wholly convincing.

‘[55] In my judgment, the *British Telecommunications* case is neither irrelevant nor distinguishable, as submitted by Mr Bradnock, and I am satisfied that this court should follow the reasoning in it. The doubts I have expressed come nowhere near satisfying the conditions set out in *R v Greater Manchester Coroner, ex p Tal* [1984] 3 All ER 240 at 248, [1985] QB 67 at 81, for a departure by one Divisional Court from a prior decision of another Divisional Court. The fact that there are now two prior decisions and that the first of them was by a court which included Lord Bingham, and on an issue that he considered difficult, makes it all the more appropriate that a consistent line should be taken.

‘[56] On that basis it seems to me that the matters relied on by the council were properly included in informations alleging a breach of the duty under s 70(2). “Reinstatement” must be given the same meaning in s 70 as in s 71, and in each case it must be taken to mean “proper reinstatement”, ie a reinstatement meeting the requirements of s 71. The issue of a “works closed” notice under s 70(3) marks the point where the undertaker has purported to complete the reinstatement, but the contractor’s view of the matter tells one nothing about whether there has in fact been a proper reinstatement. The reinstatement will not have been completed for the purposes of the statute unless and until it is a proper reinstatement meeting the s 71 requirements. Where it does not meet those requirements, the carrying out of remedial works to correct the defects forms part of the continuing process of reinstatement and is subject to the duty under s 70(2) to carry on and complete the reinstatement with all such dispatch as is reasonably practicable. It follows that it was open to the council to bring a prosecution on the basis that the process of reinstatement continued

during the periods specified in the three informations and that reinstatement was not carried on and completed with all such dispatch as was reasonably practicable during those periods.

‘[57] I would therefore give an affirmative answer to the judge’s question on s 70(2) and would dismiss the defendant’s appeal on this issue.’ *Hertfordshire County Council v National Grid Gas plc* [2007] EWHC 2535 (Admin), [2008] 1 All ER 1137 at [46]–[57], DC, per Richards LJ

RELATIONS

[For 50 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 637 see now 102 Halsbury’s Laws of England (5th Edn) (2010) para 350.]

RELATIVE

[For the Income and Corporation Taxes Act 1988, s 417(4) see now the Corporation Tax Act 2010, s 448(2).]

RELIEF OF POVERTY

See also CHARITY—CHARITABLE PURPOSES

Australia ‘[15] An institution whose primary purpose is the relief of poverty is prima facie a charitable institution. The scope of the term “relief of poverty” at law is broad. The provision of foreign aid is undoubtedly encompassed by this term.

‘[19] The fact that Aid/Watch is not directly involved in the distribution of aid does not preclude its purposes from being characterised as charitable. In *Word Investments [Commissioner of Taxation v Word Investments Ltd]* (2008) 236 CLR 204; 251 ALR 206; [2008] HCA 55] the majority of the High Court rejected the submission that Word Investments Ltd could not be a charitable institution because its activities were confined to making profits which were directed to charitable institutions. The majority judgment stated at [38]:

“[38] [T]he charitable purposes of a company can be found in a purpose of bringing about the natural and probable consequence of its immediate and expressed purposes, and its charitable

activities can be found in the natural and probable consequence of its immediate activities”.

Comr of Taxation v Aid/Watch Incorporated [2009] FCAFC 128, (2009) 266 ALR 526 at [15], [19], per Kenny, Stone and Perram JJ

RELIGION

See also WORSHIP

[Places of Worship Registration Act 1855, s 2; whether Church of Scientology was a ‘place of meeting for religious worship’.] [34] There has never been a universal legal definition of religion in English law, and experience across the common law world over many years has shown the pitfalls of attempting to attach a narrowly circumscribed meaning to the word. There are several reasons for this—the different contexts in which the issue may arise, the variety of world religions, developments of new religions and religious practices, and developments in the common understanding of the concept of religion due to cultural changes in society. While the historical origins of the legislation are relevant to understanding its purpose, the expression “place of meeting for religious worship” in s 2 of the 1855 Act has to be interpreted in accordance with contemporary understanding of religion and not by reference to the culture of 1855. It is no good considering whether the members of the legislature over 150 years ago would have considered Scientology to be a religion because it did not exist.

...
[50] In the present case Ouseley J’s conclusion that Scientology is a religion was not challenged by a respondent’s notice and counsel for the Registrar General preferred to confine his submissions to arguing that, whether or not Scientology is a religion, the Registrar General was properly entitled to conclude that its ceremonies and practices do not amount to religious worship for the reasons given by the Court of Appeal in *Ex p Segerdal* [*R v Registrar General, ex p Segerdal* [1970] 2 QB 697, [1970] 3 All ER 886, CA]. I consider that Ouseley J’s conclusion was right for a number of reasons.

[51] Unless there is some compelling contextual reason for holding otherwise, religion should not be confined to religions which recognise a supreme deity. First and foremost, to do so would be a form of religious discrimination unacceptable in today’s society. It would exclude Buddhism, along with other faiths such as Jainism, Taoism, Theosophy and

part of Hinduism. The evidence in the present case shows that, among others, Jains, Theosophists and Buddhists have registered places of worship in England. Lord Denning in *Ex p Segerdal* [1970] 3 All ER 886 at 890, [1970] 2 QB 697 at 707 acknowledged that Buddhist temples were “properly described as places of meeting for religious worship” but he referred to them as “exceptional cases” without offering any further explanation. The need to make an exception for Buddhism (which has also been applied to Jainism and Theosophy), and the absence of a satisfactory explanation for it, are powerful indications that there is something unsound in the supposed general rule.

[52] Further, to confine religion to a religion which involves belief in a “supreme deity” leads into difficult theological territory. On the evidence of Mrs Wilks, Scientologists do believe in a supreme deity of a kind, but of an abstract and impersonal nature. Ideas about the nature of God are the stuff of theological debate.

...
[56] It might be argued that the expression “religious worship” in s 2 of the 1855 Act shows that Parliament intended the word “religious” to be given a narrow interpretation. I would reject that argument. The language of the section showed an intentionally broad sweep. It included “Protestant Dissenters or other Protestants”, “persons professing the Roman Catholic religion”, “persons professing the Jewish religion” and “any other body or denomination of persons”. It may be that the members of the legislature in 1855 would not have had in mind adherence to other faiths such as Buddhism, but that is no ground for holding that they were intended to be excluded from legislation passed to remove religious discrimination.

[57] ... For the purposes of the 1855 Act, I would describe religion in summary as a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind’s place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system. By spiritual or non-secular I mean a belief system which goes beyond that which can be perceived by the senses or ascertained by the application of science. I prefer not to use the word “supernatural” to express this element, because it is a loaded word which can carry a variety of connotations. Such a belief system may or may not involve belief in a supreme being, but it does involve a belief that there is more to be understood about mankind’s nature and relationship to the universe than can

be gained from the senses or from science. I emphasise that this is intended to be a description and not a definitive formula.’ *R (on the application of Hodkin) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77, [2014] 1 All ER 737 at [34], [50]–[52], [56]–[57], per Lord Toulson SCJ

RELIGIOUS PURPOSES

[For 5(2) Halsbury’s Laws of England (4th Edn) (2001 Reissue) para 31 et seq see now 8 Halsbury’s Laws of England (5th Edn) (2015) para 27 et seq.]

REMOTE

New Zealand [Residence Policy Rules A5.26.1(b). Residence permit may be granted if applicant’s association with prohibited organisation was minimal or remote.] ‘[30] Dr Harrison submits that the Board erred in its assessment of the word “remote”. He submitted that the Board only looked at remoteness in a temporal sense (14 years ago) but did not consider the geographical senses:

- (a) New Zealand is remote from the country where AB worked;
- (b) the area in which AB worked is remote from that part of the country where the human rights abuses occurred; and
- (c) AB’s association with the organisation is completely terminated (this is really a temporal consideration).

‘[31] I do not consider this submission is sustainable. The physical distance between New Zealand and the country in issue is an irrelevancy when assessing whether someone’s involvement with an organisation is now remote. Likewise, the geographical closeness of AB’s work within the country is not, in my view, a correct focus. I take it that what underlies this proposition is that it is relevant that AB’s work was not really connected with that conduct of the organisation which brings it within the prohibited activities. Seen in that light, it is really just another way of asking if the nature and extent of AB’s involvement was “minimal”.

‘[32] The Board assessed AB’s work and his degree of involvement with the organisation. To avoid the need for total suppression of this judgment I do not repeat it. However, I agree with its analysis. The Board then observed:

[98] Counsel for the appellant says that “remote” has *inter alia* a temporal quality.

That is correct. However, an association of this nature and duration, ceasing 14 years ago, is not so remote in time as to be dismissed as irrelevant or meaningless now.

‘[33] I cannot see any error in this approach. There is nothing about the conclusion to suggest the Board must have misdirected itself. The appellant suggests the last words—irrelevant or meaningless—place a gloss on the policy’s actual language of minimal and remote, but I do not agree. In giving reasons one is always looking for the best way to articulate why it is that a test is met or not met. Simple recitation of the wording of the test is often not particularly illuminating, and efforts to provide more clarity should not be seen as misstating the test.

‘[34] Whilst the words do not capture everything that might come within minimal and remote, I do not consider it is wrong for the Board to have asked whether the nature and extent of AB’s conduct and association can now be seen as “meaningless and irrelevant”. Likewise, it was not wrong to earlier speak of his association as being “not casual or fleeting”. I consider it would be incorrect to attempt a definitive meaning of these terms, which will inevitably involve a process of balancing different factors. For example, how closely linked an applicant was to the organisation will influence an assessment of whether, in the particular case, that person’s conduct or contact with the group is now to be seen as remote.

‘[35] As with the other two grounds, I do not consider the Board misinterpreted the policy.’ *AB v Chief Executive of the Department of Labour* [2011] 3 NZLR 60 at [30]–[35], per Simon France J

REMOVED FROM CANADA

Canada [Immigration and Refugee Protection Act, S.C. 2001, c 27, s 115; Extradition Act, SC 1999, c 18, s 44.] ‘15. The supposed conflict is between the *non-refoulement* provision (s 115) of the *IRPA* and the Minister’s powers of surrender under the *EA*. Section 115 of the *IRPA* provides that a “protected person”, which includes a refugee, “shall not be removed from Canada to a country where they would be at risk of persecution”. The general powers of the Minister to surrender a person for extradition under the *EA* have no express limitation or exception relating to refugees. Thus, it is argued that the statutes conflict because the *IRPA* prohibits removal of a refugee to a place he or

she will face persecution while the *EA* permits the Minister to do so by means of surrendering the person for extradition. The appellants' position is that this conflict should be avoided by interpreting the Minister's power of surrender under the *EA* as being subject to a requirement that a refugee may only be surrendered to the country he or she fled if the refugee's status has ceased or been revoked by means of the processes set out in the *IRPA*.

'16. In my view, there is no conflict between the *IRPA* and the *EA* because the prohibition on removal from Canada under s 115 of the *IRPA* does not apply to extradition. Before turning to my reasons for reaching that conclusion, it will be helpful to place the issue in the broader context of refugee protection in Canada.

...
'24. I return, then, to the contention that s 115, and particularly the phrase "shall not be removed from Canada", prohibits extradition of a refugee. The submission is that the plain meaning of the words includes removal by extradition, that this interpretation is necessary to implement Canada's obligations under the Refugee Convention; and that the judgment of the Court in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3, supports this view. The respondent, on the other hand, submits that "removal" is a term of art under the *IRPA* and applies only to removal orders made under that Act.

'25. For the following reasons, I agree with the respondent.

'26. The appellants emphasize the ordinary meaning of the words "removed from Canada" in s 115(1) and that extradition is a form of "removal". I agree, of course, that the ordinary meaning of these words is broad enough to include removal by any means including extradition. However, according to the often repeated "modern principle" of statutory interpretation, the words used in the *IRPA* must be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, at para 21; *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559, at para 26. When this is done, it becomes clear in my view that the term "removed" has a specialized meaning in the *IRPA* and that it does not include removal by extradition.

'27. Section 115 must be considered in the context of the other provisions of the statute which also deal with the subject of removal.

Division 5 of Part I of the *IRPA* addresses "Loss of Status and Removal". The term "removal" is used in connection with the term "removal order" which is a specific order authorized by the *IRPA* in particular circumstances set out in detail therein: see, e.g. ss 44(2), 45(d) and 48. "Removed" and "removal", therefore, are words used in relation to particular procedures under the *IRPA*. This view is reinforced by the *Immigration and Refugee Protection Regulations*, SOR/2002-277. Section 53 of the *IRPA* provides that the regulations made under the *IRPA* may include provisions respecting "the circumstances in which a removal order shall be made or confirmed against a permanent resident or a foreign national": s 53(b). Part 13 of the Regulations, addresses removal. Section 223 specifies that there are three types of removal orders: departure orders, exclusion orders and deportation orders. Surrender orders under the *EA* are not included. The linking of removal to these three types of orders further reinforces the view that the words "removed" and "removal" refer to particular processes under the *IRPA*.

'28. This view is also supported by the terms of s 115 itself. Section 115(1) provides that a protected person may not be "removed from Canada" to face persecution, risk of torture or cruel and unusual punishment. However, s 115(2) creates exceptions to this prohibition in relation to persons who are inadmissible on certain grounds. Under s 115(2)(a), protection against removal in s 115(1) does not apply in the case of a person who is inadmissible on grounds of serious criminality and who in the opinion of the MCI constitutes a danger to the public. Inadmissibility on the grounds of serious criminality is addressed under s 36 of the *IRPA*. Under s 115(2)(b), the protection does not apply to persons inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the MCI, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada. Inadmissibility on the grounds of security, human rights violations and organized criminality are dealt with in the *IRPA*: ss 34, 35 and 37. Thus, s 115 deals with inadmissibility as defined under the *IRPA* and calls for the exercise of discretion by the MCI in relation to the danger of the person remaining in Canada. This, in my view, grounds the section in the processes of determining inadmissibility and ordering removal under the *IRPA*. It does not address extradition.

'29. It is also worth noting that while s 115 of the *IRPA* does not refer to extradition, it is

mentioned elsewhere in the *IRPA*. So, as we shall see shortly, s 105 of the *IRPA* deals explicitly with certain aspects of the interaction of extradition proceedings and refugee claims and s 112(2)(a) of the *IRPA* precludes persons from applying for protection under s 112(1) when they have been ordered removed from Canada and have extradition proceedings pending against them. The *IRPA*, therefore, in certain instances expressly deals with the interplay between extradition and the refugee and the removal process. The fact that it does supports an inference that when Parliament intended to address that interplay, it did so expressly. There is, as noted, no express provision in the *IRPA* dealing with the extradition of refugees.

‘30. Finally on this point, the time limits for the Minister’s surrender decision under the *EA* make it unlikely that Parliament intended to require him to await an application by the MCI under the *IRPA* for revocation or cessation of refugee status before being able to surrender a refugee. Sections 40(1) and (5)(b) of the *EA* require the Minister to order surrender, if he so decides, within 90 days after the person’s committal, with the possibility of a 60-day extension when the person has made submissions. These timelines are unrealistically short to allow the Minister to request the MCI to apply to the Refugee Protection Division for cessation or revocation of a person’s refugee status and for that process to run its course as a precondition for the exercise of the Minister’s surrender powers.

‘31. To conclude on this point, my view is that when s 115 is read in context, it is clear that the words “removed from Canada” in s 115(1) refer to the removal processes under the *IRPA*, not to surrender for extradition under the *EA*. There is, therefore, no conflict between the two statutes.’ *Nemeth v Canada (Justice)* 2010 SCC 56, [2010] 3 SCR 281 at paras 15–16, 24–31, per Cromwell J

RENT

Generally

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

[For 27(1) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 242 see now 62 Halsbury’s Laws of England (5th Edn) (2016) para 236.]

[For 39(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 83 see now 87 Halsbury’s

Laws of England (5th Edn) (2017) para 28.]

RENTCHARGE

[For 39(2) Halsbury’s Laws of England (4th Edn) (Reissue) paras 753–754 see now 87 Halsbury’s Laws of England (5th Edn) (2017) para 1033.]

REPLEVIN

[The common right to distrain for arrears of rent was abolished as from 6 April 2014: see the Tribunals, Courts and Enforcement Act 2007, s 71; Tribunals, Courts and Enforcement Act 2007 (Commencement No 11) Order 2014, SI 2017/768. See 62 Halsbury’s Laws of England (5th Edn) (2016) para 282.]

REPRESENTATION

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 408 see now 60 Halsbury’s Laws of England (5th Edn) (2011) para 36.]

[For 31 Halsbury’s Laws of England (4th Edn) (2003 Reissue) paras 703, 717–718 see now 76 Halsbury’s Laws of England (5th Edn) (2013) paras 702, 715–716.]

REPRESENTATIVES

In will

[For 50 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 649 see now 102 Halsbury’s Laws of England (5th Edn) (2010) para 365.]

REPROBATION

[For 16(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 962 see now 47 Halsbury’s Laws of England (5th Edn) (2014) para 312.]

REQUIRED

Canada [Northwest Atlantic Fisheries Organization Privileges and Immunities Order, SOR/80–64, s 3(1): immunity granted ‘to such extent as may be required for the performance of its functions’.] ‘40. The first question concerns the ordinary and grammatical meaning of the words. In this regard, it is argued that the word “required” can be defined as “necessary”. Wright J. accepted that argument and concluded

that the immunity provided for in the *NAFO Immunity Order* applies only to the extent that it is necessary, indeed indispensable, to NAFO's performance of its functions. On this basis, since NAFO's functions relate to the utilization, management and conservation of fisheries resources, the organization does not require immunity in employment-related matters. In my view, the analysis must be taken beyond this admittedly common, although limited, definition of the word "required". Other interpretive factors are relevant to a determination of the meaning of s. 3(1) of the *NAFO Immunity Order*. These other factors point toward a broader interpretation of the word "required" than the one advanced by the appellant.

'41. The appropriateness of adopting a broad interpretation is evident from a cursory review of the context of s. 3(1) of the *NAFO Immunity Order*. If the word "required" were to be interpreted as meaning "necessary" in the strictest sense, officials working for NAFO would enjoy only such personal immunities and privileges as are required for the performance of their duties. This is so because the same words—"to such extent as may be required for the performance of their functions"—appear in s. 3(3) as in s. 3(1). Such a narrow interpretation of the word "required" would mean that NAFO officials would not be entitled to import their furniture and effects free of duty—arguably a common immunity enjoyed by individuals working for international organizations—because, in light of NAFO's mission, the importation of such items would not, in this strict sense, be "required" for the performance of their duties.

'42. The appellant contends that the word "required" in s. 3(1) should not be coloured by the use of the same word in s. 3(3), because the former provision concerns NAFO as a corporate entity, whereas the latter concerns NAFO's officials. This argument is without merit. The Governor in Council is presumed to have been consistent in making the *NAFO Immunity Order*. In this context, the word "required" must be deemed to have the same meaning in s. 3(1) as in s. 3(3).

'48. The *NAFO Immunity Order* provides privileges and immunities for all those who are associated with NAFO's activities. Section 3(1) grants immunity to NAFO itself, given that it has the legal capacities of a body corporate. Sections 3(2) through (4) confer privileges and immunities on certain individuals: representatives of member states of NAFO; NAFO officials; and experts performing missions for

NAFO. The privileges and immunities thus conferred on NAFO and on its officials, representatives and experts are the ones set forth in the *Convention on the Privileges and Immunities of the United Nations*, and they are granted "to such extent as may be required for the performance of [its/their] functions".

'49. In limiting these immunities and privileges to the extent required for NAFO to perform its functions, the Governor in Council did not grant NAFO the absolute immunity conferred on the United Nations in the *Convention on the Privileges and Immunities of the United Nations*: P. Sands and P. Klein, *Bowett's Law of International Institutions* (6th ed. 2009), at p. 494. Rather, the Governor in Council granted NAFO a functional immunity, that is, the immunity required to enable NAFO to perform its functions without undue interference.

...

'51. In *Vaid [Canada (House of Commons) v Vaid]*, 2005 SCC 30, [2005] 1 SCR 667, Binnie J. said that the foundation of parliamentary privilege is the concept of "necessity", which is to be broadly construed and is understood to relate to the "dignity and efficiency of the House": para. 29. He observed that dignity and efficiency are linked to autonomy, which is necessary in order for Parliament to conduct its business: *ibid*. In consequence, a functional approach should be taken in assessing parliamentary privilege: only those acts that are necessary (in the broad sense mentioned above) in order for Parliament to conduct its business will be exempt from the jurisdiction of the courts.

'52. In my view, this same approach should be taken in determining the scope of the immunity granted to NAFO in the *NAFO Immunity Order*. The drafters of the *NAFO Immunity Order* adopted a functional approach to immunity, as can be seen from the very words they chose for s. 3(1): "to such extent as may be required for the performance of its functions".

'53. It follows that NAFO's autonomy to conduct its business and the actions it takes in performing its functions must be shielded from undue interference. What is necessary for the performance of NAFO's functions, or what constitutes undue interference, must be determined on a case-by-case basis.

'54. In this appeal, the Court must determine whether the management of relationships with senior officials should come under the protection of the immunity granted to NAFO. In my view, immunity from the appellant's claims is "required", within the meaning of the *NAFO*

Immunity Order, in order for NAFO to perform its functions.’ *Amaratunga v Northwest Atlantic Fisheries Organization* 2013 SCC 66, [2013] 3 SCR 866 at paras 40–42, 48–49, 51–54, per LeBel J

REQUIREMENTS

New Zealand [Crimes Act 1961, s 220. Offence under s 220(1)(b) of failing to account for funds a person was bound to deal with in accordance with the ‘requirements’ of any other person.] [57] The Judge found dictionary definitions of the word “requirement” to be unhelpful. He concluded, however, that the language used in the section supported the conclusion that the word “requirements” in the phrase “in accordance with the requirements of any other person” meant “in accordance with the needs or interests of the other person”. He did not consider that it meant a stipulation or direction given by that person.

[58] Central to the Judge’s reasoning was the use of the plural in “requirements”, and the fact that s 224, the predecessor to s 220, used the word “direction” rather than requirement. The Judge concluded that these factors suggested that the current wording of the section extends beyond specific directions and stipulations.

[59] We take a different view. We consider that the phrase means just what it says. Liability will arise if a person intentionally deals with property otherwise than in accordance with requirements that he or she knows have been imposed in relation to that property by another person. To interpret the word “requirements” as meaning “needs or interests” adds an unnecessary gloss to the words of the statute.

[60] We do not place any particular weight upon the fact that Parliament has used the plural of “requirement” in this context. A requirement may have several components. It may, for example, require a person to deal with property in several ways. Each would be a separate requirement.’ *Nisbet v R* [2011] NZCA 285, [2011] 3 NZLR 4 at [57]–[60], per Lang J

RES GESTAE

[For 17(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 410 see now 12 Halsbury’s Laws of England (5th Edn) (2015) para 692.]

RES IPSA LOQUITUR

[For 33 Halsbury’s Laws of England (4th Edn) (Reissue) para 664 see now 78 Halsbury’s Laws

of England (5th Edn) (2010) para 64.]

RES JUDICATA

[For 16(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 977 see now 12A Halsbury’s Laws of England (5th Edn) (2015) para 1603.]

RESCUE

[For 11(2) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 743 see now 26 Halsbury’s Laws of England (5th Edn) (2016) para 807.]

[The common law right to distrain for arrears of rent was abolished as from 6 April 2014: see the Tribunals, Courts and Enforcement Act 2007, s 71; Tribunals, Courts and Enforcement Act 2007 (Commencement No 11) Order 2014, SI 2017/768. See 62 Halsbury’s Laws of England (5th Edn) (2016) para 282.]

RESEARCH

Canada [Copyright Act, RSC 1985, c C-42, s 29: fair dealing for the purpose of research or private study does not infringe copyright.] ‘1. The purchase of musical works is increasingly carried out over the Internet. Some commercial Internet sites that sell music allow consumers to preview musical works before making a purchase. The issue in this case is whether those previews constitute “fair dealing” under s 29 of the *Copyright Act*, RSC 1985, c C-42.

‘6. In a decision released on October 18, 2007 (61 CPR (4th) 353), the Board agreed that SOCAN was entitled to collect royalties for the downloading of musical works, but not for previews. In the Board’s view, the use of previews was not an infringement of copyright since their use was “fair dealing” for the purpose of research under s 29 of the *Copyright Act* based on the factors identified by McLachlin CJ in *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339. Because the previews were not an infringement of copyright, no royalties were required to be paid to SOCAN for their use.

‘7. The Federal Court of Appeal upheld the Board’s decision (2010 FCA 123, 403 NR 57). As would I.

‘13. The test for fair dealing articulated in *CCH* involves two steps. The first is to

determine whether the dealing is for the purpose of either “research” or “private study”, the two allowable purposes listed under s. 29. The second step assesses whether the dealing is “fair”. The onus is on the person invoking “fair dealing” to satisfy both aspects of the test under *CCH*.

...
 ‘15. The first inquiry in this case, therefore, is whether previews are provided for the allowable purpose of “research” under the first step of the *CCH* fair dealing test. While *CCH* did not define the word “research”, it notably concluded that “[r]esearch” must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained” (para 51).

‘16. The Board defined “previews” as

a marketing tool offered by online music services, among others. A preview is an excerpt (usually 30 seconds or less) of a sound recording that can be streamed so that consumers are allowed to “preview” the recording to help them decide whether to purchase a (usually permanent) download. [para 18]

...
 ‘18 The Federal Court of Appeal endorsed the Board’s view that listening to previews was part of planning the purchase of a download of a musical work and was therefore “for the purpose of research”, concluding:

... it would not be unreasonable to give the word “research” its primary and ordinary meaning. The consumer is searching for an object of copyright that he or she desires and is attempting to locate and wishes to ensure its authenticity and quality before obtaining it... “[L]istening to previews assists in this investigation”. [para 20]

‘19. SOCAN argued that the Board and the Federal Court of Appeal misinterpreted the term “research” in two ways. It argued first that their interpretation of “research” was overly broad. Its second argument was that the purpose of “research” should have been analysed from the perspective of the online service provider and not the consumer. From this perspective, the purpose of the previews was not “research”, but to sell permanent downloads of the musical works.

‘20. SOCAN offers the definition of “research” as being “the systematic investigation into and study of materials and sources in order to establish facts and reach new

conclusions” (AF, at para 96). Moreover, SOCAN argues, the goal of the “research” must be for the purpose of making creative works, since only uses that contribute to the creative process are in the public interest. As a result, previews do not amount to “research” since their primary purpose is not to foster creativity, but to enable users to purchase music online.

‘21. It is true that an important goal of fair dealing is to allow users to employ copyrighted works in a way that helps them engage in their own acts of authorship and creativity: Abraham Drassinower, “Taking User Rights Seriously”, in Michael Geist, ed, *In the Public Interest: The Future of Canadian Copyright Law* (2005), 462, at pp 467–72. But that does not argue for permitting *only* creative purposes to qualify as “research” under s 29 of the *Copyright Act*. To do so would ignore the fact that the dissemination of works is also one of the *Act*’s purposes, which means that dissemination too, with or without creativity, is in the public interest. It would also ignore that “private study”, a concept that has no intrinsic relationship with creativity, was also expressly included as an allowable purpose in s 29. Since “research” and “private study” both qualify as fair dealing purposes under s 29, we should not interpret the term “research” more restrictively than “private study”.

‘22. Limiting research to creative purposes would also run counter to the ordinary meaning of “research”, which can include many activities that do not demand the establishment of new facts or conclusions. It can be piecemeal, informal, exploratory, or confirmatory. It can in fact be undertaken for no purpose except personal interest. It is true that research can be for the purpose of reaching new conclusions, but this should be seen as only one, not the primary component of the definitional framework.

...
 ‘27. In mandating a generous interpretation of the fair dealing purposes, including “research”, the Court in *CCH* created a relatively low threshold for the first step so that the analytical heavy-hitting is done in determining whether the dealing was fair. SOCAN’s submission that “research” be restricted to the creation of new works would conflate the allowable purpose with the fairness analysis and unduly raise the bar for entering that analysis. Moreover, its restricted definitional scope of “research” contradicts not only the Court’s admonition in *CCH* that “in order to maintain the proper balance between the rights of a copyright owner and users’ interests, [the fair

dealing exception] must not be interpreted restrictively” (para 48), but also its direction that the term “research” be given a “large and liberal interpretation” so that in maintaining that balance, users’ rights are not unduly constrained (paras 48, 51).

28. SOCAN’s proposed definition of “research” as requiring “systematic investigation” and “new conclusions” is also at odds with its second submission about “research”, namely, that “research” be analysed from the perspective of the purpose of the online service providers, and not that of the users. But its own proposed definition shows that it sees research as a user-focused undertaking, since the investigation and creation of new conclusions are clearly done *by* a user, not a provider. The provider’s purpose in making the works available is therefore not the relevant perspective at the first stage of the fair dealing analysis.

29. This is consistent with the Court’s approach in *CCH*, where it described fair dealing as a “user’s right” (para 48). In *CCH*, the Great Library was the provider, offering a photocopying service to lawyers requesting copies of legal materials. The Court did not focus its inquiry on the library’s perspective, but on that of the ultimate user, the lawyers, whose purpose was legal research (para 64).

30. Similarly, in considering whether previews are for the purpose of “research” under the first step of *CCH*, the Board properly considered them from the perspective of the user or consumer’s purpose. And from that perspective, consumers used the previews for the purpose of conducting research to identify which music to purchase, purchases which trigger dissemination of musical works and compensation for their creators, both of which are outcomes the *Act* seeks to encourage.’ *Society of Composers, Authors and Music Publishers of Canada v Bell Canada* [2012] SCJ No 36, 2012 SCC 36 at paras 1, 6–7, 13, 15–16, 18–22, 27–30, per Abella J

RESERVATION

[For 13 Halsbury’s Laws of England (4th Edn) (2007 Reissue) para 239 see now 32 Halsbury’s Laws of England (5th Edn) (2012) para 440.]

[For 27(1) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 168 see now 62 Halsbury’s Laws of England (5th Edn) (2016) para 162.]

RESIDE—RESIDENCE

[For 15(3) Halsbury’s Laws of England (4th Edn) (2007 Reissue) para 132 see now 37

Halsbury’s Laws of England (5th Edn) (2013) para 117.]

[European Parliament and Council Directive (EC) 2004/38, art 28(2), (3); and Immigration (European Economic Area) Regulations 2006, SI 2006/1003, reg 21(3), (4)(a). Regulation 21(3) provides that a decision to deport could not be taken in respect of a person with a permanent right of residence under reg 15 except on ‘serious grounds of public policy or public security’; reg 21(4)(a) provides that a relevant decision cannot be taken except on ‘imperative grounds of public security’ in respect of an EEA national who had resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision.] ‘[5] The only issue before this court is whether the tribunal erred in holding that HR’s periods in custody did not count for the purposes of determining whether he had been resident for ten years for the purposes of reg 21(4)(a). If they did count, his appeal would have to be allowed, since the tribunal did not find that the Secretary of State had established that there were imperative grounds of public security justifying his deportation. No issue was raised before the tribunal, or before this court, as to whether a period of residence in this country before the coming into force of the 2006 Regulations counts for the purposes of reg 21, and I express no view on it.

...

‘[17] It is common ground, and in any event clear, that the 2006 Regulations are to be interpreted consistently with the Directive which they implement ...

...

‘[23] In my judgment, recitals 23 and 24 make clear how art 28(3) is to be applied in a case such as the present. “Residence” is presence in this country in the exercise of the rights and freedoms conferred by the Treaty. An EEA national who, having been convicted of a crime, is detained for a significant period in prison or other penal institution, is not resident in this country for the purposes of art 28(3).

...

‘[26] Since the 2006 Regulations are to be interpreted consistently with the Directive, and reg 21(4) transposes art 28(3)(a) of the Directive into national law, it follows that the tribunal made no error of law when it concluded that reg 21(4) did not apply to him and rejected HR’s appeal.’ *HR (Portugal) v Secretary of State for the Home Department* [2009] EWCA Civ 371, [2010] 1 All ER 144 at [5], [17], [23], [26], per Stanley Burnton LJ

Habitual residence

[Hague Convention on the Civil Aspects of International Child Abduction 1980 (as set out in Sch 1 to the Child Abduction and Custody Act 1985).] '[6] In the present proceedings, brought under the 1985 Act and seeking an order for the return of the children to France, the father maintains that the initiation of the mother's proceedings was a wrongful retention within the meaning of the Hague Convention. That proposition is predicated upon the children's being habitually resident in France immediately before 20 November 2013. That is the question on which issue was joined in the courts below.

...
 '[17] As Lady Hale observed at [54] of *Re A* [[2013] UKSC 60, [2014] 1 All ER 82, [2014] AC 1]], habitual residence is therefore a question of fact. It requires an evaluation of all relevant circumstances. It focuses upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It is necessary to assess the degree of integration of the child into a social and family environment in the country in question. The social and family environment of an infant or young child is shared with those (whether parents or others) on whom she is dependent. Hence it is necessary, in such a case, to assess the integration of that person or persons in the social and family environment of the country concerned. The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce. In particular, it follows from the principles adopted in *Re A* and the other cases that the Court of Appeal of England and Wales was right to conclude in *Re H (children) (abduction: jurisdiction: habitual residence)* [2014] EWCA Civ 1101, [2014] 3 FCR 405, [2015] 1 WLR 863 that there is no "rule" that one parent cannot unilaterally change the habitual residence of a child.

'[18] Finally, it is relevant to note the limited function of an appellate court in relation to a lower court's finding as to habitual residence. Where the lower court has applied the correct legal principles to the relevant facts, its evaluation is not generally open to challenge unless the conclusion which it reached was not one which was reasonably open to it.

...
 '[22] Counsel for the father further argued that the Extra Division had themselves fallen into error, in treating the critical issue as being

whether it was necessary for the mother and children to have spent a longer period in Scotland before the children could be said to have become habitually resident there. The Extra Division had, it was argued, answered that question without themselves addressing the truly critical issue, namely whether the children retained habitual residence in France immediately before 20 November 2013. They had erroneously focused only on the children's circumstances in Scotland, and had left out of account the agreement between their parents as to the limited duration of the stay in Scotland, and their parents' intentions.

'[23] I do not find that submission persuasive. The Extra Division proceeded on the basis that the stay in Scotland was originally intended to be for the 12 months' maternity leave, that much being uncontroversial. They therefore assumed, in the father's favour, that the stay in Scotland was originally intended to be of limited duration. Their remark that the real issue was whether there was a need for a longer period than four months in Scotland, before it could be held that the children's habitual residence had changed, followed immediately upon their statement (at [14]):

"If the salient facts of the present case are approached in accordance with the guidance summarised earlier, the key finding of the Lord Ordinary is that the children came to live in Scotland."

In other words, following the children's move with their mother to Scotland, that was where they lived, albeit for what was intended to be a period of 12 months. Their life there had the necessary quality of stability. For the time being, their home was in Scotland. Their social life was there. Their family life was predominantly there. The longer time went on, the more deeply integrated they had become into their environment in Scotland. In that context, the question the Extra Division asked themselves did not indicate any error of approach. Nor did their answer (at [14]):

"For our part, in the whole circumstances we would view four months as sufficient."

'[24] The Extra Division therefore considered the evidence on a proper understanding of the nature of habitual residence. In the light of the evidence before them, their conclusion that the children were habitually resident in Scotland at the material time is one which they were entitled to reach.' *AR v RN* [2015] UKSC 35, [2015] 3 All ER 749 at [6], [17]–[18],

[22]–[24], per Lord Reed

In Income Tax Acts

[Note that ordinary residence is no longer relevant to matters of UK taxation following changes made by the Finance Act 2013.]

RESIDENT

See also **LAWFULLY RESIDENT; ORDINARILY RESIDENT; PERMANENTLY RESIDENT**

Australia [Income Tax Assessment Act 1936 (Cth), s 6(1): a company is a resident of Australia if it is incorporated in Australia, or, if not incorporated in Australia, it carries on business in Australia, and has either its central management and control in Australia, or its voting power controlled by shareholders who are residents in Australia.] '[112] The definition of "resident" in s 6(1) of the 1936 Act draws a distinction between companies incorporated in Australia and those incorporated elsewhere. If a company is incorporated in Australia it will be an Australian resident. Parliament has explicitly chosen one formal aspect of a company's existence—incorporation—and deemed that to be determinative of whether a company is a "resident". Notably, it has not done this for any other formal aspect of a company. HWB's contention ignores that feature of the statutory language. For example, if Parliament had intended to make the location of directors' meetings determinative, it could have done so. But Parliament did not do so. Instead, for companies not incorporated in Australia, Parliament adopted language—"central management and control"—from common law authorities concerning residency. At the time the provision was enacted, that language was well understood to involve a factual inquiry; an inquiry to which the location of the various formal aspects of a company was relevant but not determinative.

'[113] The definition of "resident" in s 6(1) of the 1936 Act is multi-faceted. The definition records, and acknowledges, that a company can be incorporated outside Australia but nevertheless can have its central management and control within Australia. In its terms, it refers to "central management and control". It does not in its terms, or implicitly, seek to limit that concept to the place where the organs of the company exercise legally effective authority. That it does not do so is not surprising. The breadth of the language chosen reflects commercial reality. What constitutes central

management and control is a question of fact and degree and can and does account for a broad range of complex arrangements.' *Bywater Investments Ltd v Commissioner of Taxation* (Matter No S134/2016) [2016] HCA 45, (2016) 339 ALR 39 at [112]–[113], per Gordon J

RESTITUTIO IN INTEGRUM

[For 12(1) Halsbury's Laws of England (4th Edn) (Reissue) para 885 see now 29 Halsbury's Laws of England (5th Edn) (2014) para 440.]

RESTORATION

[Note that the Pastoral Measure 1983 is repealed as from 1 July 2012 by the Mission and Pastoral Measure 2011, s 111, Sch 9. The definition of 'restoration', in the same terms as before, is now contained in the 2011 Measure, s 106(1).]

RESTRAINT OF PRINCES

[For 25 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 339 see now 60 Halsbury's Laws of England (5th Edn) (2011) para 323.]

RESTRAINT OF TRADE

[For 47 Halsbury's Laws of England (4th Edn) paras 14–15, 17–19 see now 18 Halsbury's Laws of England (5th Edn) (2009) paras 378–379, 381–383.]

RETAINER

[For 44(1) Halsbury's Laws of England (4th Edn) (Reissue) para 99 see now 66 Halsbury's Laws of England (5th Edn) (2015) para 561.]

RETROCESSION

[For the Income and Corporation Taxes Act 1988, s 431(2) see now the Finance Act 2012, s 139(1).]

RETROSPECTIVE

[For 44(1) Halsbury's Laws of England (4th Edn) (Reissue) paras 1283–1284 see now 96 Halsbury's Laws of England (5th Edn) (2012) paras 1185–1186.]

Australia [44] There are two senses in which a provision of a regulation might be said to have retrospective operation. The distinction between them has significance for the operation of ss 30 and 39 of the Interpretation Act, which, like other provisions of the Interpretation Act, apply to all Acts and regulations unless “the contrary intention appears”. The distinction in turn has significance for the construction of the empowering provisions.

[45] First, a provision of a regulation might be said to have retrospective operation if, and to the extent that, the provision is taken to have had legal operation at or from a past date. The potential for a provision of a regulation to have retrospective operation in that straightforward temporal sense is constrained by s 39(1)(b) of the Interpretation Act.

[46] Section 39(1)(a) of the Interpretation Act provides that a regulation or other statutory rule “shall be published on the NSW legislation website”. Section 39(1)(b) provides that the regulation or other statutory rule “commences on the day on which it is so published or, if a later day is specified in the rule for that purpose, on the later day so specified”. Section 39(1)(b) as originally enacted used the words “shall take effect”. The word “commences” was substituted by amendment in 2009 to be consistent with the expression used elsewhere in the Interpretation Act in connection with Acts generally. The word “commences” and the words “shall take effect” have the same meaning: they refer to when legal operation begins.

[47] By limiting when legal operation can begin to a date on or after the date on which a regulation is published, s 39(1)(b) of the Interpretation Act has the effect of preventing a provision of a regulation from having legal operation at or from a date before the regulation is published. That is to say, it imposes an absolute prohibition against backdating the legal effect of a provision of a regulation, applicable to all regulations except in so far as the contrary intention appears in an empowering statute.

[48] Secondly, a provision of a regulation might be said to have retrospective operation if, and to the extent that, the regulation operates to alter rights or liabilities which have already come into existence by operation of prior law on past events. The potential for a regulation to have retrospective operation in that substantive sense is affected in part by s 30 of the Interpretation Act and in part by the “general rule of the common law” stated by Dixon CJ in *Maxwell v Murphy* [(1957) 96 CLR 261 at 267; [1957] ALR 231 at 232–233]. *Adco Constructions Pty Ltd (ABN 001 044 391) v Goudappel*

[2014] HCA 18, (2014) 308 ALR 213 at [44]–[48], per Gegele J

RIGHT

Enjoyment as of right

[For 12(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 623 see now 32 Halsbury’s Laws of England (5th Edn) (2012) para 23.]

RIGHT OF WAY

[For 12(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 636 see now 32 Halsbury’s Laws of England (5th Edn) (2012) para 36.]

[For 16(2) Halsbury’s Laws of England (4th Edn) (Reissue) paras 156–157 see now 87 Halsbury’s Laws of England (5th Edn) (2017) paras 876–877.]

Way of necessity

[For 16(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 165 see now 87 Halsbury’s Laws of England (5th Edn) (2017) para 885.]

RIGHTS OF CUSTODY

[Child Abduction and Custody Act 1985, Sch 1, art 3; Council Regulation (EC) 2201/2003.] [1] The preamble to the Hague Convention on the Civil Aspects of International Child Abduction 1980 (The Hague, 25 October 1980; TS 66 (1986) Cm 33) (the Convention) states that its purpose is “to protect children internationally from the harmful effects of their wrongful removal or retention”. But under art 3 the taking or keeping of a child is only “wrongful” if it is in breach of “rights of custody”. The same applies under the Brussels II Revised Regulation (Council Regulation 2201/2003/EC (OJ 2003 L388, p 1) (the Regulation), which complements and takes precedence over the Hague Convention as between all but one of the member states of the European Union. So what is meant by “rights of custody”? It might be thought that the meaning of a concept so central to the operation of both instruments would be well settled by now. But this is not even true within the United Kingdom. The Courts of Appeal in England and Wales and in Northern Ireland have taken different views. It therefore falls to this court to resolve the difference. If nothing else, the position should be the same throughout the United Kingdom.

[2] The concept of “rights of custody”

would appear to have at least two functions. One is to identify those removals or retentions which are presumptively so harmful to the welfare of a child that the authorities must take swift action to return him to the country from which he has been taken or kept away. Many international removals of children will not be harmful to them at all, for example where their united parents take a well-planned sabbatical in another country or even emigrate permanently. Other international removals may or may not be so harmful. The Convention draws a clear distinction between "rights of custody" and "rights of access". It does not presume that removal or retention in breach of rights of access is so harmful that the child must instantly be returned. Another function of "rights of custody", therefore, is to secure that long-term decisions about the child's future are taken in the country where he was habitually resident immediately beforehand and not in the country to which he has been taken.

[3] The issue, therefore, is between two different approaches to the interpretation of the concept. Is it to be interpreted strictly and literally as a reference to rights which are already legally recognised and enforceable? Or is it to be interpreted purposively as a reference to a wider category of what have been termed "inchoate rights", the existence of which would have been legally recognised had the question arisen before the removal or retention in question? The issue is well illustrated by the facts of the present case.

[22] It is most unfortunate that the wording of the Convention and Regulation are not identical. However, despite the difference in wording, the apparent intention of both instruments is that the attribution of "rights of custody" is to be determined according to the law of the country where the child was habitually resident immediately before his removal or retention. Further, art 3 of the Convention contemplates that rights of custody may arise "in particular" in three ways: by operation of law, by administrative or judicial decision, and by an agreement having legal effect. This does not rule out that such rights might arise in other ways (see the Explanatory Report by Professor E Perez-Vera (Hague Conference on Private International Law, Actes et documents de la Quatorzième session, vol III, 1980), para 67). By contrast, the list in art 2(11) of the Regulation appears exhaustive. Furthermore, a "judicial or administrative decision" in art 3 is intended in its widest sense (see Perez-Vera, para 69). By contrast, a "judgment"

is defined in art 2(4) of the Regulation as a judgment relating to parental responsibility pronounced by a court of a member state. Given, however, that the whole thrust of the Regulation is to supplement and to strengthen the obligations laid down in the Convention, and that it would appear unlikely that the Regulation intended to cut down the possible sources of custody rights which are indirectly protected by the obligation to return the child, they should be construed consistently with one another wherever possible.

[23] The line of cases [on 'inchoate rights'] begins with the majority decision of the Court of Appeal in *Re B (a minor) (abduction)* [1995] 2 FCR 505.... Waite LJ held that the term "rights of custody" was—

"capable of being applied in a Convention context to describe the inchoate rights of those who are carrying out duties and enjoying privileges of a custodial or parental character which, though not yet formally recognised or granted by law, a court would nevertheless be likely to uphold in the interests of the child concerned" (See [1995] 2 FCR 505 at 518)

In this case the father's status was one which—

"any court ... would be bound to uphold; at least to the point of refusing to allow it to be disturbed—abruptly or without due opportunity of a consideration of the claims of the child's welfare—merely at the dictate of a sudden reassertion by the mother of her official rights."

Staughton LJ agreed with Waite LJ but he also accepted evidence that under the law of Western Australia parents could make valid agreements as to the custody or guardianship of their children which would be binding without a court order. ...

[56] To which question are the "inchoate rights" recognised in *Re B* the answer? There is a suggestion, in the written submissions from Reunite, that the Hague Conference, in its INCADAT database, may see them as falling within the first, the domestic law question. It is, of course, the case that their existence has been recognised in outgoing as well as incoming cases in England and Wales; and that MacKinnon J was persuaded that they were part of our national law in *Courtney v Springfield* [16 July 2008, unreported, Ontario Superior Court of Justice]. But in my view there can be no doubt that the concept was developed as an answer to

the second question: in *Re B*, the court was asking itself whether the position of the father amounted to “rights of custody” for the purposes of the Convention, not whether the national law of Western Australia would so regard it. Again, in outgoing cases such as *Re W*, *Re B* [[1998] 2 FCR 549, [1999] Fam 1], the court was not suggesting that these were rights recognised for domestic law purposes, but whether they were rights which in English law were recognised for Convention purposes.

[57] If it is indeed a Convention question, then the answer should be the same in all member states. Yet we face the very real difficulty that there is very little support for such an expansive view of rights of custody among the other states parties to the Convention. Once again, the courts of England and Wales, in their enthusiasm to support the object and purposes of the Convention, have pushed at the boundaries. However they have done so for many years now, albeit in a very narrow category of cases, without apparent objection from the rest of the Hague community. One reason may be that it is apparent from the Perez-Vera report that, although there must be some legal content to the factual situation disrupted by the abduction, the listed sources of that legal content were not intended to be exhaustive, thus “favouring a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration” (para 67). Another reason may be that the English approach is entirely consistent with the two fundamental purposes of the Convention, to protect children from the harmful effects of international abduction and to secure that disputes about their future are determined in the state where they were habitually resident before the abduction.

[58] Does the decision of the CJEU in *McB v E* [(Case C-400/10 PPU) [2011] All ER (EC) 379, [2011] Fam 364] constitute an insuperable obstacle to our continuing to take that approach? After anxious consideration I have reached the view that it does not. The CJEU stressed that, in the Regulation as in the Convention, the concept of rights of custody is an autonomous one (para 41). It must follow that its content is not to be determined by reference to the laws of individual member states, even if the question of who enjoys such rights is left to them. The CJEU were asked whether the Regulation precluded a member state from providing in its own law that the acquisition of rights of custody by a child’s father depended upon his obtaining a judgment from a national court. They were not asked

whether the Regulation precluded a requesting state from regarding whatever legal situation the father might be in as being within the autonomous concept of rights of custody for the purpose of the Regulation. If a strictly limited category of so-called “inchoate rights” fall within that concept for the purpose of the Convention, there is no reason why they should not do so for the purpose of the Regulation, which is intended to strengthen rather than weaken the implementation of the Convention. As it happens, the father in *McB v E* would not have fallen within the *Re B* concept, as at the very highest he was sharing care with the mother.

[59] How then may the people who possess that strictly limited category of rights be defined, consistently with the principles and purposes of the Convention and the Regulation? In my view the “continuum” as described in *Re B* is imprecise. It risks disrupting the important distinctions drawn in the Convention between rights of custody and rights of access and between those who do and those who do not have something which can plausibly be termed a right. I would define such people thus. (a) They must be undertaking the responsibilities, and thus enjoying the concomitant rights and powers, entailed in the primary care of the child. Thus, for example, our law recognises the obvious truth that people who are actually looking after a child, even if they do not have parental responsibility, may “do what is reasonable in all the circumstances of the case for the purpose of safeguarding and promoting the child’s welfare” (Children Act 1989, s 3(5)). (b) They must not be sharing those responsibilities with the person or persons having a legally recognised right to determine where the child shall live and how he shall be brought up. They would not then have the rights normally associated with looking after the child. (c) That person or persons must have either abandoned the child or delegated his primary care to them. (d) There must be some form of legal or official recognition of their position in the country of habitual residence. This is to distinguish those whose care of the child is lawful from those whose care is not lawful. Examples might be the payment of state child-related benefits or parental maintenance for the child. And (e) there must be every reason to believe that, were they to seek the protection of the courts of that country, the status quo would be preserved for the time being, so that the long-term future of the child could be determined in those courts in accordance with his best interests, and not by the pre-emptive strike of abduction.

‘[60] Those requirements are consistent with the twin purposes of the Convention. First, they protect the child from the harmful effects of international child abduction by recognising that he should not be peremptorily removed from their care. Second, they enable the courts of the child’s habitual residence to determine where his long-term future should lie. It is possible to analyse them in terms of “an agreement having legal effect”, but only if the unilateral (and usually clandestine) decision of the abducting parent is not seen as effective to revoke that agreement.

‘[62] I conclude, therefore, that the grandmother’s status did constitute “rights of custody” in relation to Karl on the day when he was removed for the purpose of the Convention and the Regulation. Her status had legal content derived from the decisions taken by the competent authorities in the light of the mother’s previous delegation of primary care to her. It had not been deprived of all content by the mother’s notice to the authorities (which may or may not have been communicated to the grandmother). Thus to take him out of the country without her consent was in breach of those rights and wrongful in terms both of the Convention and the Regulation.’ *Re K (a child) (abduction: rights of custody)* [2014] UKSC 29, [2014] 3 All ER 149 at [1]–[3], [22]–[23], [56]–[60], [62], per Lady Hale DP

RIGHTS ... UNDER ENACTMENTS

[Water Act 1989, s 4, Sch 2.] Whether the right to discharge sewer contents had passed to the successor company under the transfer scheme under Sch 2.] ‘[28] Section 4 of the 1989 Act provides for the transfer of the water authorities’ functions to the water undertakers and sewerage undertakers respectively and for there to be schemes for the division of the property, rights and liabilities of those authorities between their successor companies and the NRA.

‘[30] The meaning of “property, rights and liabilities” is elucidated by para 2(3) of Sch 2, which provides so far as material:

“The property, rights and liabilities of a water authority that shall be capable of being transferred in accordance with a scheme under this Schedule shall include—
(a) property, rights and liabilities that would not otherwise be capable of being transferred or assigned by the water

authority; (b) property situated anywhere in the United Kingdom or elsewhere; (c) rights and liabilities under enactments, including—(i) such rights and liabilities as may arise after the transfer date by virtue of enactments amended or repealed by this Act and, in pursuance of provision contained in Schedule 26 to this Act, may be the subject of an allocation made by a scheme under this Schedule; and (ii) other rights and liabilities under enactments which are amended or repealed by this Act subject to a saving ...”

‘[31] This subparagraph is clearly intended to be as all-embracing a provision as it could be. Parliament has enacted that a transfer scheme can even transfer a right which is incapable of transfer in the normal way, as well as rights under an enactment.

‘[57] In my judgment, in respectful disagreement with the judge, the expression “rights ... under enactments” was not apt to cover the implied right of discharge on the true interpretation of s 4 of the 1989 Act.

‘[63] I accept that it is clear from s 4 of the 1989 Act that the transfer scheme was intended to apply to the whole of the transferor’s sewerage undertaking. It was clearly the purpose of the transfer scheme to ensure that all assets and rights were vested in the successor company by a single document, lock, stock and barrel. If some asset or right were omitted and the transferor was dissolved before the omission was spotted, it might well be difficult to put the matter right. The transfer scheme was therefore not limited to matters for which a written agreement was required, or to transfers of non-assignable contracts or to property-related rights and liabilities.

‘[64] However, the implied right of discharge was not a right in the usual sense. It was simply an incident of the statutory functions of the sewerage undertaker, which were indeed set out in the 1989 Act. It was different because at the time of the transfer scheme there was no need to transfer it. I do not consider that Parliament intended a transfer scheme to be used to vest a right which it was itself creating and vesting in the transferee by other provisions of the 1989 Act. As a matter of construction, I consider that in this regard the expressions “functions” and “property, rights and liabilities” in s 4 of the 1989 Act fall to be treated as covering a separate subject-matter, and that that restriction on what ought otherwise to constitute

“rights” and “liabilities” cannot therefore be extended by Sch 2 to the 1989 Act. It follows that the obligation to pay compensation is also not transferred. It follows that s 16(1)(c) of the 1978 Act cannot assist the respondent.’ *Manchester Ship Canal Co Ltd v United Utilities Water plc* [2013] EWCA Civ 40, [2013] 2 All ER 642 at [28], [30]–[31], [57], [63]–[64], per Arden LJ; revsd [2014] UKSC 40, [2014] 4 All ER 40

[67] Were the argument based on the 1989 Act’s retention and amendment of s 30 of the 1936 Act to be rejected, I would accept United Utilities’ alternative argument that the transfers to sewerage undertakers pursuant to the 1989 Act included the water authorities’ existing rights of discharge. This would be on the basis that the water authorities’ rights of discharge from existing outfalls under the 1936 Act (as amended by the 1973 Act) constituted “property” or (as I tend to think is more likely) “rights”, which would have been transferred as part of the water authorities’ “property, rights and liabilities” in s 4(1)(b) of the 1989 Act. It seems to me that, whether such rights were “property” or “rights”, they were ‘vested’ in the water authorities, and it would be unrealistic to think that the 1989 Act could have intended that they be removed when the functions of those authorities were being transferred to other entities. In the absence of any transitional provisions, the ability to be able to discharge through existing outfalls was essential: indeed, it was an integral part of the sewerage authorities’ continuing functions and duties, as explained at [66], above. It would have been “so unfair”, or the better but equally appropriate expression may be “so absurd”, if the water authorities’ existing rights of discharge had been removed by the 1989 Act “that Parliament could not have intended it”, to quote Lord Rodger in *Wilson v First County Trust Ltd* [2003] 4 All ER 97, [2004] 1 AC 816 (at [201]).

[68] In answer to this, Mr McCracken QC for the Manchester Ship Canal Company Limited, a canal owner, relies, first, on the precise terms of para 2(3) of Sch 2 to the 1989 Act, and, secondly, on the anomalous nature of the “right” involved. As to the first point, he says that para 2(3) restricts the breadth of the expression “property, rights and liabilities”, and in particular that sub-para (c)(ii) limits the transferable rights to those “under enactments which are amended or repealed by this Act subject to a saving”. He points out that s 30 of the 1936 Act was amended by the 1989 Act without a saving provision. I do not accept that argument, because, in my view, para 2(3) was

intended to widen, not to narrow, the meaning of “property, rights and liabilities”, as is apparent from the phrase “shall include”. In any event, it is highly arguable that (i) the “right” involved was not in fact granted “under” s 17 of the 1875 Act as I have explained at [62], above, and (ii) s 30 of the 1936 was not relevantly “amended” for the purpose of sub-para (c)(ii). However, given that para 2(3) is not a definition provision, it is not necessary to consider those two points.

[69] Mr McCracken’s second argument is summarised at [64] of Arden LJ’s judgment in the Court of Appeal ([2013] EWCA Civ 40, [2013] 2 All ER 642, [2013] 1 WLR 2570), where she said that she thought that the right of discharge enjoyed by the water authorities was not within the expression “property, rights and liabilities”, as used in s 4 and elsewhere in the 1989 Act. She explained that this was because “the implied right of discharge was not a right in the usual sense” and “was simply an incident of the statutory functions of the sewerage undertaker”. For my part, I do not see why the fact that a right is implied or incidental prevents it from falling within the word “rights” in the 1989 Act, or indeed from being a vested right for the purposes of s 16(1)(c) of the 1978 Act. This view is reinforced by the fact that the precise legal characterisation of the rights of local authorities as a result of sewers being statutorily vested in them appear to be somewhat unclear—see the discussion in *Taylor v North West Water Ltd* [1995] 1 EGLR 266 at 267–272. Thus, there is, as was pointed out by Lord Russell of Killowen in *Bradford v Mayor of Eastbourne* [1896] 2 QB 205 at 211, a number of cases which support his view that “the vesting [under s 13 of the 1875 Act] is not a giving of the property in the sewer and in the soil ... but giving such ownership and such rights only as are necessary for the purpose of carrying out the duties of a local authority ...”. Yet there can be no doubt but that those rights were regarded as vested rights which survived the repeal of s 20 of the 1936 Act, and were transferred to sewerage undertakers pursuant to the 1989 Act.’ *Manchester Ship Canal Co Ltd v United Utilities Water plc* [2014] UKSC 40, [2014] 4 All ER 40 at [67]–[69], per Lord Neuberger

RIOT

[For 11(1) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 555 see now 26

Halsbury's Laws of England (5th Edn) (2016) para 550.]

Persons riotously and tumultuously assembled together

[Riot (Damages) Act 1886, s 2(1).] '[28] In my judgment, looking at the jurisprudence as a whole, which is the approach Rix LJ advocated in the *Yarl's Wood* case [*Yarl's Wood Immigration Ltd v Bedfordshire Police Authority* [2009] EWCA Civ 1110, [2010] QB 698, [2010] 2 All ER 221] at [56], the following characteristics of the assembly of persons are required if they are to be "persons riotously and tumultuously assembled together" within the meaning of the 1886 Act so that the relevant police authority is liable to provide compensation. (1) There must be a riot within the meaning of s 1 of the Public Order Act 1986. ... (2) The assembly must be of some size, certainly more than three or four persons. It is for another case than the present whether, provided there are 12 or more (as now required to constitute a riot) this aspect of the concept of a "tumult" or of persons assembled "tumultuously" will be satisfied, but certainly it was satisfied in the present case, given that there were in the region of 20 to 25 people. (3) Of more significance in the present context, the persons assembled must be acting in an agitated, excited, volatile manner, usually (in the light of the *Edmonds* case [*DH Edmonds Ltd v East Sussex Police Authority* (1988) Times, 15 July, CA]) also making a noise, rather than acting stealthily, so that it can be said that their riotous behaviour could, at least notionally, have been prevented by the police. However, the *Edmonds* case is not authority for the proposition that unless the crowd is making a

tremendous noise, they cannot be riotously and tumultuously assembled together if other indicia of a riotous and tumultuous assembly are present. The real touchstone is that there must be some "public" element to the behaviour, what Mr Michael Crane QC for the insurer claimants described as a perceived or palpable threat of a riot to which the police could, notionally, have responded. (4) Those cases where the courts have held that the victims of riot are entitled to compensation under the 1886 Act are ones which involve the rioters engaging in wanton damage to property or, as Mr Crane put it, where the rioters exhibit an animus towards the property in question and are not simply looting in order to steal. Examples are *Pitchers's* case [*Pitchers v Surrey County Council* [1923] 2 KB 57; *affd* [1923] 2 KB 57, CA] where the Canadian soldiers went on a violent rampage damaging and looting the shops in the camp and the *Yarl's Wood* case where the detainees set fire to and otherwise caused serious damage to the detention centre and property in it.' *Mitsui Sumitomo Insurance Co (Europe) Ltd v Mayor's Office for Policing and Crime* [2013] EWHC 2734 (Comm), [2014] 1 All ER 422 at [28], per Flaux J

RITE

[For 14 Halsbury's Laws of England (4th Edn) para 953n see now 34 Halsbury's Laws of England (5th Edn) (2011) para 750n.]

ROYALTY

[For 31 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 334 see now 76 Halsbury's Laws of England (5th Edn) (2013) para 334.]

S

SAFE

[Factories Act 1961, s 29(1).] [108] The judge held that what was “safe” within the meaning of s 29(1) was not to be judged objectively, but was “really a jury question, to be answered in the light of all the circumstances prevailing at the time, including what might reasonably have been foreseen by an employer” (para 97). And again at para 99 “as contemplated by Rose J in [*Taylor v Fazakerley Engineering Co* (26 May 1989, unreported)], the standard of safety in the section is governed by the general standard which ought reasonably to have been adopted by employers at the relevant time”. Having reviewed the facts in detail, he concluded that the standard of safety was determined by the 1972 Code until the coming into force of the Noise at Work Regulations 1989 and that, judged by the standard of the 1972 Code, Mrs Baker’s place of work was safe. Having reached this conclusion, he did not go on to consider whether her employers had discharged the burden of proving that they had done all that was reasonably practicable to make and keep the place safe for any person working there.

[109] Smith LJ agreed with and applied the Court of Appeal decision in *Larner v British Steel plc* [1993] 4 All ER 102, [1993] ICR 551 (which was followed by the Inner House of the Court of Session in Scotland in *Mains v Uniroyal Englebert Tyres Ltd* [1995] IRLR 544, [1995] SC 518) and held ([2009] PIQR P332 at [76]) that the safety of a place of work within the meaning of s 29 was “to be judged objectively without reference to reasonable foresight of injury”.

[110] She said that what is objectively safe cannot change with time. On the evidence before the judge, she held that the places of work where the ambient noise levels were 85 dB(A) lepd or above were not safe (at [78]). In the alternative, if reasonable foresight was relevant, she said that by the early 1970s any employer who kept abreast of developing knowledge would have known that prolonged exposure to 85 dB(A) lepd was harmful to some people (at [79]). On that basis, by the early 1970s there would have been liability for breach

of s 29, subject to the reasonable practicability defence.

[111] Like Lord Mance, I prefer the approach of the judge, with the qualification that what is “safe” is an objective question in the sense that safety must be judged by reference to what might *reasonably* be foreseen by a reasonable and prudent employer. The concept of what is safe is not, however, absolute. As Lord Nicholls and Lord Hobhouse said in *R (on the application of Junttan Oy) v Bristol Magistrates’ Court* [2003] UKHL 55, [2004] 2 All ER 555, safety is a relative concept. People can legitimately hold different opinions as to what is safe. Opinions as to what is safe may vary over time as, with developing knowledge, changes occur to the standards that are reasonably expected to be followed. I do not, therefore, agree with Smith LJ ([2009] PIQR P332 at [78]) that what is objectively safe cannot change with time. Standards of safety are influenced by the opinion of the reasonable person and foreseeability of risk plays a part in the forming of that opinion. If reasonable foreseeability is not imported into the concept of safety, then unless the Court of Appeal are right in holding that it is relevant to reasonable practicability, s 29(1) imposes an obligation on employers to guard against dangers of which they cannot reasonably be aware (in so far as it is reasonably practicable to do so). Breach of that obligation exposes the employer to potential criminal liability: see s 155 of the 1961 Act. That is an unreasonable interpretation to place on the statute, which I would not adopt unless compelled to do so by clear words, whether express or necessarily to be implied. In my view, there are no such words.

...

[118] In my view, the meaning of s 14(1) [of the Factories Act 1961] is highly relevant. As a matter of ordinary English, the word “dangerous” is an antonym of “safe”. The text of s 14(1) suggests that it is being so used in the subsection. The subsection provides that every dangerous part of any machinery shall be securely fenced unless “it is in such a position or of such construction as to be as *safe* to every person employed or working on the premises as it would be if securely fenced” (my emphasis). The contrast between “dangerous” and “safe” is striking. As I have said, the meaning of s 14(1) is long-established: there can be no liability for dangerous parts of machinery unless the danger is reasonably foreseeable. In these circumstances, it would be surprising if Parliament had intended to impose liability under s 29(1) for a

danger (or lack of safety) which is not reasonably foreseeable.

‘[119] The only justification for interpreting “safe” in s 29(1) as not importing the concept of reasonable foreseeability is that it is *unnecessary* to do so because reasonable foreseeability is imported into the reasonable practicability qualification. I accept that, if it is imported into the reasonable practicability qualification, there is no *need* to interpret “safe” as importing reasonable foreseeability in order to avoid an inexplicable mismatch between ss 14(1) and 29(1).’ *Baker v Quantum Clothing Group Ltd* [2011] UKSC 17, [2011] 4 All ER 223 at [108]–[111], [118]–[119], per Lord Dyson SCJ

SAFE PORT

[For 43(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 1704 see now 7 Halsbury’s Laws of England (5th Edn) (2015) para 519.]

SAILING VESSEL

[For 43(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 853 see now 94 Halsbury’s Laws of England (5th Edn) (2008) paras 728, 731, 773.]

SALARIES AND EMOLUMENTS

Australia [International Organisations (Privileges and Immunities) Act 1963 (Cth).] ‘[65] The phrase “salaries and emoluments” in Item 2 of Pt I of the Fourth Schedule to the IOPI Act recognises that the payments which an international organisation may make to a person who holds an office may be of a variety of characters. It is apparent that “emolument”, appearing as it does in the phrase “salaries and emoluments”, is intended to capture a broader range of additional benefits than “salaries”. However, in the context of Item 2 of Pt I of the Fourth Schedule to the IOPI Act and the SAPI Regulations [Specialized Agencies (Privileges and Immunities) Regulations (Cth)], that phrase is subject to the two conditions referred to earlier — the emolument must be received whilst the person is an officer of a specialized agency and the emolument must be received from the specialized agency. A monthly pension payment does not, and cannot, satisfy those conditions. Indeed, adapting the language of Rich J in *Nettle* [*Nettle v Howarth* (1935) 53 CLR 55, [1935] ALR 241], monthly pension

payments are not “advantages in money or money’s-worth which flow from occupation of an office or the like”. A pension does not flow from occupation of an office. It flows only on and from cessation of that office.’ *Macoun v Commissioner of Taxation* [2015] HCA 44, (2015) 326 ALR 452 at [65], per French CJ, Bell, Gageler, Nettle and Gordon JJ

SALARY PACKAGING ARRANGEMENTS

Australia ‘[33] The phrase “salary packaging arrangement” is not defined by the 2008 Agreement. Its meaning falls to be determined according to established principles of construction of an industrial instrument.

‘[38] The phrase “salary packaging”, in the context of an existing employment relationship, describes a situation where an employee’s total remuneration paid by way of salary is restructured by the employee sacrificing salary in exchange for a non-salary form of remuneration. To engage in “salary packaging” is to make a salary packaging arrangement. Sometimes this process is referred to as “salary sacrificing”.

‘[39] The *CCH Macquarie Dictionary of Employment and Industrial Relations* describes the practice of salary packaging synonymously with “salary sacrifice” as follows (D Yerbury & M Karlsson, *The CCH Macquarie Dictionary of Employment and Industrial Relations* (CCH Australia Limited & Macquarie Library Pty Ltd, 1992), at 310):

the structuring of the total remuneration to an employee... so as to increase that employee’s disposable income and maximise his/her choice as to which elements of a remuneration package would be most personally beneficial, while retaining the same net cost of employment to the employer. Often the package involves less direct salary than hitherto and more fringe benefits.

‘[40] As that definition makes clear, the subject of a salary packaging arrangement is remuneration earned. A salary packaging arrangement, or salary packaging, is the making of an arrangement that will restructure the remuneration otherwise payable to an employee as salary for a mix of salary and non-salary remuneration. In an existing employment, that restructure will involve the employee sacrificing part of an existing entitlement to receive salary in return for service for other benefits earned by the

employee and provided by the employer as remuneration in return for service. A fundamental feature of a salary packaging arrangement is the substitution of one form of remuneration for another.

‘[41] The remuneration provided in substitution for salary may take various forms. It may be the provision of a good or service like a vehicle or access to a gym. It may be the discharge of a debt owed by the employee to another person, such as a membership subscription to a union or to a health fund. What is crucial, to my mind, is that the salary substitute is provided to the employee as remuneration for services rendered. Only if that is so, is remuneration the subject of the arrangement and the arrangement a salary packaging arrangement.’

‘[42] Where a good or service is not provided by an employer to an employee as remuneration, it is not provided as part of a salary packaging arrangement. In that case, there is no exchange of salary for a different remunerative benefit, there is simply the provision of a benefit either gratuitously or in exchange for a payment. If such a benefit is paid for, it may be paid for out of the salary due to be paid to the employee, but that would simply be a payment made by the employee, out of salary, for a good or service provided by the employer. It would not be the substitution of salary for another form of remuneration where the good or service was not provided as remuneration. By definition, it would not constitute a salary packaging arrangement.’

‘[43] I should add that, in addressing the meaning of “salary packaging arrangement”, I have taken into account the views of two accountants called by the parties which, in each case, were contained in expert reports received, pursuant to order, as submissions. I think it fair to say, as DEECD contended, that both experts agreed that the general understanding of the term “salary packaging arrangement” is:

An arrangement between an employer and employee whereby the employee agrees to forego an amount of monetary remuneration in return for the provision of non-cash benefits by the employer.

Neither expert directly addressed whether a fundamental feature of a salary packaging arrangement is the substitution of one form of remuneration for another, but that seems implicit from their agreed definition.’ *Australian Education Union v Victoria (Department of Education and Early Childhood Development)*

[2015] FCA 1196, (2015) 333 ALR 1 at [33], [38]–[43], per Bromberg J

SALE OF GOODS

[For 41 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 1 see now 91 Halsbury’s Laws of England (5th Edn) (2012) para 1.]

By description

[For 41 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 72 see now 91 Halsbury’s Laws of England (5th Edn) (2012) para 73.]

By sample

[For 41 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 93 see now 91 Halsbury’s Laws of England (5th Edn) (2012) para 94.]

SALVAGE

[For 43(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 931 see now 94 Halsbury’s Laws of England (5th Edn) (2008) para 883.]

Salvage charges

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 434 see now 60 Halsbury’s Laws of England (5th Edn) (2011) para 400.]

SAME SOURCE

Canada [Civil Code of Québec, SQ 1991, c 64 art 2896. Class action for neighbourhood disturbances.] ‘[100] Article 2908 *CCQ* restates the principle set out in art 2233a *CCLC* [Civil Code of Lower Canada] that an application for leave to bring a class action suspends prescription until the judgment granting the motion is no longer susceptible of appeal ...

‘[101] In the instant case, the action was authorized on March 31, 1994 by Thibault J. Prescription was therefore *suspended* between the date of the application, June 4, 1993, and the date when Thibault J’s judgment was no longer susceptible of appeal, namely 30 days after March 31, 1994 (art 494 *CCP* [Code of Civil Procedure]). Prescription then ran again until the action was filed on August 1, 1994. The *Civil Code of Québec* provides that the filing of a judicial demand *interrupts* prescription:

2892. The filing of a judicial demand before the expiry of the prescriptive period

constitutes a civil interruption, provided the demand is served on the person to be prevented from prescribing not later than sixty days following the expiry of the prescriptive period ...

[102] Article 2896 *CCQ* adds that the interruption continues until judgment and has effect in respect of any right arising from the same source:

2896. An interruption resulting from a judicial demand continues until the judgment acquires the authority of a final judgment (*res judicata*) or, as the case may be, until a transaction is agreed between the parties.

The interruption has effect with regard to all the parties in respect of any right arising from the same source.

The question is therefore whether the damage suffered by the representatives after the filing of the judicial demand in August 1994 arose from the “same source”. The analysis on this point will make it possible to decide whether the representatives can be compensated not only for neighbourhood disturbances that occurred between June 4, 1991 and the date of filing of the demand, June 4, 1993, but also for damage suffered up to the time SLC ceased operations in 1997.

[103] In this case, the courts below correctly adopted a liberal interpretation of the words “same source”. Dutil J held that the *CCQ* does not limit the general scope of the word “source” in art 2896 *CCQ* (para 223) and concluded that it is possible to claim compensation for damage that has the same cause but is spread out over time. Moreover, in her judgment authorizing the class action, Thibault J did not limit the members’ claims to the period starting on June 4, 1991 and ending with the filing of the motion for authorization on June 4, 1993. The Court of Appeal confirmed the validity of Dutil J’s liberal interpretation of the expression “same source” (paras 224–25).

[104] The Court of Appeal had also concluded in *ABB Inc v Domtar Inc* [2005] RJQ 2267, 2005 QCCA 733, that the word “source” must be interpreted broadly rather than narrowly. ...

[105] Baudouin and Deslauriers also discuss the concept of “continuing damage” and its consequences for prescription. This type of damage involves an injury that recurs or persists over time. In such a case, it makes sense to allow the victim to bring a single action to put a permanent end to the damage rather than

requiring him or her to bring a series of actions. ...

[106] Here, the “source” of the continuing damage suffered by the representatives, namely the acts that generated their right of action, remains the same: activities of SLC that caused excessive neighbourhood annoyances. Since those activities continued until 1997, it would make no sense (in addition to being impractical, as Dutil J pointed out at para 230) to ask the group’s representatives to repeat their motion every three years for each annoyance suffered. In conclusion, we agree with the courts below that all events subsequent to the filing of the action were relevant, and in our opinion, they did not err in law or in fact in this regard.’ *St Lawrence Cement Inc v Barrette* [2008] 3 SCR 392, [2008] SCJ No 65, 299 DLR (4th) 385, 2008 SCC 64 at [100]–[106], per LeBel and Deschamps JJ

SATISFACTION

[For 16(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 739 see now 47 Halsbury’s Laws of England (5th Edn) (2014) para 176.]

SATISFY

Australia [1] A criterion for the issue of a protection visa under the Migration Act 1958 (Cth) (the Act) is that the applicant be a non-citizen of Australia to whom the minister “is satisfied” that Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Section 36(2)(a) of the Act so provides. If the minister “is satisfied” that this and other criteria “have been satisfied” then the minister “is to grant the visa”; if “not satisfied”, then the visa must be refused: s 65(1).

[2] The term “satisfy” has various shades of meaning. Two of them are involved in the collocation presented by ss 36 and 65 of the Act. One is that the applicant for a protection visa answers or meets the requirement or condition that Australia has protection obligations to the applicant. The second is that the decision maker accepts or is content that the applicant answers or meets that requirement or condition.’ *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16, (2010) 266 ALR 367 at [1]–[2], per Gummow ACJ and Kiefel J

New Zealand [Personal Property Securities Act 1999, s 167.] [3] By s 167(1) of the Act I

can make an order that the financing statement/security interest be maintained if I am “satisfied that none of the grounds for making a demand under section 162 exist”. The invariably vexed question then arises as to what is meant by “satisfied” in this context. There is no Court of Appeal or Supreme Court authority on point.

...
[8] Despite the reasonably extensive judicial comment on this point, I remain unconvinced that the approach taken in caveat cases is directly transferrable to the present context given the statutory language utilised. Quite helpfully for the purposes of s 167(1), the judgment of the Court of Appeal in *R v White* [[1988] 1 NZLR 264, CA] directly confronted the interpretive exercise of ascertaining the meaning of the word “satisfied”. While this case was criminal in nature, that does not derogate from the weight of the exercise undertaken there. In that case, the Court of Appeal said:

The phrase “is satisfied” means simply “makes up its mind” and is indicative of a state where the Court on the evidence comes to a judicial decision. There is no need or justification for adding any adverbial qualification to “is satisfied” — *Blyth v Blyth* [1966] AC 643. In that case the House of Lords rejected the view of the Court of appeal that “it is satisfied” means “satisfaction beyond reasonable doubt”. Lord Pearson said:

“The degree or quantum of proof required by the Court before it comes to a conclusion may vary according to the gravity of the subject matter to which the conclusion relates, but in relation to which subject matter the specified conclusion is reached or not reached by the end of the trial: the Court either is or is not satisfied upon each point.”

To much the same effect is the dictum of Smith J in *Angland v Payne* [1944] NZLR 610 (CA & SC) at 626:

“... the Judge must be ‘satisfied’. This implies, I think, the weighing of the opposing contentions and the reaching by the Judge of a clear conclusion that a substantial ground exists. The Judge must pass beyond the stage of saying that there ‘seems’ to be a substantial ground. He must be ‘satisfied’ that there is a substantial ground.”

And Adams J in *Robertson v Police* [1957] NZLR 1193 (SC), 1195:

“The mind of the Court must be ‘satisfied’—that is to say, it must arrive at the required affirmative conclusion—but the decision may rest on the reasonable probabilities of the case, which may satisfy the Court that the fact was as alleged, even though some reasonable doubt may remain ... the Court is not at liberty to uphold the defence unless the evidence produces in its mind the required acceptance of the truth of the allegation.”

[9] This approach has recently been confirmed by the Court of Appeal [in, eg *R v A* [2009] NZCA 380 at [9]–[12]]. The older decision of the Court of Appeal in *Re Woodcock and Woodcock* [[1957] NZLR 960 (CA & SC) at 963–964, per Finlay ACJ] further fortifies this approach ...

[10] Given the approach taken by these authorities as to the meaning of the phrase “is satisfied”, in my view Parliament must be taken as having accepted this to be the position when enacting the Act. ...

[11] I therefore propose to consider the present application not on the basis of any approaches previously proposed but rather, by an evaluation of the submissions and evidence before me. In doing so, I will ask whether WCSH has persuaded me that none of the grounds contained in s 162 apply here. I do not intend to qualify the statutory language in any way. Either I will be satisfied or I will not.’ *Working Capital Solutions Holdings Ltd v Pezaro* [2014] NZHC 1020, [2014] 3 NZLR 379 at [3], [8]–[11], per Gendall J

SCHEME

Managed investment scheme

Australia [Corporations Act 2001 (Cth) s 601ED. Plaintiff argued that the aggregate of the arrangements with MBC and the litigation funder (the agreements) in respect of each class action established a managed investment scheme, which by s 601ED was required to be, but had not been, registered under the Act.] [10] Turning to the legislation, a managed investment scheme is defined in s 9 of the Corporations Act to relevantly include:

... a scheme that has the following features:

(i) people contribute money or money’s

- worth as consideration to acquire rights (*interests*) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);
- (ii) any of the contributions are to be pooled, or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property, for the people (the *members*) who hold interests in the scheme (whether as contributors to the scheme or as people who have acquired interests from holders);
 - (iii) the members do not have day-to-day control over the operation of the scheme (whether or not they have the right to be consulted or to give directions).

A managed investment scheme must be registered under s 601EB if it has more than 20 members: s 601ED(1). If it is not registered a person must not operate the scheme: s 601ED(5).

[11] The first step in the process of determining whether the definition applies to the arrangements created by the funding agreements and the retainer agreements is to consider whether those arrangements amount to a "scheme". As regards the meaning of "scheme", it appears that the word is used in its ordinary signification — namely a programme or plan of action: *Australian Softwood Forests Pty Ltd v Attorney-General (NSW)*; *Ex rel CAC* (1981) 148 CLR 121 at 129; 36 ALR 257 at 262; 6 ACLR 45 at 50 (*Australian Softwood*) which considered the meaning of the word "scheme" in the definition of "interest" in s 76(1) of the Companies Act 1961 (NSW). The scheme "must be capable of being identified within certain boundaries": *Australian Securities and Investments Commission v Takaran Pty Ltd* (2002) 43 ACSR 46; [2002] NSWSC 834 at [12] (*Takaran*). Moreover, the program or plan must be "coupled with a series of steps or course of conduct to effectuate the purpose and pursue the programme or plan": *Takaran* at [15].

[12] It is hard to avoid the conclusion that the agreements brought into existence a plan of action. In essence the plan involves: (a) putting in place a group of persons willing to participate in proceedings against Multiplex; (b) ensuring that those persons would not be exposed to costs; (c) retaining a firm of solicitors that would act on the group's behalf; and (d) making sure that the legal fees would be paid. As the

facts show, the plan was implemented with the commencement and prosecution of the actions.

[13] Turning to the features which the scheme must exhibit, the first (which I have broken down into its separate limbs) is that "[i] people contribute [ii] money or money's worth [iii] as consideration to acquire rights ... to benefits produced by the scheme". It is to be noted that there is no requirement for the peoples' contributions to be the same. For instance, if contributions are in money, the amount may differ from contributor to contributor. Indeed, some may contribute money, others money's worth. Multiplex says the contributors are: (a) the litigation funder who has put up money or the promise to pay money; and (b) the group members (including the representative parties) each of whom has promised to pay to the litigation funder a percentage of the resolution sum. I treat the group member's promise, coupled as it is with a direction that MB [Maurice Blackburn Pty Ltd] pay the amount out of the common account, to be an equitable assignment of future property: *Vat-savaya Venkata Jagapati v Poosapati Venkata-pati* (1924) 52 LR Ind App 1 cited with approval in *Tooth v Brisbane City Council* (1928) 41 CLR 212 at 220-1; [1928] ALR 245 at 249-50. (I observe that it was not suggested that a person is unable to assign the fruits of litigation — such an assignment is not contrary to public policy: *Glegg v Bromley* [1912] 3 KB 474).

[14] Returning to the first limb of the first feature, the word "contribute" means to be "made available": *Crocombe v Pine Forests of Australia Pty Ltd* (2005) 219 ALR 692; [2005] NSWSC 151 at [52]-[53] (*Crocombe*) or to "pay or supply": *Burton v Arcus* (2006) 32 WAR 366; 57 ACSR 468; [2006] WASCA 71 at [57] (*Burton*). A promise to do something may be a "contribution". What these people have done amounts to a contribution. As regards the litigation funder its contribution is either in money (the payment of legal fees, etc) or the promise to pay that money. The contribution of the group member is the assignment of future property.

[15] The second limb of the first feature requires the contribution be in money or money's worth. The meaning of the expression "money's worth" has been considered in different circumstances. ...

[18] There are cases that have considered the expression when used in the definition of managed investment scheme. In *Crocombe*, for example, the plaintiffs purchased land and

agreed that the land could be used for purposes of a pine forest plantation. In return the plaintiffs were to receive the income from the forestry activities. In the event, little or no revenue was received. Accordingly, the plaintiffs moved to wind up what they alleged was an unregistered managed investment scheme. The question that arose was whether the agreement to allow the land to be used for the plantation was a contribution of money's worth being the consideration to acquire certain rights. Young CJ in Eq held that a contribution of an interest in land could be a contribution in money's worth. He appears to have acted on the view that a contractual promise to allow land to be used for purposes of the forestry venture in return for a share of the income to be generated from the venture was a contribution of money's worth. Young CJ in Eq did not give extensive reasons. Presumably what he had in mind was that the promise was "money's worth" because it was "worth money": see also *Hance v Cmr of Taxation* [2008] FCAFC 196 at [98]–[100].

[19] I am prepared to accept that the promises given by the litigation funder and the group members are money's worth. Each promise is capable of being valued, notwithstanding, in the case of a group member's promise, the contingent nature of the right that has been assigned. The principal factors that would be considered in valuing the assigned right are: (a) the merits of the causes of action; (b) the quantum of damages (if any) likely to be recovered; (c) an appropriate discount for risk; and (d) the likely costs to be incurred in prosecuting the claim.

[20] The final limb is to determine whether each contribution was consideration (that is the value given or price paid) for the acquisition of "rights ... to benefits produced by the scheme". For that it is necessary to identify the benefit (if any) that has been both acquired by the contributors and produced by the scheme. The principal object of the scheme is to recover in litigation the loss which each group member says he or she has suffered as a result of the alleged wrongdoing by Multiplex. The recovery of damages or compensation is not, by any meaning, a "benefit" a group member has acquired. If any group member is entitled to recover damages or compensation from Multiplex it is because there is in existence a justiciable cause of action against Multiplex, a cause of action which exists separately from, and is antecedent to, the scheme. No group member has given value or paid for those causes of action as part of the scheme.

[21] Multiplex contend that each group

member obtained the following key benefits from the arrangements: (a) immunity from an adverse costs order; (b) immunity from the requirement to provide security for costs; and (c) funding for the legal costs incurred, and that will be incurred, in the conduct of the proceeding. Multiplex also point to the fact that group members enjoy the right to share in the legal work carried out by MB for their "common benefit" which allows them to prosecute their claim at a substantially lower cost than if they paid for the same legal work on an individual basis.

[22] It is true that each group member is able to pursue his or her claim because he or she has executed a funding agreement. I will assume (but it is by no means clear), that in the absence of funding no group member would have brought an individual action against Multiplex. On the basis of this assumption, Multiplex says that each group member acquired a benefit in that his or her claim is being prosecuted "risk free", albeit "risk free" for a price. I found this argument to be attractive for a time. But, in the end, I do not believe that the right, whether "risk free" or not, to participate as a plaintiff, or in some other capacity, in a law suit is a relevant benefit. For an investor to obtain a benefit under a managed investment scheme he or she must acquire a right to some hoped for profit or gain the scheme will produce. In *Takaran Barrett J* said (at [15]): "Profit-making will almost invariably be a feature or objective of the kind of scheme with which the s 9 definition of 'managed investment scheme' is concerned, given the definition's references in several places to 'benefits'". Here, each group member obtains the right to participate in an action in exchange for a promise to pay a portion of the resolution sum to the litigation funder. The group member's promise has significant value. Assuming that no single group member has a sizable stake in Multiplex securities, one might assume that the value of the promise is less than the total cost an individual group member would be required to pay to prosecute his or her own claim. The aggregated value of the group members' promises is, however, likely to be far greater than the value of the consideration they receive from the litigation funder in return. Thus, although each group member may obtain an advantage, they do not acquire a benefit. Put another way, the consideration provided by the litigation funder cannot be characterised as a profit made by group members.

[23] This point may be demonstrated by a simple example. Assume the following facts: (a) 20 friends wish to take a holiday within

Australia, but cannot agree on where they should go; (b) the cheapest domestic flight an individual can purchase is \$400; (c) it is possible to charter a 20 seater aircraft (with pilot, flight attendant, food and entertainment) to fly the friends on a mystery flight (that is, to a destination unknown to the friends and known only to the pilot and aircraft owner) for \$4000 (that is at a cost of \$200 per friend). If Multiplex is correct, each friend has obtained a benefit. Further, this arrangement may, on Multiplex's submissions, constitute a managed investment scheme.

'[24] The position of the group members may be contrasted with the litigation funder. It has made a contribution in money or money's worth for which it acquired a stake in the resolution sum. Plainly that is a right to a benefit produced by the scheme. But there must be 20 people who acquire benefits, and here there are not.

'[25] Multiplex also suggested additional benefits (immunity from an adverse costs order and the requirement to provide security for costs). Apart from the representative parties (or a plaintiff in a test case) these so called benefits are illusory in that they are not produced by the scheme. No costs order or order for the provision for security can be made against group members: see for example s 43(1A) of the Federal Court Act 1976 (Cth); see also *Bray v F Hoffman-La Roche Ltd* (2003) 130 FCR 317; 200 ALR 607; [2003] FCAFC 153.

'[26] It follows that the first feature of the definition is not satisfied.

'[27] The second feature that the scheme must exhibit (which I have also broken down into its separate limbs) is that "[i] any of the contributions are to be pooled or [ii] used in a common enterprise to [iii] produce financial benefit or benefits consisting of rights or interests in property" for members. This feature is not, in my opinion, satisfied. ...

'[34] The final feature is that "the members do not have day-to-day control over the operation of the scheme". In *Burton* at [74] Buss JA observed that "expressions such as 'control' take their colour from the context in which they appear". He went on to say in *Burton* at [79] that the requirement of day-to-day control "is concerned with control in fact as distinct from the legal right to control. It is also concerned with control in fact by the members of a scheme as a whole". Buss JA explained in *Burton* at [80] that members will have day-to-day control over the operation of a scheme if: "(a) the members as a whole

participate in making the routine, ordinary, everyday business decisions relating to its management; and (b) the members as a whole are bound by the decisions which are made". Finally, he noted in *Burton* at [82] that if the "operator of a scheme manages the scheme (or certain aspects of it) on behalf of the members [it] does not mean that the members by their agent, the promoter or operator have day-to-day control in fact over the operation of the scheme. In other words, the management activities of the promoter or operator in relation to the scheme are not to be imputed to the members in determining whether the members have such day-to-day control".

'[35] It is difficult to apply the notion of day-to-day control to the running of litigation. It may be, though, a matter of perspective. For example, a partner at a law firm may instruct a junior lawyer to manage an action. From the perspective of the partner as well as the junior lawyer, it could be said that the junior lawyer had day-to-day control of the action. But, it is difficult to apply the notion of day-to-day control when one views the position from the perspective of the client. A retainer to conduct proceedings on behalf of a client authorises the solicitor to do all things necessary and proper for the conduct of the proceeding. It is, however, by no means clear that this authority gives the solicitor the day-to-day control of the litigation. The problem is that although the concept is apt for the conduct of a business and other commercial enterprises, it has little application to the running of litigation where things simply do not happen on a day-to-day basis.

'[36] If the concept were to apply to the relationship of solicitor and client with respect to the control of litigation (a point I need not decide), group members seem to have ceded control to MB.

'[37] The upshot of this reasoning is that the arrangements with the funder and MB do not create a managed investment scheme. This should not come as a surprise. First, with the evident purpose of the legislation in mind, the essence of a managed investment scheme, stripped of all of its technicalities, is a scheme in which people invest money (or money's worth) in a common venture with the expectation of profit that will result from the efforts of others. That is not what has happened here. Second, the obligations that would come into existence if this were a managed investment scheme, assuming they could be put into effect, would afford group members little protection of the kind envisaged.' *Brookfield*

Multiplex Ltd v International Litigation Funding Partners Pte Ltd (No 3) [2009] FCA 450, (2009) 256 ALR 427 at [10]–[15], [18]–[27], [34]–[37], per Finkelstein J

See also COMMON ENTERPRISE; MONEY'S WORTH; OPERATE; POOLING

SCHOOL

County school

[For 15(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 102n see now 35 Halsbury's Laws of England (5th Edn) (2015) para 106n.]

Maintained school

[For 15(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 102 see now 35 Halsbury's Laws of England (5th Edn) (2015) para 106.]

Public school

[For 15(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 509 see now 35 Halsbury's Laws of England (5th Edn) (2015) para 370.]

Voluntary school

[For 15(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 102 see now 35 Halsbury's Laws of England (5th Edn) (2015) para 106n.]

[For 15(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 102 et seq see now 35 Halsbury's Laws of England (5th Edn) (2015) para 106 et seq.]

SCIENTIFIC PROOF

'Scientific proof' of diagnosis usually refers to whether a medical opinion is supported, for example, by X-rays, an MRI, or laboratory tests. 'Scientific proof' of etiology might consist of animal studies or epidemiological research. There is generally no legal requirement that any affirmative conclusion be supported by scientific proof. (*Professor T G Ison*, 15 *Medico-legal Journal of Ireland* pp 15–23)

SCULPTURE

[Whether film props were 'sculpture' within the meaning of the Copyright Designs and Patents

Act 1988, s 4.] '[5] In the course of making the first Star Wars film a number of works were created. They include some paintings and drawings by a Mr McQuarrie showing scenes including stormtroopers in their helmets and armour and a clay model of a stormtrooper helmet made by a Mr Pemberton. Mr Ainsworth was asked to produce a final version in plastic based on the model and McQuarrie works and did so, incorporating his own improvements. In doing so he used what can fairly be called "sculpting" techniques. ...

'[6] So far as United Kingdom law is concerned it is accepted that the two-dimensional works produced (eg the scene paintings) are copyright works. Whether the models for the helmet are in themselves copyright works depends on whether they are "sculptures" within the meaning of s 4 of the Copyright Designs and Patents Act 1988.

... '[74] None of this is necessarily controversial but we are not convinced that these examples really help. A plaster statue of a saint can, in artistic terms, be very good or very bad. There are many examples of both. But most people would, we think, accept that both kinds were sculptures notwithstanding their religious purpose. Similarly, a well-designed stage prop may be highly artistic and one knows of stage sets for opera and ballet designed by a number of artists of great note. Again their status as an artistic work would not be negated by the use to which their designs were intended to be put.

'[75] The issue in this case and the judge's approach to it, does not turn on the purpose for which it is actually used but on the purposive nature of the object: what the judge described as its "intrinsic quality of being intended to be enjoyed as a visual thing". As we read his judgment, the purpose of the object is simply one of the relevant guides to whether it qualifies as a sculpture. A precise definition of that term is not possible which is why the judge has outlined a number of considerations which should act as signposts to the right answer. One can demonstrate this by an example. Most people would not regard a real soldier's helmet as a sculpture. Although made of pressed metal from a mould, its essential functionality as such is to take it outside any reasonable use of that term. A medieval suit of armour, however highly decorated, is no different. Although now of largely historical interest, it was made for a practical purpose which, again, characterises it as an object of utility rather than an artistic work. This view of these objects would not change if they were used as props for a play or

film. Their use in that context would not alter their nature or their description.

[76] But if the soldier's helmet appears on a bronze statue of a soldier as part of an artistic representation of the man and his kit no one would, we think, dispute that it formed part of a sculpture. It has no practical utility. It cannot be used as a helmet and, to that extent, it is not one.

[77] The result of this analysis is that it is not possible or wise to attempt to devise a comprehensive or exclusive definition of "sculpture" sufficient to determine the issue in any given case. Although this may be close to adopting the elephant test of knowing one when you see one, it is almost inevitable in this field. We therefore consider that the judge was right to adopt the multi-factorial approach which he did.

[78] We turn then to the second aspect of Mr Bloch's appeal on this point which is whether the judge correctly applied the various guidelines he has set out. In doing so we observe that this is the type of case referred to by Lord Hoffmann in *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700, [2000] 1 WLR 2416 in which an appellate court must pay considerable respect to the assessment made by the fact-finding judge and should not reverse his decision unless it is satisfied that he erred in principle.

[79] The first class of item to consider are the helmet and armour. Mr Bloch seeks to avoid our example of a real soldier's helmet being used as a prop in a film by stressing the fictional and imaginary nature of the stormtroopers and what they were. These were not, he submits, the helmet and armour of a real soldier and are therefore no more part of reality than the horn of a unicorn would be. That is not a real horn and this is not, in any real sense, a helmet.

[80] But that argument confuses the fictional nature of the stormtrooper with his physical depiction in the film. Although invented, the helmet and armour are still recognisable as such and have a function within the confines of the film as the equipment of the stormtrooper. They are, to that extent, no different from and serve the same purpose as any real helmet or armour used in a film. The judge made this point by referring to the primary function of the helmet and armour as being utilitarian and lacking in artistic purpose. This is simply a shorthand for the application of the various considerations set out at [2009] IP & T 401 at [118]. He was, in our view, entitled to come to that conclusion on the facts of this case. We also think that he was right to do so. Neither the armour nor the helmet are sculpture.

[81] That leaves the toy stormtroopers. Mr Bloch submits that the distinction which the judge made based on *Britain v Hanks Bros & Co* (1902) 86 LT 765 is untenable and that the facts of that case are indistinguishable from those under consideration on this appeal. The toy stormtroopers would not, of course, have qualified as sculptures under the 1814 Act because they are not statues or models of the human figure but that particular qualification no longer exists. It is, however, clear from the judgment of Wright J that the submission he had to deal with was that the models were toys of no artistic merit whereas, on the evidence, the opposite was the case.

[82] As already indicated, we think the judge was right to point to the existence of what can loosely be described as a work of art as the key to the identification of sculpture. On this basis, artistic and accurate reproductions of soldiers could qualify notwithstanding that some children might wish to play with them. But in most modern cases toy soldiers, whether real or fictional, will not be works of art and will not differ materially in artistic terms from the plastic Frisbee in *Wham-O Manufacturing Co v Lincoln Industries Ltd* [1985] RPC 127. They will be playthings registrable for their design qualities but nothing else. This distinction may be difficult to draw in some cases but we suspect that the cases which will qualify for protection under the Copyright Act will be relatively rare. The judge recognised the need not to make qualitative judgments about the artistic merits of the toy soldiers in *Britain v Hanks Bros & Co* compared to the stormtroopers and therefore emphasised the real purpose of the latter being one of play. But the true distinction between the two cases can be expressed in more fundamental terms. We are not dealing here with highly crafted models designed to appeal to the collector but which might be played with by his children. These are mass produced plastic toys. They are no more works of sculpture than the helmet and armour which they reproduce.' *Lucasfilm Ltd v Ainsworth* [2009] EWCA Civ 1328, [2010] 3 All ER 329 at [5]–[6], [74]–[82], per Jacob LJ; affd on this point [2011] UKSC 39, [2011] 4 All ER 817

SEARCH

Canada [Canadian Charter of Rights and Freedoms, s 8: everyone has the right to be secure against unreasonable search or seizure. Disclosure of intercepted communications

under the Criminal Code, RSC 1985, c C-46, s 193(2)(e) to a peace officer or prosecutor in Canada or to a person or authority with responsibility in a foreign state for the investigation or prosecution of offences.] '32. Section 8 [of the Canadian Charter of Rights and Freedoms] is typically invoked where police perform a search or seizure and thereby infringe upon an individual's reasonable expectation of privacy. It is quite evident that the interception of wiretap communications constitutes a search. However, the disclosure of previously intercepted communications — which is what s. 193(2)(e) implicitly authorizes — is not, in my view, a "search" within the meaning of s. 8. Therefore, as a preliminary matter, it is important to clarify precisely how s. 8 is engaged in the present case. I now turn to that issue.

'33. Mr Wakeling submits that s. 8 is engaged because the disclosure of his intercepted communications pursuant to s. 193(2)(e) amounted to a second search, such that a second judicial authorization was necessary prior to the Impugned Disclosure. Absent such authorization, he argues that the police violated his s. 8 rights.

'34. With respect, I disagree. As the intervener the British Columbia Civil Liberties Association ("BCCLA") observes, the plain meaning of "search" does not include the disclosure of information by the state. A disclosure is simply the communication to a third party of previously acquired information.

'35. In sum, there was only one search that engaged s. 8 of the *Charter* on the facts of this case — the original lawful interception of Mr Wakeling's private communications. For this reason, to invoke s. 8, the appellant must rely on some other analytical approach.

'36. The BCCLA frames the s. 8 analysis in a different way. It submits that to the extent s. 193(2)(e) permits disclosure of the fruits of a search, it forms "part of the context in which courts must assess the reasonableness of the law authorizing the search" (factum, at para. 3).

'37. This submission warrants brief elaboration. According to the BCCLA, s. 193(2)(e) is an integral part of a search regime for wiretap interceptions set out in Part VI of the *Criminal Code*. Like all laws authorizing searches, that regime — including any integral part of that regime — must be reasonable in order to comply with s. 8 of the *Charter*. Therefore, if s. 193(2)(e) is held to be unreasonable, this would taint the overall regime for s. 8 purposes and render it unconstitutional.

'38. While I see some merit in the analytical

approach proposed by the BCCLA, my conclusion that s. 8 protects targets at both the interception *and* disclosure stages under Part VI is more a function of the special dangers associated with wiretaps. Parliament has recognized that wiretaps pose heightened privacy concerns beyond those inherent in other searches and seizures. Justice Karakatsanis describes (at para. 116) the serious privacy implications of electronic surveillance, citing this Court's caution that "one can scarcely imagine a state activity more dangerous to individual privacy" (*[R v Duarte [1990] 1 SCR 30]*, at p. 43). Given these implications, the protections that Parliament has seen fit to fold into the wiretap regime include s. 193 which provides that, other than for one of the delineated purposes, the disclosure of wiretap information is not only unauthorized, it is criminal.

'39. The highly intrusive nature of electronic surveillance and the statutory limits on the disclosure of its fruits suggest a heightened reasonable expectation of privacy in the wiretap context. Once a lawful interception has taken place and the intercepted communications are in the possession of law enforcement, that expectation is diminished but not extinguished. This heightened and continuing expectation of privacy in the wiretap context is further indication that s. 8 ought to apply to disclosures under Part VI.

'40. In sum, while I acknowledge the Chief Justice's concern that s. 193(2)(e) does not engage s. 8 simply by virtue of its integral place in the search regime of Part VI, that is not the *sole* reason — or indeed the main one — why I conclude that s. 8 is engaged in this context. As I have emphasized, Parliament has recognized that wiretap interceptions are an exceptional and invasive form of search, and it is therefore perfectly appropriate, in my view, that s. 8 protections should extend to wiretap disclosures by law enforcement. Furthermore, there is a residual and continuing expectation of privacy in wiretap information that persists *even after it has been lawfully collected*. Indeed, the Chief Justice agrees that "residual privacy interests" remain at the time of disclosure and that s. 8 protects against unreasonable uses of the information by law enforcement (para. 95). I am therefore satisfied that s. 8 is properly engaged.' *Wakeling v United States of America* [2014] SCJ No 72, [2014] 3 SCR 549 at paras 32–40, per Moldaver J

Reasonable search

[CPR 31.7 and CPR PD 31, para 2A.4.] '[26] The focus in the present applications is on the steps taken by the defendants to give disclosure of electronic documents. The focus is therefore not on the steps taken by the claimants. As appears below, the claimants adopted a quite different approach to disclosure of electronic documents or "e-disclosure". The claimants asked me to compare what they did with the steps taken by the defendants in order to assess whether the defendants had carried out a reasonable search for electronic documents and whether the court should now require the defendants to take further steps. ...

...
 '[29] Rule 31.7 [of the CPR] identifies the duty of search by a party required to give disclosure. Such a party is required to make "a reasonable search" for the documents required to be disclosed by way of standard disclosure (apart from the documents on which the party itself relies). ...

...
 '[39] At para 2.15, the *Cresswell Report* [Electronic Disclosure: A Report of a Working Party Chaired by the Honourable Mr Justice Cresswell, 6 October 2004, http://www.hmcourts-service.gov.uk/docs/electronic_disclosure1004.doc] discusses the duty to search for documents. It states that CPR Pt 31 gives a party "a certain degree of latitude" as to the extent of the search because what may be reasonable in one case may be inadequate in another. The test of "a reasonable search" in r 31.7 has the virtue of flexibility and takes account of the overriding objective: see para 2.18. At para 2.18(4), the report refers to back-up data and describes this as commonly having the disadvantage that the data is compressed and it can be difficult and costly to retrieve. At para 2.20 the report refers to the possibility of a search being carried out electronically using specified words or strings of words, rather than manually.

...
 '[46] ... [I]t must be remembered that what is generally required by an order for standard disclosure is "a reasonable search" for relevant documents. Thus, the rules do not require that no stone should be left unturned. This may mean that a relevant document, even "a smoking gun" is not found. This attitude is justified by considerations of proportionality. This point is well made by Jacob LJ in *Nichia Corp v Argos Ltd* [2007] EWCA Civ 741 at [50]–[52], [2007] IP & T 943 at [50]–[52].

'[47] This case provides an opportunity for the court to emphasise something mentioned in CPR PD 31 which the parties in the present case disregarded. Paragraph 2A.2 of the practice direction states that the parties should at an early stage in the litigation discuss issues that may arise regarding searches for electronic documents. Paragraph 2A.5 of the practice direction states that where keyword searches are used they should be agreed as far as possible between the parties. Neither side paid attention to this advice. In this application the focus is upon the steps taken by the defendants. They did not discuss the issues that might arise regarding searches for electronic documents and they used keyword searches which they had not agreed in advance or attempted to agree in advance with the claimants. The result is that the unilateral decisions made by the defendants' solicitors are now under challenge and need to be scrutinised by the court. If the court takes the view that the defendants' solicitors' keyword searches were inadequate when they were first carried out and that a wider search should have been carried out, the defendants' solicitors' unilateral action has exposed the defendants to the risk that the court may require the exercise of searching to be done a second time, with the overall cost of two searches being significantly higher than the cost of a wider search carried out on the first occasion.

'[48] There emerged at the hearing a difference in the legal approach which was urged upon me as to the scope of the court's review in this case. Mr Nourse on behalf of the defendants said that the question of what was "a reasonable search" had to be decided in the first instance by the solicitor in charge of the disclosure process. Rule 31.7 and paras 2 and 2A of the practice direction refer to someone "deciding" what is a reasonable search. That decision inevitably had to be made in the first instance by the solicitor. Mr Nourse referred to para 6.33 in *Matthews and Malek on Disclosure* (3rd edn, 2007) where the authors state: "What constitutes a reasonable search may be regarded as being to a certain extent subjective and thus the disclosing party is given a degree of latitude in making standard disclosure". Mr Nourse also referred to *Nichia Corp v Argos Ltd* [2007] IP & T 943 at [77] where Rix LJ said:

"Once attention is focused on the rationale of standard disclosure in the context of any relevant issue, it is possible to appreciate that it is those parties and their advisors

who are in the best position to adopt the procedures which are both commensurate and proportionate.”

‘[49] Mr Nourse then submitted that when a court is asked to review the decision made by the relevant solicitor, it should adopt a standard of review which reflects the degree of latitude given to the solicitor and the subjective character of the decision and this should lead the court to reach a conclusion different from the solicitor’s conclusion only in a case where the solicitor’s decision was outside the band of permissible reasonable decisions, alternatively, the court should adopt the approach of an appellate court reviewing an exercise of discretion. Mr Nourse referred to the classic statement of the approach in such a case in *G v G* [1985] 2 All ER 225 at 229, [1985] 1 WLR 647 at 652 per Lord Fraser of Tullybelton, where he said:

“... the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible.”

‘[50] Mr Davies QC on behalf of the claimant submitted that there was no warrant for Mr Nourse’s approach in the wording of the rules or the practice direction. He submitted that the court should have regard to all the circumstances which included the factors identified in r 31.7 and in para 2A.4 of the practice direction and the court should make up its own mind as to what was required by way of a reasonable search.

‘[51] It is right that the decision as to what is a reasonable search rests in the first instance with the solicitor in charge of the disclosure exercise. However, the practice direction makes clear that some parts at least of the process ought to be discussed with the opposing solicitor with a view to achieving agreement so as to eliminate, or at any rate reduce, the risk of later dispute. If a solicitor, whose decision as to what is a reasonable search is later challenged on a specific disclosure application, the court may well be influenced, in the solicitor’s favour, if it sees that the solicitor was very fully informed as to the issues arising in the case, and had made a fully considered decision applying all the factors in r 31.7 and para 2A.4 of the practice direction. However, even if the court

can, in a proper case, be favourably influenced by the diligence and conscientiousness of an individual solicitor, in my judgment, the task of deciding what is required by a reasonable search is a task given to the court by the wording of the rules. This task can be carried out by the court either in advance of the search being done or with hindsight, where a search has been carried out and its extent is challenged by the other party. I do not find any warrant in the language of the rules or practice direction for Mr Nourse’s suggestion that the standard of review should be a judicial review standard of irrationality or the standard adopted by an appellate court reviewing the exercise of a discretion. The passage in *Disclosure* is an echo of para 2.15 of the *Cresswell Report*. It is clear that these comments only amount to a statement that what is reasonable depends upon a number of circumstances and factors which differ from case to case. Similarly, the comment of Rix LJ in *Nichia Corp v Argos Ltd* reflects the fact that the solicitor in the first instance has the job of deciding what the extent of the search should be. That comment does not limit the scope of review by the court in a case where the decision is challenged.

‘[52] Further, I do not think that it would be helpful for the court to decline to form, and act on; its own view but instead to indulge in a review of the decision-making process on the part of the solicitor. Such a review would deflect the court from determining what is a reasonable search, taking account of all the factors and with the benefit of hindsight, into an examination of the solicitor’s mental processes at an earlier time. It should also be remembered that the duty to give disclosure is a continuing duty. A solicitor might reasonably think at an early stage in the process that a certain search will suffice. However, later events may require the solicitor to think the matter through again and form a different view and conduct a wider search. Accordingly, if the court’s task was limited to a judicial review of a decision-making process, the court may have to consider several decisions taken at different stages, or even a suggested omission on the part of the solicitor to think again, in the light of new material becoming available.

‘[53] There is one other general matter to which I should refer at this stage. In making his application for an order that the defendant should carry out further keywords searches, Mr Davies QC on behalf of the claimants emphasised that the question was whether it was reasonable to carry out such an extended search in the first place rather than the question being

whether it was reasonable for the court to order the defendants to carry out a second search, the defendants having already searched with fewer keywords. In my judgment, Mr Davies is correct that the first question for the court is what should have been done in the first place by way of a reasonable search. If the court reaches the conclusion that more should have been done in the first place then the court will conclude that a party has failed to carry out a reasonable search. That does not necessarily mean that the court will then order the defaulting party to carry out the search which it initially should have carried out. The court's approach is governed by r 31.12 which provides that the court "may" make an order for specific disclosure in such a case. Thus, the rule contemplates the possibility that the court may not make such an order. The position is described in para 5.4 of CPR PD 31 which says that the court will "usually" make an order for specific disclosure to ensure that the obligation to give disclosure is properly complied with. However, it must be possible for a court to reach a conclusion in a particular case that the required search which should have been carried out in the first instance would, if carried out at a second stage, be disproportionate as regards cost and the likelihood of revealing anything worthwhile.' *Digicel (St Lucia) Ltd v Cable & Wireless plc* [2008] EWHC 2522 (Ch), [2009] 2 All ER 1094 at [26], [29], [39], [46]–[53], per Morgan J

SEASHORE

[For 49(2) Halsbury's Laws of England (4th Edn) (2004 Reissue) paras 18–19 see now 100 Halsbury's Laws of England (5th Edn) (2009) paras 34–35.]

SEAWORTHY

[For 25 Halsbury's Laws of England (4th Edn) (2003 Reissue) paras 248–249 see now 60 Halsbury's Laws of England (5th Edn) (2011) paras 257–258.]

[For 43(2) Halsbury's Laws of England (4th Edn) (Reissue) para 1650 et seq see now 7 Halsbury's Laws of England (5th Edn) (2015) para 419 et seq, 93 Halsbury's Laws of England (5th Edn) (2008) para 484.]

SECURE TENANT DIES

[The Housing Act 1985 s 89 deals with succession when a secure tenant dies. Position

on death of one joint tenant.] '[10] It does not of course follow that Pt IV of the 1985 Act produces the same outcome [as the common law], in spite of the similar purpose of that legislation. What does follow, as it seems to me, is that there must be something in the language of the 1985 Act or inherent in its purpose which excludes the operation of the relevant features of the general law relating to joint tenancies. The only possible basis for such an exclusion in the case of the 1985 Act is the use of the indefinite article in the phrase "where a secure tenant dies" in s 89(1). The argument has to be (and is) that in the case of a joint tenancy "a secure tenant" means any one of the individuals constituting the joint tenant.

'[11]... For the purposes of sub-s (1), "a secure tenant dies" when a sole tenant dies. If the tenancy is a joint tenancy, the tenant has not died if there remains at least one living joint tenant in whom all the proprietary and contractual rights attaching to the tenancy subsist. Section 89 of the 1985 Act is a mandatory provision which is wholly concerned with the transmission of the tenancy to a person other than the previous tenant, on account of the latter's death. This makes sense only on the assumption that there no longer is a previous tenant. Where there is a surviving joint tenant, the whole statutory basis for disposing of the succession to the tenancy is absent. It is no answer to this to say that the purpose of the statute is to transfer the tenancy to members of the tenant's family living in the house. That simply begs the question. It is not necessary to provide for the transmission of a tenancy on death unless there is, so to speak, a vacancy. If the tenancy subsists in the surviving joint tenant, there is none. It is obvious that s 89 implicitly excludes the possibility of the transmission of the tenancy upon death in a manner inconsistent with its terms. But the recognition of the right of the survivor under a joint tenancy is not inconsistent with the provisions of s 89 relating to the transmission of tenancies, because the survivor's right is not a matter of transmission. The survivor has the same rights as he always did.

'[12] It follows from the basic legal characteristics of a joint tenancy that the argument based on the use of the indefinite article in s 89(1) depends on a false distinction between "a tenant" and "the tenant". The distinction is false because the section is concerned with the tenant and the tenancy, not with the partial interest of any one individual in the tenancy. Where property is held under a joint tenancy, there is only one tenant, albeit that

there are two or more people who jointly constitute that tenant. The draftsman of the 1985 Act undoubtedly envisaged that secure tenancies might be held jointly. The possibility is referred to in terms in ss 81 and 88(1)(b). In construing a statute, the ordinary presumption is that Parliament appreciated the legal incidents of those relationships which it is regulating. If, therefore, the draftsman had intended “a secure tenant” in s 89 to mean any one of two or more joint tenants it is hardly conceivable that he would have left that intention to be inferred from his use of an indefinite article, instead of dealing with the point expressly (eg “a secure tenant, or in the case of a joint tenancy, any person having an interest under a joint tenancy”).’ *Solihull Metropolitan Borough Council v Hickin* [2012] UKSC 39, [2012] 4 All ER 867 at [10]–[12], per Lord Sumption SCJ

SECURED CREDITOR

[For 3(2) Halsbury’s Laws of England (4th Edn) (2002 Reissue) para 560 see now 5 Halsbury’s Laws of England (5th Edn) (2013) para 574.]

SECURITY—SECURITIES

[For the Income and Corporation Taxes Act 1988, s 710(2), (2A), (3) see now the Income Tax Act 2007, s 619(1)–(4).]

In will

[For 50 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 585 see now 102 Halsbury’s Laws of England (5th Edn) (2010) para 296.]

Restricted securities

[The Income Tax (Earnings and Pensions) Act 2003, s 423(1) provides that for the purposes of Pt 7 Ch 2, ‘employment-related securities are restricted securities or a restricted interest in securities if: (a) there is any contract, agreement, arrangement or condition which makes provision to which any of subsections (2) to (4) applies; and (b) the market value of the employment-related securities is less than it would be but for that provision’.] ‘[74] ... Part 7 is clearly concerned with particular taxation issues which arise when employees are remunerated in shares and other securities. ...

‘[75] ... Parliament’s response was to impose a charge to tax when the restrictions were lifted (subject to the exemption of

favoured arrangements), rather than when the shares were acquired. ... The amended version of Ch 2 with which these appeals are concerned was enacted ... to address aspects of the previous provisions which were considered to leave them vulnerable to avoidance or to create anomalies. The structure of the legislation continued to be based on the exemption of restricted securities from income tax when the shares were acquired, and the imposition of a charge to tax when the restrictive conditions were lifted, subject to a widely drawn exemption from the latter charge.

‘[76] It is in the context explained in para [74], and against the background described in para [75], that it is necessary to consider the scope of the exemption on acquisition conferred by s 425(2), and more specifically the question whether, in s 423(1), the words “any contract, agreement, arrangement or condition which makes provision to which any of subsections (2) to (4) applies” should be construed as referring to “provision” with a genuine business or commercial purpose.

‘[77] Approaching the matter initially at a general level, the fact that Ch 2 was introduced partly for the purpose of forestalling tax avoidance schemes self-evidently makes it difficult to attribute to Parliament an intention that it should apply to schemes which were carefully crafted to fall within its scope, purely for the purpose of tax avoidance. Furthermore, it is difficult to accept that Parliament can have intended to encourage by exemption from taxation the award of shares to employees, where the award of the shares has no purpose whatsoever other than the obtaining of the exemption itself: a matter which is reflected in the fact that the shares are in a company which was brought into existence merely for the purposes of the tax avoidance scheme, undertakes no activity beyond its participation in the scheme, and is liquidated upon the termination of the scheme. The encouragement of such schemes, unlike the encouragement of employee share ownership generally, or share incentive schemes in particular, would have no rational purpose, and would indeed be positively contrary to rationality, bearing in mind the general aims of income tax statutes.

‘[78] More specifically, it appears from the background to the legislation that the exemption conferred by s 425(2), in respect of the acquisition of securities which are “restricted securities” by virtue of s 423(2), was designed to address the practical problem which had arisen of valuing a benefit which was, for business or commercial reasons, subject to a

restrictive condition involving a contingency. The context was one of real-world transactions having a business or commercial purpose. There is nothing in the background to suggest that Parliament intended that s 423(2) should also apply to transactions having no connection to the real world of business, where a restrictive condition was deliberately contrived with no business or commercial purpose but solely in order to take advantage of the exemption. On the contrary, the general considerations discussed in para [77], above, and the approach to construction explained in paras [64] and [68], above, point towards the opposite conclusion.

...
 “[85] In summary, therefore, the reference in s 423(1) to “any contract, agreement, arrangement or condition which makes provision to which any of subsections (2) to (4) applies” is to be construed as being limited to provision having a business or commercial purpose, and not to commercially irrelevant conditions whose only purpose is the obtaining of the exemption.

...
 “[89] The appeals thus belong to the line of cases mentioned in *Barclays Mercantile* [2005] 1 All ER 97, [2005] 1 AC 684, where it was decided that “elements which have been inserted into a transaction without any business or commercial purpose did not, as the case might be, prevent the composite transaction from falling within a charge to tax or bring it within an exemption from tax” (see para [35]). That was the approach adopted, for example, in *IRC v Burmah Oil Co Ltd* [1982] STC 30 at 32, 1982 SC (HL) 114 at 124 in relation to what Lord Diplock described as “a pre-ordained series of transactions ... into which there are inserted steps that have no commercial purpose apart from the avoidance of a liability to tax which in the absence of those particular steps would have been payable”. Where a purposive construction so requires, one can proceed in such a case in the manner described by Lord Brightman in *Furniss (Inspector of Taxes) v Dawson* [1984] 1 All ER 530 at 543, [1984] AC 474 at 527:

“the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied.”

[90] Since the restrictive conditions attached to the shares do not make provision to which s 423 applies, it follows that the shares are not “restricted securities” within the meaning of

that section.’ *UBS AG v Revenue and Customs Commissioners; Deutsche Bank Group Services (UK) Ltd v Revenue and Customs Commissioners* [2016] UKSC 13, [2016] 3 All ER 1 at [74]–[78], [85], [89]–[90], per Lord Reed SCJ

SECURITY INTEREST

Canada [Income Tax Act, RSC 1985, c 1 (5th Supp), s 224(1.3).] “[14] In this case, Parliament has chosen an expansive definition of “security interest” in s 224(1.3) *ITA* in order to enable maximum recovery by the Crown under its deemed trust for unremitted income tax and employment insurance premiums deducted at source by employers. Parliament did so, in part, in response to this Court’s decision in *Royal Bank of Canada v Sparrow Electric Corp* [1997] 1 SCR 411, which interpreted the former deemed trust provisions in the *ITA* narrowly.

“[15] In order to constitute a security interest for the purposes of s 227(4.1) *ITA* and s 86(2.1) *EIA*, the creditor must hold “any interest in property that secures payment or performance of an obligation”. The definition of “security interest” in s 224(1.3) *ITA* does not require that the agreement between the creditor and debtor take any particular form, nor is any particular form expressly excluded. So long as the creditor’s interest in the debtor’s property secures payment or performance of an obligation, there is a “security interest” within the meaning of this section. While Parliament has provided a list of “included” examples, these examples do not diminish the broad scope of the words “any interest in property”: see *Dagg v Canada (Minister of Finance)* [1997] 2 SCR 403, at para 68, and R Sullivan, *Sullivan on the Construction of Statutes* (5th ed 2008), at pp 61–68).

“[16] I agree with my colleague that the common linguistic meaning of the defined term “security interest” in s 224(1.3) *ITA* is the English term “security interest”. A “security interest” is defined as any interest in property or “*droit sur un bien*” (right over property) that secures the performance of an obligation.’ *Caisse populaire Desjardins de l’Est de Drummond v Canada* [2009] SCJ No 29, 2009 SCC 29 at [14]–[16], per Rothstein J

SEDITION

[Note. The common law offence of sedition has been abolished: Coroners and Justice Act 2009, s 73(a).]

SEIZURE

Of goods

[Delete the entry relating to 17(1) Halsbury's Laws of England (4th Edn) (Reissue) para 165.]

Of ship

[For 25 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 337 see now 60 Halsbury's Laws of England (5th Edn) (2011) para 328.]

SELF-CONTAINED

Self-contained part of a building

[Leasehold Reform, Housing and Urban Development Act 1993 s 3(1). The right to collective enfranchisement by qualifying tenants who between them are tenants of 50% or more of the total number of flats in the specified premises conferred by Ch I of Pt I of the Leasehold Reform, Housing and Urban Development Act 1993 applies, under s 3(1), to premises consisting of 'a self-contained building or part of a building'. For the purposes of s 3, sub-s (2) defines a part of a building as a self-contained part if it constitutes a vertical division of the building and the structure of the building is such that that part could be redeveloped independently of the remainder of the building and the services provided by means of pipes, cables, etc (relevant services) for occupiers in that part are provided independently of the relevant services provided for occupiers of the remainder of the building or could be so provided without involving the carrying out of any works likely to result in the significant interruption in the provision of any such services for the occupiers of the remainder of the building.] '[14] I will begin by considering sub-ss (8)–(10) of s 13. These provide:

- "(8) Where any premises have been specified in a notice under this section, no subsequent notice which specifies the whole or part of those premises may be given under this section so long as the earlier notice continues in force.
- (9) Where any premises have been specified in a notice under this section and—(a) that notice has been withdrawn ... no subsequent notice which specifies the whole or part of those premises may be given under this section within the period of twelve months beginning with the date of withdrawal or ...

- (10) In subsections (8) and (9) any reference to a notice which specifies the whole or part of any premises includes a reference to a notice which specifies any premises which contain the whole or part of the premises; and in those subsections and this 'specifies' means specifies under subsection (3)(a)(i)."

'[15] These provisions appear to envisage that a notice which specifies a self-contained part of the building (the whole of the relevant premises which I will call X) may be later replaced by a notice which specifies a different self-contained part of the building (which I will call Y) where Y is only a part of X. In that event, Y is necessarily a smaller part of the building than X. Therefore if notices in respect of both X and Y are potentially valid, it follows that a self-contained part of a building (for the purposes of s 3) cannot be limited to the smallest possible self-contained part.

...
'[18] The other statutory provision upon which Henderson J relied is s 4(3A) which was introduced into the 1993 Act by amendment in 1996. Prior to the amendment, s 3(1)(a) contained an additional requirement that the freehold of the whole of the building or self-contained part of the building should be owned by the same person. It was found that some landlords were avoiding enfranchisement by hiving off the freehold of small parts of the premises to another landlord, usually an associated company. So, in 1996, that additional requirement was repealed and a new exclusion clause was inserted in s 4 as follows:

'4. Premises excluded from right.— ...

- (3A) Where different persons own the freehold of different parts of premises within subsection (1) of section 3, this Chapter does not apply to the premises if any of those parts is a self-contained part of a building for the purposes of that section.'

'[19] Mr Rainey's submission in respect of this subsection was that this additional exclusion would have been wholly unnecessary if a valid notice could only be served in respect of an indivisible self-contained part of the building. The freehold of that indivisible self-contained part would inevitably be held by one landlord. The implication of this provision is that a self-contained part of a building may well contain two or more self-contained parts.

'[20] Mr Munro made two submissions on

this point. First, he submitted that it was not permissible to have regard to this amended provision in construing the words of the original statutes: see *A-G v Lamplough* (1878) 3 Ex D 214. Second, if that is wrong, s 4(3A) does no more than show that Parliament wanted to clarify the position in relation to blocks of flats where the freehold is split between owners and says nothing about the position where (as here) the freehold of the relevant premises is in single ownership. In my view, it is permissible to have regard to this amendment which became necessary once the additional requirement (which had been abused) was removed from s 3 in order that it could be made clear that enfranchisement was available only in respect of a self-contained part of a building the freehold of which was in single ownership. I share the view of Henderson J that this provision provides support for the tenants' contention.

'[21] In my judgment, ss 4(3A) and 13(8)–(10) taken together are conclusive of the true construction of the expression "self-contained part of a building" within s 3(1). I can see no justification for putting a gloss on the clear statutory words so as to require that a self-contained part must be the smallest possible self-contained part.' *Crafrule Ltd v 41–60 Albert Palace Mansions (Freehold) Ltd* [2011] EWCA Civ 185, [2011] 2 All ER 925 at [14]–[15], [18]–[21], per Smith LJ

SELF-DEFENCE

[For 45(2) Halsbury's Laws of England (4th Edn) (Reissue) para 369 see now 97 Halsbury's Laws of England (5th Edn) (2015) para 462.]

SEPARATE ENTITY

See also INSTRUMENTALITY

Australia [Airlines claimed immunity against proceedings alleging price-fixing under the Foreign States Immunities Act 1985 (Cth), s 9, which applied by force of s 22 to a "separate entity".] '[23] "[S]eparate entity" is defined in s 3:

separate entity, in relation to a foreign State, means a natural person (other than an Australian citizen), or a body corporate or corporation sole (other than a body corporate or corporation sole that has been established by or under a law of Australia), who or that:

- (a) is an agency or instrumentality of the foreign State; and
- (b) is not a department or organ of the executive government of the foreign State.

'[24] It is further defined in s 3(2):

(2) For the purposes of the definition of *separate entity* in subsection (1), a natural person who is, or a body corporate or a corporation sole that is, an agency of more than one foreign State shall be taken to be a separate entity of each of the foreign States.

'[25] For ease of reference we shall refer to a body corporate or a corporation sole simply as a corporation.

'[26] The definition of separate entity provides the following information. First, a separate entity is not a foreign state. Second, a separate entity may be a natural person other than an Australian citizen. Third, a separate entity may be a corporation other than a corporation that has been established by or under a law of Australia. Fourth, a separate entity may be a natural person or a corporation that is an agency of more than one foreign state and in that case shall be taken to be a separate entity of each of the foreign states. Fifth, a natural person or a corporation is a separate entity if the natural person or corporation is an agency or instrumentality of the foreign state and, as well, is not a department or organ of the executive government of that foreign state.

'[124] It follows from the preceding discussion that the primary judge erred in construing the definition of "separate entity" as containing requirements that the foreign state own and control a corporation to the point where it exerted a real or tangible level of day-to-day management control over it. Those requirements are not contained in express or implied terms in the Act. They are not necessary to give the Act effect. They are inconsistent with the express provision that an individual, who cannot be owned, can be a separate entity. They assimilate the position of a corporation to an organ of the foreign state, contrary to the exclusion of such a body in the express words of the definition.

'[125] Additionally, s 3(2) expressly recognises that a separate entity may not be controlled at all by a single foreign state. It provides that where a person is an agency of more than one foreign state it "shall be taken to be a separate entity of each of the foreign

States". Thus, where such a person can act by a majority vote of its constituent foreign states, it is taken by force of s 3(2) to be acting as a separate entity of each state, even in respect of a particular state that dissented in the vote on the action for which immunity of the entity is being considered. The deeming in s 3(2) operates regardless of the exercise of, or capacity to, control the separate entity by the foreign state in particular circumstances.

'[126] It would be contrary to the express terms of s 3(2) to hold that because a person was a separate entity of more than one foreign state, none of which had power to exercise day-to-day control over its management, that it was not a separate entity. His Honour was wrong to use the criterion of day-to-day control as determinative. And, although ordinarily, foreign states that act through a single separate entity may each have a particular governmental purpose informing its participation, it will not necessarily be the case that the participation of all the other states will be actuated the same purpose or that all of them will even have a predominantly governmental purpose for participating.

'[127] Usually, it will be relevant to consider whether the foreign state owns all or part of any corporation's issued capital either directly or beneficially. It will also be relevant, usually, to consider the extent to which any such ownership interest confers power on the state to control aspects of the corporation's affairs, such as by being able to control the results of any resolutions at general meetings or to take any role in the management of the corporation's business: compare *Fraser v NRMA Holdings Ltd* (1995) 55 FCR 452 at 472E–8G; 127 ALR 543 at 560–6; 15 ACSR 590 at 607–13 (*NRMA*) per Black CJ, von Doussa and Cooper JJ and *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51; 188 ALR 241; [2002] HCA 18 at [23]–[26] and [32] (*SGH*), per Gleeson CJ, Gaudron, McHugh and Hayne JJ and *Adeang* at 4–5 per Hayne J and the authorities there discussed. However, these particular considerations are not exhaustive and, in some cases, may not be of any, or any great, relevance.

'[128] A person can be a separate entity for a one-off transaction, act or activity. The correct approach is to consider, on the whole of the evidence, whether the person is acting for, or being used by, the foreign state as its means to achieve some purpose or end of that state in the relevant circumstances.' *PT Garuda Indonesia Ltd (ARBN 000 861 165) v Australian Competition and Consumer Commission (NSD*

667/2010) [2011] FCAFC 52, (2011) 277 ALR 67 at [23]–[26], per Lander and Greenwood JJ and at [124]–[128], per Rares J

SEQUESTRATION

Of benefice

[For 14 Halsbury's Laws of England (4th Edn) para 894 see now 34 Halsbury's Laws of England (5th Edn) (2011) paras 698–699, 701.]

Writ of sequestration

[For 17(1) Halsbury's Laws of England (4th Edn) (Reissue) para 105 see now 22 Halsbury's Laws of England (5th Edn) (2012) para 97.]

SERIES

Series of related matters or transactions

[Aggregation clause in solicitors' indemnity policy providing that claims were to be treated as 'one claim' for the purposes of policy limits where transactions were 'a series of related matters or transactions'.] '[15] AIG do not suggest that ILP's acts or omissions constitute one act or omission or one series of related acts or omissions or the same act or omission in a series of related matters or transactions but it does contend that they constitute "similar acts or omissions in a series of related matters or transactions". For this purpose it is not enough that the similar acts or omissions occurred on their own; they have to occur "in a series of related matters or transactions" and it is this phrase which is at the centre of the debate.

'[16] The words "matters or transactions" are common enough in policies covering solicitors who may receive instructions in relation to a "matter" such as drafting a will or negotiating a compromise which would not themselves be "transactions"; a solicitor may also be required to perform a transaction such as concluding a contract of sale or drawing up and executing a conveyance or a transfer. The phrase "matters or transactions" is intended to cover all aspects of a solicitor's business and it may not be of great concern whether the source of a solicitor's liability is a matter or a transaction. In the present case, however, it is more natural to say that the liability arises from negligence in relation to a transaction since the making of the contracts and the setting up of and the transfer of money from an escrow account are essentially "transactions" rather

than “matters”. The critical question is whether the negligence or breach of duty occurred “in a series of related ... transactions”.

[17] The word “series” itself usually implies some connection between the events or concepts which constitute the series. It is, after all, derived from the Latin “serere” which means to connect. When the mortified Mr Elton left Highbury “after a series of what had appeared to him strong encouragement” it was the same lady who had, in his optimistic opinion, given him that encouragement (*Emma*, volume 2, Ch 4).

[18] As used in the phrase “in a series of related ... transactions” it is even more obvious that there has to be a connection since the transactions have to be “related” and that can only mean related to one another. The question then is how that connection or relationship is to be established—what degree of connection or relation is required for the purpose of the aggregation clause? Will any connection do, however remote?

[19] In our view it must, as Mr Edwards submitted, be an intrinsic rather than a remote relationship. That means that there must be a relationship of some kind between the transactions relied on rather than a relationship with some outside connecting factor, even if that extrinsic relationship is common to the transactions. Thus transactions which all take place with reference to one large area of land in a particular country might be related transactions if they refer to or (perhaps) envisage one another, but if the relevant transaction is the payment of money out of an escrow account which should not have been paid out of that account, the fact of geography is too remote; what will be intrinsic will depend on the circumstances of that payment.

[20] We conclude, therefore, that the judge went rather too far when he said that the transactions had to be “dependent on each other” before aggregation could occur. In the very next sentence ... he said that transactions could not be related unless they were in some way inter-connected. With that we can agree but there can be degrees of connection (or inter-connection) which are less than “dependence” and we do not think the terms of the policy require the degree of closeness contemplated by “dependence”.

[21] Mr Lockey criticised the judge for implying the word “dependent” into the phrase “series of related ... transactions”; he would no doubt criticise this court for implying the word “intrinsic” into the phrase. The difficulty, however, with Mr Lockey’s construction (that

any degree of relatedness will do) is that it is impossibly wide since it can be said that, in the end, everything is related to everything else and the aggregation clause becomes almost meaningless.

The traditional and well-known way in which to formulate an extremely wide aggregation clause is to use words such as “any claim or claims arising out of all occurrences ... consequent on or attributable to one source or original cause” or “arising from one originating cause or series of events or occurrences attributable to one originating cause (or related causes)”. The aggregation clause in the present case is, almost ostentatiously, not formulated in this way and cannot therefore have been intended to have the same width as clauses drafted in such terms.

...

[30] ... [W]e consider that the history does give some support for the argument that it was not intended that the phrase “a series of related ... transactions” is to be interpreted in such a manner that any relation, however loose, will suffice. There must be some restriction on the concept of relatedness and the most satisfactory approach is that the relation must be an intrinsic relationship not an extrinsic one.’ *AIG Europe Ltd v OC320301 LLP (formerly The International Law Partnership LLP)* [2016] EWCA Civ 367, [2017] 1 All ER 143 at [15]–[21], [30], per Longmore LJ

Series of transactions

Canada [Income Tax Act, RSC 1985, c 1 (5th Supp), s 55(1) (repealed).] ‘4. The Judge held that “series of transactions” in the transitional provision does not have the common law meaning of a pre-ordained series of transactions that it has in other anti-avoidance provisions in the Act, including section 245, the General Anti-Avoidance Rule (GAAR), which was also enacted by SC 1988, c 55. In the Judge’s view, “series” had its ordinary meaning in the transitional provision. Hence, TD’s disposition of its shares did not have to be part of a pre-ordained series of transactions in order to fall within subsection 55(1).

...

‘32. Subsection 55(1) was repealed by subsection 33(1) of SC 1988, c 55, and ceased to apply to most transactions entered into after September 13, 1988, when it received royal assent. However, paragraph 33(4)(a) kept subsection 55(1) alive until the end of the year with respect to post-September 13 transactions,

if they were part of a series of transactions that commenced before September 13...

'33. Although "series of transactions" was not defined in section 33, paragraph 33(4)(a) stated that whether a transaction is part of a series is to be determined without reference to subsection 248(10) of the Act, which was enacted by SC 1986, c 55. Subsection 248(10) extends the common law meaning of "series of transactions", that is, a series of *pre-ordained* transactions, by deeming the series to include related transactions completed in contemplation of the series, even if not themselves pre-ordained: *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54, [2005] 2 SCR 601 at paras 25 and 26 (*Canada Trustco*)...

'37. With all respect to the Judge, the phrase "series of transactions" in paragraph 33(4)(a) of the transitional provision has, in my view, the same meaning that it has in anti-avoidance provisions of the Act, including section 245. Thus, in order for the December 1, 1988 disposition of TD's Oxford shares to be subject to subsection 55(1), it must have been part of a pre-ordained series of transactions that had commenced before September 13, 1988.

'38. I start with the general presumption of statutory interpretation that Parliament intends a word or phrase to have the same meaning when used in the same statute, and that statutes dealing with the same subject matter are intended to operate harmoniously together: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th edn (Markham, Ontario: Lexis-Nexis Canada Inc, 2008), 215–23, 416–19. I would add that, unlike the Judge, I take the view that the relevant question is the meaning, not of the single word "series", but of the complete phrase "series of transactions", which has acquired the status of a legal term of art in the context of anti-avoidance provisions.

'39. However, "series of transactions" is contained in a transitional provision. The interpretation of words in such provisions was considered in *Canada v Trade Investments Shopping Centre Ltd* (1993), 93 DTC 5382 (FC), affd (1996), 96 DTC 6570 (FCA) (*Trade Investments*) by my colleague Justice Noll, when a Judge of the then Federal Court—Trial Division. He said (at p 5387):

... when a question of interpretation arises as to the scope of a transitional provision, it must be answered by reference to the

provision of substantive law it accompanies and the specific situation which Parliament sought to alleviate by introducing it.

'41. Applying this approach to the present case, counsel for the Crown argued that the substantive context of the Act indicates that "series of transactions" in paragraph 33(4)(a) did not mean a pre-ordained series.

'44. While there is force in these arguments, I cannot accept them.

'45. First, paragraph 33(4)(a) provides that whether a post-September 13 transaction is part of a series of transactions commencing before that date is to be determined "without reference to subsection 248(10)". This is the provision that extends the common law meaning of "series of transactions" to include related transactions completed in contemplation of the series, even though not themselves pre-ordained. If, as the Crown argues, "series of transactions" in paragraph 33(4)(a) simply means sequential and related, but not necessarily pre-ordained, transactions, it would have been pointless to provide that subsection 248(10) does not apply: such transactions would already be included in the series by virtue of the ordinary definition of "series of transactions".

'46. It would only make sense to exclude subsection 248(10)—which is designed to include transactions otherwise excluded from the common law meaning of "series of transactions" because not pre-ordained—if the series of transactions had to be pre-ordained. In my opinion, the transitional provision's exclusion of subsection 248(10) is a positive indication that "series of transactions" in paragraph 33(4)(a) has its common law meaning.

'47. Second, a statutory provision does not normally apply to events after its repeal. Subsection 33(4) can plausibly be viewed as designed to balance anti-avoidance and taxpayer certainty by applying subsection 55(1), after the date of its repeal, only to dispositions that are an integral and pre-planned part of a scheme that commenced before its repeal. To continue to apply subsection 55(1) to a post-repeal disposition that was part of a series of sequential but not pre-ordained transactions would unduly extend the life of a repealed statutory provision and defeat taxpayer expectations.

'48. Third, drawing the line between the end of one statutory regime and the start of another

inevitably involves an element of arbitrariness. I do not share the Crown's view that there is something absurd in the notion that Parliament would create a separate anti-avoidance regime for the three and a half months following the repeal of subsection 55(1).' *Toronto-Dominion Bank v Canada* 2011 FCA 221, [2011] FCJ No 1029 at paras 4, 32–33, 37–39, 41, 44–48, per Evans JA

SERIOUS

[United Nations Convention relating to the Status of Refugees 1951, art 1F(b): the provisions of the Convention do not apply to 'any person with respect to whom there are serious reasons for considering that ... he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee'. Whether post-offence events were material to a decision under art 1F(b), so as to allow an offender to 'expiate' his crime.] '[27] It is right, of course, that there is a very live question whether there were "serious reasons for considering" that the appellant's crime was "serious" ..., but the resolution of that question turns on what is meant by "serious". That engages the former expression to which I have referred, "serious non-political crime"; which in turn touches both the argument about expiation and the second head of Mr Husain's submissions—that for textual reasons, "serious" is to be equated with "particularly serious". I will address that separately (and briefly). For present purposes the dictum in *Al-Sirri* [*Al-Sirri v Secretary of State for the Home Dept*, DD (*Afghanistan*) v *Secretary of State for the Home Dept* [2012] UKSC 54, [2013] 1 All ER 1267, [2013] 1 AC 745] and related texts serve to emphasise the necessary gravity of offences sufficiently heinous to exclude the perpetrator from international protection by force of art 1F.

...
 '[32] The moral force of the refugee's plight has in my opinion led some writers and authorities, including with respect the UNHCR, to contemplate a construction of art 1F(b) which travels well beyond the proper territory of interpretation. Upon this construction the meaning of the term "serious" in the expression "serious non-political crime" is elucidated by reference to factors which have nothing whatever to do with the crime itself; and art 1F(b) is mutated from a definition to a prescription for strategic evaluation by the decision-maker. These initiatives make bad law,

for they are not rooted in the law's proper source, which is the terms of the Convention. They invite the court to legislate. It is elementary that we have no business to do so. The imperative of high authority such as *Al-Sirri*—"the exclusion clauses in the Refugee Convention must be restrictively interpreted and cautiously applied"—is certainly no mandate for such an approach.

'[33] It is in any event doubtful, to say the least, whether on the facts this appellant might be a proper beneficiary of a doctrine of expiation applied to art 1F(b). He received a two-year sentence of imprisonment which he did not serve in full, and permanent expulsion from France.

'[34] I will turn next to Mr Husain's second principal submission, namely that the [Upper Tribunal] failed to apply the correct construction of art 1F(b), by which "serious" is to be equated with "particularly serious", to the facts of the case. The real issue here is the asserted equivalence between "serious" and "particularly serious". ...

'[35] I mean no disrespect to Mr Husain in giving this argument short shrift. A distinction between "serious" and "particularly serious", fuelled only by a further distinction between the French terms "crime" and "délit", does little more to serve the practical interpretation of the Convention than a debate about the number of angels on the head of a pin. The offences of which the appellant was convicted in France were, as it happens, délits. Some individual délits will, on the particular facts, be more serious than some crimes. I have already accepted (at [27], above) that *Al-Sirri* and related texts serve to emphasise the necessary gravity of offences sufficiently heinous to exclude the perpetrator from international protection by force of art 1F: "serious crime" certainly denotes especially grave offending. But I do not think that is a function of nice distinctions in French criminal law, or the presence or absence of the adverb "particularly".

...
 '[45] In the result I can find nothing in this court's earlier decision to call in question my view that the [Upper Tribunal] was entitled to conclude, as it did, that the appellant was giving succour to a terrorist cause, and doing so as a senior conspirator; and as such had plainly committed a "serious non-political crime" within the meaning of art 1F(b). Sullivan LJ himself observed (para [17]) that this was a case "in which the appellant was found to be a member of an organisation or grouping whose

only purpose was terrorism”.

‘[46] I will add this. If it was wrong to presume that mere membership of an organisation with terrorist aims was enough for art 1F(b) to bite, so also is it wrong to presume that any particular level of overt activity has to be shown. *JS (Sri Lanka)* [R (on the application of *JS (Sri Lanka)*) v *Secretary of State for the Home Dept* [2010] UKSC 15, [2010] 3 All ER 881, [2011] 1 AC 184] is nothing to the contrary. As Ward LJ said, “serious” is an ordinary word. Its interpretation therefore depends upon the context of its use, here art 1F; and its application upon all the facts of the particular case.’ *AH (Algeria)* v *Secretary of State for the Home Department* [2015] EWCA Civ 1003, [2016] 3 All ER 453 at [27], [32]–[35], [45]–[46], per Laws LJ

Serious non-political crime

Canada [United Nations Convention Relating to the Status of Refugees, Can TS 1969 No 6, art 1F(b).] ‘1. The issue in this case is whether Luis Alberto Hernandez Febles is ineligible for refugee protection because of crimes committed before he came to Canada. Mr Febles was admitted to the United States as a refugee from Cuba. While living in the United States, he was convicted and served time in prison for two assaults with a deadly weapon — in the first case, he struck a roommate on the head with a hammer, and in the second, he threatened to kill a roommate’s girlfriend at knifepoint. The U.S. revoked his refugee status and issued a removal warrant, which is still outstanding.

‘2. After his refugee status in the U.S. was revoked, Mr Febles fled to Canada, entering illegally. He now claims refugee protection in Canada. The question is whether Article 1F(b) (the “serious criminality” exclusion) of the *Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6 (“*Refugee Convention*”), incorporated in Canada by s. 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (“*IRPA*”), bars him from refugee protection because of the crimes he committed in the past.

‘3. Essentially, different interpretations of Article 1F(b) of the *Refugee Convention* are in contention. The Minister of Citizenship and Immigration (“Minister”) says that the Article 1F(b) serious criminality exclusion is triggered whenever the refugee claimant has committed a serious non-political crime before coming to Canada. It is not confined to fugitives from justice. Nor are post-crime events, like

rehabilitation or expiation, relevant, in the Minister’s view. The only question is whether the claimant committed a serious non-political crime before seeking refugee protection in Canada.

‘4. Mr Febles and the United Nations High Commissioner for Refugees (“UNHCR”) advocate narrower interpretations of Article 1F(b). Mr Febles argues that the exclusion in Article 1F(b) is confined to fugitives from justice (which Mr Febles, having served his sentences, is not). The UNHCR (with whom Mr Febles agrees) argues that the question is whether the refugee claimant is “deserving” of refugee protection *at the time of the application*, which requires consideration not only of the seriousness of the offence itself, but of how long ago the offence was committed, the conduct of the claimant since the commission of the offence, whether the claimant has expressed regret or renounced criminal activities, and whether the claimant poses a threat to the security of Canada at the present time.

‘5. In a nutshell, the Minister says that serious criminality under Article 1F(b) is simply a matter of looking at the seriousness of the crime when it was committed, while Mr Febles and the UNHCR say it requires consideration of other matters — whether the claimant is a fugitive and/or his current situation, including rehabilitation, expiation and current dangerousness.

‘6. For the reasons that follow, I agree with the conclusion of the Immigration and Refugee Board (“Board”), upheld in the courts below, that only factors related to the commission of the criminal offences can be considered, and whether those offences were serious within the meaning of Article 1F(b). On this interpretation of Article 1F(b), Mr Febles does not qualify for refugee protection because of the serious crimes he committed in the U.S. before seeking admission to Canada as a refugee.

...

‘17. The ordinary meaning of the terms used in Article 1F(b) — “has committed a serious ... crime outside the country of refuge prior to his admission to that country” — refers only to the crime at the time it was committed. The words do not refer to anything subsequent to the commission of the crime. There is nothing in the text of the provision suggesting that it only applies to fugitives, or that factors such as current lack of dangerousness or post-crime expiation or rehabilitation are to be considered or balanced against the seriousness of the crime.

‘18. The mandatory wording of the Article (“shall not apply”) chosen by the parties to the

Refugee Convention unequivocally supports the view that all a subscribing country can consider in determining whether a claimant is excluded under Article 1F(b) is whether the claimant committed a serious crime outside the country of refuge prior to applying for refugee status there. Nothing in the words used suggests that the parties to the *Refugee Convention* intended subsequent considerations, like rehabilitation, expiation and actual dangerousness, to be taken into account.

...
 '22. ... I cannot accept Mr Febles' argument that Articles 1F(a) and 1F(c) support the view that the exclusion from refugee protection under Article 1F(b) is confined to fugitives. There is nothing in the wording of these provisions or in the jurisprudence to support this contention. (See *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 S.C.R. 678, at paras. 38 and 101, and *Pushpanathan [Pushpanathan v. Canada (Minister of Citizenship and Immigration)]*, [1998] 1 S.C.R. 982, at paras. 65–66 and 70 where the scope of these articles is discussed.) While Article 1F(c) uses the word "guilty", Articles 1F(a) and 1F(b) both use the word "committed".

'23. The immediate context therefore supports the Minister's interpretation. It would be anomalous if the word "committed" were ascribed different meanings in Articles 1F(a) and 1F(b) and the use of consistent language in these two articles was meant to evince an intention on the part of the drafters that they be applied inconsistently. As nobody has suggested that Article 1F(a) is confined to fugitives, it follows that Article 1F(b) would similarly not be restricted to fugitives.

...
 '60. Article 1F(b) excludes anyone who has ever committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee. Its application is not limited to fugitives, and neither is the seriousness of the crime to be balanced against factors extraneous to the crime such as present or future danger to the host society or post-crime rehabilitation or expiation.

'61. The appellant concedes that his crimes were "serious" when they were committed, obviating the need to discuss what constitutes a "serious ... crime" under Article 1F(b). However, a few comments on the question may be helpful.

'62. The Federal Court of Appeal in *Chan v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 390 (C.A.), and *Jayasekara [Jayasekara v. Canada (Minister of Citizenship*

and Immigration)], 2008 FCA 404, [2009] 4 F.C.R. 164] has taken the view that where a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada, the crime will generally be considered serious. I agree. However, this generalization should not be understood as a rigid presumption that is impossible to rebut. Where a provision of the Canadian *Criminal Code*, R.S.C. 1985, c. C-46, has a large sentencing range, the upper end being ten years or more and the lower end being quite low, a claimant whose crime would fall at the less serious end of the range in Canada should not be presumptively excluded. Article 1F(b) is designed to exclude only those whose crimes are serious. The UNHCR has suggested that a presumption of serious crime might be raised by evidence of commission of any of the following offences: homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery (Goodwin-Gill [Goodwin-Gill, Guy S. *The Refugee in International Law*, 2nd edn, Oxford: Clarendon Press, 1996], at p 179). These are good examples of crimes that are sufficiently serious to presumptively warrant exclusion from refugee protection. However, as indicated, the presumption may be rebutted in a particular case. While consideration of whether a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada is a useful guideline, and crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion, the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner.' *Febles v Canada (Citizenship and Immigration)* [2014] SCJ No 68, [2014] 3 SCR 431 at paras 1–6, 17–18, 22–23, 60–62, per McLachlin CJ

Serious personal injury offence

Canada [Criminal Code, RSC 1985, c C-46, s 752.] '2. The term "serious personal injury offence" means, inter alia, an indictable offence involving "the use or attempted use of violence against another person" for which the offender may be sentenced to imprisonment for 10 years or more: s. 752, subpara. (a)(i) of the definition of "serious personal injury offence" ("SPIO"). On application by a prosecutor, where an individual has been convicted of such an offence, and if the court finds that there are reasonable grounds to believe that the individual might be found to be a dangerous

offender or a long-term offender, the court must remand the individual for a psychological assessment: s. 752.1(1). This assessment then forms the basis for an application for a finding that the individual is a dangerous offender or a long-term offender.

'3. This case concerns the scope of the definition of an SPIO and, consequently, the threshold for entry into the dangerous and long-term offender system. The offender, Mr Steele, robbed a drugstore, telling the cashiers that he had a gun. There is no evidence that he actually had a gun or that physical force was used. Mr Steele was convicted of robbery under s. 343(a) of the Criminal Code on the basis that he had "use[d] ... threats of violence to a person". The Crown, viewing this as an SPIO, gave notice of its intention to apply to the court to remand Mr Steele for assessment pursuant to s. 752.1(1). Mr Steele's offence clearly meets two of the requirements of the definition of an SPIO referred to above: robbery is an indictable offence for which the offender may be sentenced to imprisonment for 10 years or more (see s. 344). The question is whether the offence — which involved threats of violence to a person, but no physical force — meets the other requirement of that definition: that of involving "the use or attempted use of violence against another person".

'4. Both the trial judge and the Court of Appeal answered this question in the negative. They found, in essence, that a threat of violence does not on its own constitute "the use or attempted use of violence". For the reasons that follow, I respectfully disagree.

'5. A threat of violence that suffices to ground a conviction for robbery under s. 343(a) does indeed constitute the use of violence against another person within the meaning of subpara. (a)(i) of the definition of an SPIO set out in s. 752. By threatening to harm his victims while committing robbery, Mr Steele used violence against them. Since the other requirements of the definition are clearly met, his offence qualifies as an SPIO.' *R v Steele* [2014] SCJ No 61, [2014] 3 SCR 138 at paras 2–5, per Wagner J

Serious reasons for considering

'[1] These appeals are concerned with a little-used provision in art 1F(c) of the United Nations Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1954), Cmd 9171) (the Refugee Convention). This excludes from refugee status and protection "any person with respect to whom there are

serious reasons for considering that ... he has been guilty of acts contrary to the purposes and principles of the United Nations". ...

'[6] The Qualification Directive [Council Directive (EC) 2004/83 (OJ 2004 L304, p 12)] is transposed into United Kingdom law by the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, SI 2006/2525. Regulation 2 provides that "refugee" means a person who falls within Article 1(A) of the Geneva Convention and to whom regulation 7 does not apply". Regulation 7(1) states that "A person is not a refugee, if he falls within the scope of Article 1D, 1E or 1F of the Geneva Convention". The Immigration Rules provide, in para 334, that a person will be granted asylum, *inter alia*, if "(ii) he is a refugee, as defined in reg 2 of [the 2006 Regulations]".

'[7] However, s 54 of the Immigration, Asylum and Nationality Act 2006 provides:

"(1) In the construction and application of article 1(F)(c) of the Refugee Convention the reference to acts contrary to the purposes and principles of the United Nations shall be taken as including, in particular—(a) acts of committing, preparing or instigating terrorism (whether or not the acts amount to an actual or inchoate offence), and (b) acts of encouraging or inducing others to commit, prepare or instigate terrorism (whether or not the acts amount to an actual or inchoate offence).

(2) In this section—"the Refugee Convention" means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951, and 'terrorism' has the meaning given by section 1 of the Terrorism Act 2000."

...

'[16] In our view, this is the correct approach. The article should be interpreted restrictively and applied with caution. There should be a high threshold "defined in terms of the gravity of the act in question, the manner in which the act is organised, its international impact and long-term objectives, and the implications for international peace and security" (para 47 of the *Background Note*). And there should be serious reasons for considering that the person concerned bore individual responsibility for acts of that character. ...

'[75] We are, it is clear, attempting to discern the autonomous meaning of the words "serious

reasons for considering". We do so in the light of the UNHCR view, with which we agree, that the exclusion clauses in the Refugee Convention must be restrictively interpreted and cautiously applied. This leads us to draw the following conclusions: (1) "Serious reasons" is stronger than "reasonable grounds". (2) The evidence from which those reasons are derived must be "clear and credible" or "strong". (3) "Considering" is stronger than "suspecting". In our view it is also stronger than "believing". It requires the considered judgment of the decision-maker. (4) The decision-maker need not be satisfied beyond reasonable doubt or to the standard required in criminal law. (5) It is unnecessary to import our domestic standards of proof into the question. The circumstances of refugee claims, and the nature of the evidence available, are so variable. However, if the decision-maker is satisfied that it is more likely than not that the applicant has *not* committed the crimes in question or has *not* been guilty of acts contrary to the purposes and principles of the United Nations, it is difficult to see how there could be serious reasons for considering that he had done so. The reality is that there are unlikely to be sufficiently serious reasons for considering the applicant to be guilty unless the decision-maker can be satisfied on the balance of probabilities that he is. But the task of the decision-maker is to apply the words of the Refugee Convention (and the Directive) in the particular case.' *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54, [2013] 1 All ER 1267 at [1], [6]–[7], [16], [75], per Lady Hale and Lord Dyson SCJJ

SERVANT

Household servant

[For 50 Halsbury's Laws of England (4th Edn) (2005 Reissue) para 651 see now 102 Halsbury's Laws of England (5th Edn) (2010) para 367.]

SERVICE

See BROADCASTING

SERVICES OF EQUAL QUALITY

Canada [Official Languages Act, RSC 1985, c 31 (4th Supp), Part IV.] '[2] It is common ground in this appeal that the rights being claimed are of constitutional origin, since the

relevant provisions of the *OLA* implement the constitutional right of any member of the public to be served by federal institutions in the official language of his or her choice (*Lavigne v Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 SCR 773). The Chief Justice stated the following constitutional question:

Do s 20(1) of the *Canadian Charter of Rights and Freedoms* and Part IV of the *Official Languages Act*, RSC 1985, c 31, read in light of the principle of equality set out in s 16(1) of the *Charter*, require Industry Canada to provide services of equal quality in both official languages?

'[3] The parties agree, correctly so in my opinion, that the provisions referred to in this constitutional question create a constitutional duty to make services "of equal quality in both official languages" available to the public. The answer to the constitutional question is therefore clearly yes. What is in issue in this appeal is the scope of this concept of "services of equal quality".'

'[4] With respect, in defining the scope of the language duties in this case, the Federal Court of Appeal, which rendered the decision under appeal, appears to have adopted an overly narrow view of linguistic equality that does not take account of the nature and objectives of the program in question. Nevertheless, for reasons I will explain below, I reach the same conclusion as that court on the merits. It is true that the respondents were not fulfilling their language duties under Part IV of the *OLA* at the time the appellants Raymond DesRochers and Corporation de développement économique communautaire CALDECH ("CALDECH") filed their complaint with the Commissioner of Official Languages of Canada ("Commissioner"). However, any deficiencies that remained at the time the application was heard were, as the trial judge concluded, beyond the scope of Part IV, which means that no remedy other than costs was appropriate.

...
'[17] Part IV of the *OLA* is entitled "Communications With and Services to the Public". The specific issue in this appeal is whether the respondents breached their duty under s 22 to ensure that any member of the public can "communicate" with and "obtain available services" from the federal institution "in either official language".

...
'[23] It is clear simply from the wording of

the enactment that the distinction between Part IV and Part VII is important. It is also clear from the evidence that what the appellants DesRochers and CALDECH sought in their application was in essence, first, to show that there was a real need for economic development services in the French-speaking community and, second, to convince the court that the government had a positive duty to take concrete measures to support the development of the French-speaking community in Simcoe County in order to counter the increasing rate of assimilation. As we will see, the question whether the duties under Part IV were fulfilled is much narrower than the question before the Federal Court in the original application. What must be done to answer it is essentially to conduct a comparative analysis in order to determine whether the services *provided* by the federal institution in each official language community are of equal quality. ...

...
 '[31] Before considering the provisions at issue in the case at bar, it will be helpful to review the principles that govern the interpretation of language rights provisions. Courts are required to give language rights a liberal and purposive interpretation. This means that the relevant provisions must be construed in a manner that is consistent with the preservation and development of official language communities in Canada (*R v Beaulac* [1999] 1 SCR 768, at para 25). Indeed, on several occasions this Court has reaffirmed that the concept of equality in language rights matters must be given true meaning (see, for example, *Beaulac*, at paras 22, 24 and 25; *Arsenault-Cameron v Prince Edward Island*, 2000 SCC 1, [2000] 1 SCR 3, at para 31). Substantive equality, as opposed to formal equality, is to be the norm, and the exercise of language rights is not to be considered a request for accommodation. Bearing this in mind, I will now consider the scope of the remedies provided for in s 77 of the *OLA*. ...

...
 '[39] As I explained above, the only provisions of Part IV of the *OLA* that are at issue in this case are the following:

Part IV

Communications With and Services to the Public

...

21. Any member of the public in Canada has the right to communicate with and

to receive available services from federal institutions in accordance with this Part.

22. Every federal institution has the duty to ensure that any member of the public can communicate with and obtain available services from its head or central office in either official language, and has the same duty with respect to any of its other offices or facilities
 - (a) within the National Capital Region; or
 - (b) in Canada or elsewhere, where there is significant demand for communications with and services from that office or facility in that language.

...

25. Every federal institution has the duty to ensure that, where services are provided or made available by another person or organization on its behalf, any member of the public in Canada or elsewhere can communicate with and obtain those services from that person or organization in either official language in any case where those services, if provided by the institution, would be required under this Part to be provided in either official language.

'[40] It is common ground that Huronia is a region where there is "significant demand", within the meaning of s 22, for communications and services in the minority official language. As well, it is no longer in dispute in this Court that, as the courts below concluded, s 25 applies in this case. The issue is whether the respondents have fulfilled their duties under s 22.

'[41] The scope of s 22 must be assessed in light, *inter alia*, of the purpose of the *OLA*. The appellants rely in particular on s 2(a), which reads as follows:

2. The purpose of this Act is to
 - (a) ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions, in particular with respect to their use in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in

communicating with or providing services to the public and in carrying out the work of federal institutions;

... [45] As I stated in the introduction to these reasons, the parties agree that as a general rule, the principle — provided for in s 20(1) of the *Charter* and implemented in Part IV of the *OLA* — that members of the public are entitled to linguistic equality when receiving services entails an obligation to make services “of equal quality in both official languages” available to the public. The parties disagree, however, on what is meant by “equal quality”.

[46] The appellants conceded before this Court that equality of rights and privileges as to the use of the two official languages has been achieved through the institutional infrastructure created by Industry Canada in response to the Commissioner’s recommendations. They also acknowledged that in order to also achieve equality of *status*, it will in most cases suffice for the government to communicate and deliver the same service equally in both official languages. But, the appellants argue, depending on the nature of the service in question, it will sometimes be necessary to go further and take account of the special needs of the language community receiving the service. They assert that in the instant case, Industry Canada is required to provide — through a separate institution if necessary — economic development services that not only are delivered in the official language of the user’s choice, but also are adapted to the special needs and cultural reality of the region’s French-speaking community.

[47] The appellants submit that a community economic development service that is tailored to the needs of the majority and is merely offered to the minority in its language amounts at best to accommodation. On this basis, they request an order declaring that Industry Canada, in developing its programs and providing its services, has a duty to consider the special needs and cultural reality of the French-speaking community regarding economic development.

[48] The respondents contend that the order being sought should not be granted. Their view is that depending on the nature of the service, the government might, in order to fulfil its language duties, be required to change its *method* of providing the service, but not the *content* of the service itself. They argue that “[t]his would amount to giving official language

minority communities, *via* subsection 20(1) of the *Charter* and Part IV of the *Act*, a right to participate in defining the content of programs, which even a generous reading of those provisions, having regard to subsection 16(1) of the *Charter*, does not authorize”.

[49] According to the respondents, what is being claimed here is not the equal provision of available services in both languages, but the provision of services other than those being offered that better reflect the socio-demographic characteristics of the linguistic minority community. They assert that the appellants are basically claiming a right to parallel services provided by a Francophone organization. In the respondents’ view, linguistic equality does not have as broad a scope as this, but is instead achieved “by guaranteeing equal linguistic access to the services offered, not by access to distinct services”. They therefore submit that the Federal Court of Appeal was correct to conclude that the rights being claimed in this case exceed the scope of Part IV of the *OLA*.

[50] In reply to the respondents’ arguments, the appellants stress that the purpose of this application is not to claim a right to parallel services managed by the linguistic minority community. In their opinion, there is ample evidence that the needs of the French-speaking minority community are indeed different from those of the English-speaking majority community and that North Simcoe, unlike CALDECH, has not succeeded in reaching the French-language business community. The appellants therefore request, in addition to the above-mentioned order, that the government be ordered to provide funding to CALDECH, at least until substantive equality is achieved in the services provided by North Simcoe both in terms of rights and privileges as to the use of the official languages and in terms of the *status* of those languages in the federal institution.

[51] It seems clear to me that the respondents are correct to say that the principle under s 20(1) of the *Charter* and Part IV of the *OLA* of linguistic equality in the provision of government services involves a guarantee in relation to the services *provided* by the federal institution. However, it is not entirely accurate to say that linguistic equality in the provision of services cannot include access to services *with distinct content*. Depending on the nature of the service in question, it is possible that substantive equality will not result from the development and implementation of identical services for each language community. The content of the principle of linguistic equality in government services is not necessarily uniform. It must

be defined in light of the nature and purpose of the service in question. Let us consider the community economic development program in the case at bar.

‘[52] At the relevant time, Industry Canada described its community economic development program as follows:

[TRANSLATION] Community economic development (CED) is a global approach to development under which communities take charge of their own economic futures and decide the direction they will take to attain their goals...

In addition to the business development and strategic planning services mentioned above, CFDCs may take part in all kinds of other CED activities and projects. These will vary greatly from one community to another, depending on priorities established in the local strategic planning process. ...[Underlining added]

...

‘[53] It is difficult to imagine how the federal institution could provide the community economic development services mentioned in this description without the participation of the targeted communities in both the development and the implementation of programs. That is the very nature of the service provided by the federal institution. It necessarily follows, as is expressly recognized in the above passage, that the communities could ultimately expect to have *distinct* content that varied “greatly from one community to another, depending on priorities established” by the communities themselves.

‘[54] Given the nature of the services at issue here, I therefore disagree with Létourneau JA’s view that the principle of linguistic equality does not entail a right to “access to equal regional economic development services” (at para 33), or that the respondents did not have a duty under Part IV of the *OLA* to “take the necessary steps to ensure that Francophones are considered equal partners with Anglophones” (at para 38) in the definition and provision of economic development services. With respect, it seems to me that Létourneau JA did not fully consider the nature and objectives of the program in question in so defining the scope of the duties resulting from the guarantee of linguistic equality. What matters is that the services provided be of equal quality in both languages. The analysis is necessarily comparative. Thus, insofar as North Simcoe, in accordance with the programs’

objectives, made efforts to reach the linguistic majority community and involve that community in program development and implementation, it had a duty to do the same for the linguistic minority community.

‘[55] However, two points must be made regarding the scope of the principle of linguistic equality in the provision of services. First, the duties under Part IV of the *OLA* do not entail a requirement that government services achieve a minimum level of quality or actually meet the needs of each official language community. Services may be of equal quality in both languages but inadequate or even of poor quality, and they may meet the community economic development needs of neither language community. A deficiency in this regard might be due to a breach of the duties imposed by the *DIA*, as the Federal Court of Appeal pointed out in this case, or to a breach of the duties under Part VII, as the Commissioner seemed to believe. I will come back to this point.

‘[56] Second, nor does the principle of linguistic equality in the provision of services mean that there must be equal results for each of the two language communities. Inequality of results may be a valid *indication* that the quality of the services provided to the language communities is unequal. However, the results of a community economic development program for either official language community may depend on a large number of factors that can be difficult to identify precisely.

...

‘[62] There is no doubt that disparity in results can be a sign that the quality of services is unequal, but the inquiry must not end there. Several factors may come into play that have nothing to do with the comparative quality of the services provided by the federal institution in each official language. In the instant case, to support their contention that the services were not of equal quality, the appellants place great emphasis on the success of CALDECH, which implemented more than 50 projects for the French-speaking community. The extent to which this provides a basis for comparing the quality of North Simcoe’s services in each official language is debatable. It seems to me that the very existence of CALDECH may explain why so few Francophones chose to use North Simcoe’s services, whatever their quality may have been. In any event, the apparent disparity in results between the two language communities does not support a conclusion that the services were of unequal quality.’ *DesRochers v Canada (Industry)* [2009] 1 SCR 194,

[2009] SCJ No 8, 302 DLR (4th) 632, 2009 SCC 8 at [2]–[4], [17], [23], [31], [39]–[41], [45]–[56], [62], per Charron J

SERVITUDE

[For 16(2) Halsbury's Laws of England (4th Edn) (Reissue) para 3 see now 87 Halsbury's Laws of England (5th Edn) (2017) para 733.]

SET-OFF

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 406 see now 11 Halsbury's Laws of England (5th Edn) (20159) para 382.]

SETTLED

'Regulation 6 of the Immigration (Procedure for Marriage) Regulations 2005, SI 2005/15 specifies a person "who is settled in the United Kingdom" within the meaning of para 6 of the immigration rules. This basically means someone who is ordinarily resident here, not in breach of the immigration laws, and without any restriction on the period for which he may remain. A very large number of people who have been here lawfully for a long time will still not be "settled" here in this sense.' *R (on the application of Baii) v Secretary of State for the Home Department (Nos 1 and 2)* [2008] UKHL 53, [2008] 3 All ER 1094 at [39], per Baroness Hale of Richmond

SETTLEMENT

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 601 see now 91 Halsbury's Laws of England (5th Edn) (2012) para 501.]

Compound settlement

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 601 see now 91 Halsbury's Laws of England (5th Edn) (2012) para 501.]

Marriage settlement

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 603 see now 91 Halsbury's Laws of England (5th Edn) (2012) para 503.]

Post-nuptial settlement

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 604 see now 91 Halsbury's Laws

of England (5th Edn) (2012) para 504.]

Protective settlement

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 607 see now 91 Halsbury's Laws of England (5th Edn) (2012) para 507.]

Strict settlement

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 606 see now 91 Halsbury's Laws of England (5th Edn) (2012) para 506.]

SETTLEMENT (OF DISPUTE)

Australia [International Arbitration Act 1974 (Cth), s 21.] '[104] Prior to the amendments which came into effect in July 2010, s 21 of the IAA provided:

If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute.

... '[109] The proper construction of the expression "the settlement of that dispute" viewed in its context within s 21 of the IAA and in the context of the Act as a whole is central to Rizhao's argument. Rizhao contends that a dispute is settled by the delivery of an arbitral award. However, Mount Gibson contends that viewed in context, "settlement" of a dispute extends to and includes all matters leading up to the satisfaction of the claims advanced by the parties to the dispute and therefore extends to and includes matters relating to the judicial review of awards, and their recognition and enforcement.

'[110] Mount Gibson's position is supported by the natural and ordinary meaning of the language used in s 21. The word "settlement" bears a number of meanings which have no relationship to its meaning in the context of s 21 of the IAA. Meanings that are relevant to that context given by the *Macquarie Dictionary* include:

The satisfying of a claim or demand; (law) final disposition of an estate or the like.

'[111] The context in which the word "settlement" is used in s 21, and in the Act as a

whole, strongly support giving that word its natural and ordinary meaning, extending to and including all matters up to the final resolution and disposition of claims. International commercial arbitration is a process invoked by a party who seeks to have claims satisfied. The commencement of arbitral proceedings, the conduct of those proceedings, and the delivery of an award are steps along the road towards satisfaction of the claims advanced. Although in one sense it might be said that the purpose of a party commencing arbitral proceedings is to obtain an award in its favour, plainly the award is not an end in itself, but merely a means by which the ultimate goal of obtaining satisfaction of that party's claims might be achieved. There are a number of steps which must be taken between delivery of the award and achievement of the ultimate goal of satisfaction of the disputed claim. Those steps include judicial review of the award (if any application is made to set aside the award), and enforcement of the award by a court of competent jurisdiction which might use its coercive processes and powers to compel compliance with the award and thereby achieve the ultimate goal of satisfaction of the disputed claim.

...
 '[122] For these reasons, none of the provisions of the IAA or the Model Law to which Rizhao refers are capable of displacing the natural and ordinary meaning of the word "settlement" in s 21. It follows that, prior to its amendment in 2010, the section enabled parties to an arbitration agreement to exclude all the provisions of the Model Law, including the provisions relating to judicial review, recognition and enforcement.'

Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd [2012] WASCA 50 (2012) 287 ALR 315 at [104], [109]–[111], [122], per Martin CJ

SEVERE MENTAL IMPAIRMENT

[Note that the definitions of 'severe mental impairment' and 'severely mentally impaired' in the Mental Health Act 1983, s 1(2) are repealed by the Mental Health Act 2007, s 1(3) as from 3 November 2008.]

SEWER

[For 38 Halsbury's Laws of England (4th Edn) (2006 Reissue) para 613 see now 46 Halsbury's Laws of England (5th Edn) (2010) para 998.]

SEXUAL ACTIVITY IN QUESTION

Canada [Criminal Code, RSC 1985, c C-46, s 273.1(1): 'consent' means, for the purposes of ss 271, 272 and 273 (offence of sexual assault), the voluntary agreement of the complainant to engage in the sexual activity in question.] '20. There are essentially two approaches to the question of what constitutes "voluntary agreement ... to ... the sexual activity in question" and the role of mistake or deception in determining whether such agreement existed.

'21. The first approach, which has many variants, defines the "sexual activity in question" as extending beyond the basic sexual activity the complainant thought she was consenting to at the time to conditions and qualities of the act or risks and consequences flowing from it, provided these conditions are "essential features" of the sexual activity (reasons of the majority of the Court of Appeal, at paras. 71 and 81) or go to "how" the physical touching was carried out (reasons of Abella and Moldaver JJ.). Under this approach, whether a complainant's mistake prevents voluntary agreement to the sexual activity under s. 273.1(1) depends on the nature of the mistake. The difficulty with this approach, as we shall see, is that it provides no clear line between mistakes that result in no consent under s. 273.1(1), and mistakes that do not. The result of this lack of clarity may be inappropriate criminalization and uncertainty in the law.

'22. The second approach defines the "sexual activity in question" more narrowly as the basic physical act agreed to at the time, its sexual nature, and the identity of the partner. If the complainant subjectively agreed to the partner's touching and its sexual nature, voluntary agreement is established under s. 273.1(1) of the *Criminal Code*. That voluntary agreement, however, may not be legally effective. The *Code* also sets out a number of situations in which, notwithstanding apparent agreement, no consent is obtained. In particular, deceptions may negate consent if they meet the requirements for fraud under s. 265(3)(c).

'23. The choice between these approaches is a matter of statutory construction. Which approach is correct depends on (1) the wording, scheme and object of the provisions of the *Criminal Code*; (2) the jurisprudence on the provisions and their common law predecessors; and (3) the underlying objectives of the criminal law. ...

'24. The plain words of the provisions, read in their ordinary and natural sense, support a narrow interpretation of the basic definition of

“consent” in s. 273.1(1). The ordinary meaning of the “sexual activity in question” is the physical act agreed to; there is nothing in the wording to suggest that it includes the conditions or qualifications of the sexual act.

‘25. The scheme of the provisions—a basic definition of “consent” in s. 273.1(1), coupled with circumstances vitiating such agreement in s. 265(3) and s. 273.1(2)—also supports a narrow interpretation of “voluntary agreement ... to ... the sexual activity in question”.

‘28. In summary, the primary tools of statutory construction all point to a rejection of the broad interpretation of the “sexual activity in question” under the “essential features”/“how the act was carried out” approach.

‘54. We conclude that Farrar J.A. was correct to interpret the “sexual activity in question” in s. 273.1(1) to refer simply to the physical sex act itself (for example, kissing, petting, oral sex, intercourse, or the use of sex toys). The complainant must agree to the specific physical sex act. For example, as our colleagues correctly note, agreement to one form of penetration is not agreement to any or all forms of penetration and agreement to sexual touching on one part of the body is not agreement to all sexual touching.

‘55. The “sexual activity in question” does not include conditions or qualities of the physical act, such as birth control measures or the presence of sexually transmitted diseases. Thus, at the first stage of the consent analysis, the Crown must prove a lack of subjective voluntary agreement to the specific physical sex act. Deceptions about conditions or qualities of the physical act may vitiate consent under s. 265(3)(c) of the Criminal Code, if the elements for fraud are met.’ *R v Hutchinson* 2014 SCC 19, [2014] 1 SCR 346 at paras 20–25, 28, 54–55, per McLachlin CJ and Cromwell J

SEXUAL EXPERIENCE

New Zealand [Evidence Act 2006, s 44: leave to cross-examine in relation to sexual activity.]

‘[19] A preliminary point is whether the admissibility of the evidence of the second incident is to be considered under the general provisions of ss 7 and 8 of the Evidence Act, or whether the more stringent test under s 44 applies on the basis that the disputed evidence relates to “the sexual experience of the complainant with any person other than the defendant”.

‘[20] The argument in the District Court proceeded on the basis that the questions were governed by ss 7 and 8. Counsel made the same assumption in argument before us. During the hearing, we raised with counsel the possibility that s 44 applied despite the absence of any physical contact between D and her stepbrothers. We have since undertaken some research on this issue. It transpires that the issue has arisen on at least two occasions in the High Court and two in this Court.

‘[21] In *R v Mallinson* [HC Rotorua TO20114, 29 August 2002] Baragwanath J ruled in a jury trial that evidence that the female complainant, along with other young women, exposed their breasts in a form of exhibitionism fell within s 44(1) as “sexual experience”. In contrast, in *Follas v R* [HC Tauranga CRI-2004-070-590, 8 February 2005] Laurenson J held that s 23A of the former Evidence Act was not engaged where the complainant had made numerous comments and gestures of a sexual nature to police officers. The Judge found that some element of participation by another person was required and that mere presence by an unwilling observer did not amount to “sexual experience” with another person.

‘[22] In *R v Kerley* [CA197/03, 28 October 2003] this Court was prepared to accept for the purpose of the appeal (as agreed by counsel) that chatroom discussion of a sexual nature on the internet could fall within the predecessor of the present s 44(1), but did not consider there to be any logical link between this material and the possibility of a false complaint.

‘[23] Finally, in *Sutherland v R* [[2010] NZCA 154] this Court held that evidence of grooming of the young male complainant by an older man on an earlier occasion did not amount to sexual experience (the police having decided that the earlier conduct was not criminal in nature).

‘[24] Without expressing any view about the correctness of these decisions, we find that the evidence relating to the second incident did amount to sexual experience by D with another person in terms of s 44(1) of the Evidence Act. Mere observation of sexual activity by others may not be enough but, in the present case, D orchestrated the incident. She procured the two toddlers to undertake the activity in question and then photographed each in turn. Whether or not her conduct in this respect was criminal and irrespective of any evidence of physical contact between the complainant and the boys, it clearly amounted to sexual experience within the meaning of s 44(1).

‘[25] This finding is consistent with the

protective purpose of s 44, which is to prevent the inappropriate blackening of the character of a complainant in the eyes of the jury.’ *Nguyen v R* [2011] NZCA 8, [2011] 2 NZLR 343 at [19]–[25], per Randerson J

SEXUAL ORIENTATION

On grounds of sexual orientation

[Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661, reg 5. Employee subjected by colleagues at work to sexual innuendo suggesting in obvious terms that he was homosexual, although employee was a heterosexual, married man with three children.] ‘[44] In my judgment, however, even on the assumed facts, the proper construction of reg 5(1) of the Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661 leads to a conclusion that there was “harassment... on grounds of sexual orientation” because the conditions of reg 5(1) were satisfied, namely that (a) on grounds of sexual orientation (b) the tormentors engaged in unwanted conduct (c) which had the purpose or effect of violating the claimant’s dignity or creating a degrading, humiliating or offensive environment for the claimant, and (d) which should reasonably be considered as having that effect.

‘[45] It seems to me that, without the benefit of accumulated case law, that conclusion follows from an objective approach to the characterisation of the conduct. If one were to ask the question whether the repeated and offensive use of the word “faggot” in the circumstances of this case was conduct “on grounds of sexual orientation” the answer should be in the affirmative irrespective of the actual sexual orientation of the claimant or the perception of his sexual orientation by his tormentors.

‘[46] If the conduct is “on grounds of sexual orientation” it is plainly irrelevant whether the claimant is actually of a particular sexual orientation. In a case of this kind, even if the claimant is homosexual, it is obviously not for the claimant to show that he is homosexual, any more than a claimant in a racial discrimination case must prove that he is Asian or a Jew.

‘[47] It would follow from the decision of the Employment Appeal Tribunal (the EAT) that if the claimant is actually homosexual, but those who victimise him do not in fact believe him to be so, then reg 5(1) would not be engaged. I do not consider that this could have been the

intended result of the legislation, and I do not consider that it is its result.

‘[48] By virtue of s 3A(1) of the Race Relations Act 1976 there will be harassment where a person “on grounds of race or ethnic or national origins” engages in unwanted conduct which has essentially the same purpose or effect as in reg 5 of the Employment Equality (Sexual Orientation) Regulations 2003, SI 2003/1661. In my judgment, where an employee is repeatedly and offensively called a Paki or a Jew-boy even when he is not of Asian or Jewish origin, and even when his tormentors do not believe that he is, that conduct can amount to harassment for the purposes of the 1976 Act.

‘[49] This is not the same as the example of an able-bodied but clumsy person being called “a spastic” which was mentioned in argument. Section 3B of the Disability Discrimination Act 1995 provides that a disabled person is subject to harassment where the offensive conduct is engaged in “for a reason which relates to the disabled person’s disability”. See also ss 28SA, 31AC. Not only does that wording require an actual disability, but also, however unacceptable the word may have become, it does not normally denote actual disability when being used offensively.

‘[50] Does the case law require the conclusion to which the EAT came? In my judgment it does not.

... ‘[67]... I do not consider that it follows from *Nagarajan v London Regional Transport* [[1999] 4 All ER 65, [2000] 1 AC 501, HL] that in the present case Mr English’s acceptance that the tormentors did not believe he was gay leads to the inevitable conclusion that in the context of reg 5 the offensive remarks were not made on grounds of sexual orientation.

... ‘[69] In my judgment there is nothing in *Showboat Entertainment Centre Ltd v Owens* [1984] 1 All ER 836, [1984] 1 WLR 384, *Nagarajan v London Regional Transport* [1999] 4 All ER 65, [2000] 1 AC 501 or *Redfearn v Serco Ltd (t/a West Yorkshire Transport Service)* [2006] EWCA Civ 659, [2006] IRLR 623, [2006] ICR 1367] to require the court in this type of case to inquire whether the maker of offensive homophobic statements actually thought that the victim was homosexual. The natural meaning of reg 5 in my judgment is sufficient to make such an inquiry irrelevant.’ *English v Thomas Sanderson Blinds Ltd* [2008] EWCA Civ 1421, [2009] 2 All ER 468 at [44]–[50], [67], [69], per Lawrence Collins LJ

SHACK

[For 6 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 420 see now 13 Halsbury's Laws of England (5th Edn) (2017) para 316.]

SHAM (MARRIAGE)**See also MARRIAGE OF CONVENIENCE**

‘[8] The United Kingdom responded to [Council Resolution (EC) 97/C 382/01 of 4 December 1997 on measures to be adopted on the combating of marriages of convenience (OJ 1997 C 382 p 1)], in part, by enacting s 24 of the Immigration and Asylum Act 1999. This section imposed a duty on (among others) superintendent registrars to report to the Secretary of State any proposed marriage of which notice was given to them in which there were reasonable grounds for suspecting that the marriage would be a “sham marriage”. This expression was defined in sub-s (5) to mean—

“a marriage (whether or not void)—(a) entered into between a person (‘A’) who is neither a British citizen nor a national of an EEA State other than the United Kingdom and another person (whether or not such a citizen or such a national); and (b) entered into by A for the purpose of avoiding the effect of one or more provisions of United Kingdom immigration law or the immigration rules”.

R (on the application of Baiai) v Secretary of State for the Home Department (Nos 1 and 2) [2008] UKHL 53, [2008] 3 All ER 1094 at [8], per Lord Bingham of Cornhill
 ‘[34] My Lords, a “sham” marriage is still a valid marriage in English law.

“The fact is that in the English law of marriage there is no room for mental reservations or private arrangements regarding the parties’ personal relationships once it is established that the parties are free to marry one another, have consented to the achievement of the married state and observed the necessary formalities.” (See *Vervaeke v Smith* [1982] 2 All ER 144 at 149, [1983] 1 AC 145 at 152 per Lord Hailsham of St Marylebone LC.)

This has long been recognised as a rule of public policy. The ecclesiastical courts from whom our marriage law was derived did not want parties to an apparently valid marriage claiming that it was void because of some

private reluctance to accept all of the obligations it entailed. How would one single out which obligations were essential and which not? There are many happily married couples who do not live together and many more who do not have children together. Nor are all so-called “sham” marriages entered into for “a nefarious purpose”; as Lord Simon of Glaisdale has pointed out, “Auden married the daughter of the great German novelist, Thomas Mann, in order to facilitate her escape from persecution in Nazi Germany” (see *Vervaeke v Smith* [1982] 2 All ER 144 at 158, [1983] 1 AC 145 at 164; for another example of an altruistic sham marriage see *Silver (or Kraft) v Silver* [1955] 2 All ER 614, [1955] 1 WLR 728).

‘[35] This means that the authorities are not free simply to disregard those marriages which they believe have been entered into purely in order to gain some perceived immigration advantage. No doubt such marriages do take place. No doubt also they are difficult to detect, not least because of the difficulty of unpicking the variety of reasons why two people might choose to marry one another. There are many perfectly genuine marriages which may bring some immigration advantage to one or both of the parties depending on where for the time being they wish to make their home. That does not make them “sham” marriages.’ R (on the application of Baiai) v Secretary of State for the Home Department (Nos 1 and 2) [2008] UKHL 53, [2008] 3 All ER 1094 at [34]–[35], per Baroness Hale of Richmond

SHARES (IN COMPANY)

[For 7(1) Halsbury's Laws of England (4th Edn) (2004 Reissue) para 820 see now 15A Halsbury's Laws of England (5th Edn) (2016) para 1244.]

[The Companies Act 1985, s 744 has been repealed by the Companies Act 2006 and the definition of ‘shares’ is now to be found in the 2006 Act, s 540.]

- (1) In the Companies Acts ‘share’, in relation to a company, means share in the company’s share capital.
- (4) In the Companies Acts—
 - (a) references to shares include stock except where a distinction between share and stock is express or implied, and
 - (b) references to a number of shares include an amount of stock where the context admits of the reference to shares being read as including stock.

(Companies Act 2006, s 540(1), (4))

Preference shares

[For 7(1) Halsbury's Laws of England (4th Edn) (2004 Reissue) para 766, para 766n see now 15A Halsbury's Laws of England (5th Edn) (2016) para 1248, para 1248 n.]

Australia [Corporations Act 2001 (Cth), ss 254A, 254J; Companies Act 1961 (NSW), ss 61, 66. '[66] The appellant's central submission in this appeal was that a share could not be a "preference share" unless the rights attaching to it gave some preference or priority over some other *issued* share. The appellant submitted that this construction accorded with "the development of the 'preference share' as a practical means of encouraging additional investment in companies in financial difficulty and with the terms and the legislative history of the relevant provisions" of the 2001 Act.

'[67] It is important, however, to begin by recognising that nothing in the 1961 Act provided any textual footing for the submission that a share was not a "preference share" unless the rights attaching to it gave some preference or priority over some other issued share. The emphasis given by the 1961 Act to the definition of the rights of shareholders in the memorandum and articles of association points very firmly against accepting the appellant's submission. What was a "preference share" for the purposes of the 1961 Act was to be determined by reference to the relevant company's memorandum and articles of association, not by reference to the state of the issued capital of that company at any time. That is, whether a share was a "preference share" did not depend upon what shares the company had issued. If a company's memorandum and articles of association provided that shares of an identified class carried some right with respect to repayment of capital, participation in surplus assets or profits, cumulative or non-cumulative dividends, voting, or priority of payment of capital or dividend which preferred the holder of a share of that class over the holder of some other class of share for which the memorandum and articles of association provided, those shares were preference shares.

'[68] In this case, the company's articles of association described the rights which attached to each of the classes of shares. In that regard it may be noted that the subscriber shares in the company taken by Mr Leo Weinstock and the solicitor were described as preference shares

even though, of course, no other shares had been issued. The appellant acknowledged that acceptance of her central argument entailed that those shares were not preference shares, at least when they were first taken by the subscribers.

'[69] Whether, *at the time of issue* of any particular share, the rights attaching to that share then afforded any commercial advantage to the holder would no doubt depend upon the content of those rights and what other shares had then been issued. As Handley AJA rightly pointed out [in *Weinstock v Beck* (2011) 252 FLR 462; [2011] NSWCA 228 at [134]–[135]], however, it is necessary to distinguish between the rights attached to a share and the enjoyment of those rights. The holder of a share has whatever rights the memorandum and articles of association attached to that share. If, after the share was issued and allotted, there were to arise some question about the order in which shareholders would be repaid capital, participate in surplus assets or profits, receive or accumulate an entitlement to dividends, vote, or obtain payment of capital or dividend, that question would be resolved according to the rights attaching to the respective shares. A share which had one or more preferential rights was properly described as a "preference share" not only at the time the immediate question about employment or exercise of rights fell for consideration but also at the time of issue.

'[70] Further support for the conclusion that what was a preference share required consideration only of what was provided by the constituent documents of the company is found in the text of s 61(1) itself. That subsection provided that a company, "*if so authorised by its articles*", might "issue preference shares which are, or at the option of the company are to be liable to be redeemed". [Emphasis added.] Section 61(1) thus required that the company concerned have authority under its articles of association to issue the shares in question. But the effect of the appellant's argument was to add a further requirement to s 61(1): that the company concerned should have already issued some shares having rights inferior to those which were to be issued under the power given by s 61(1) and the company's articles of association. There is no basis for implying any additional requirement of that kind in s 61(1).

'[71] The appellant submitted that if what is a preference share was determined by reference to what shares *could* be issued rather than what shares *had been* issued a company could be left without any members. This would follow, so it was submitted, if a company issued only

redeemable preference shares and those shares were all redeemed.

[72] The result to which the appellant pointed may be theoretically possible. It may be doubted, however, that the directors of the company would, or consistently with their duties could, permit the result described in argument to come to pass. But regardless of whether those doubts are well-founded, the point made by the appellant is wholly met by the provisions of both the 1961 Act and the 2001 Act governing winding up by the court. The 2001 Act provided that it was a ground for winding up by the court that the company had no members. The 1961 Act provided that, subject to an exception that is not presently relevant, it was a ground for winding up by the court that the number of members of a proprietary company was reduced below two.

[73] Statute having dealt with the issue in this way, the possibility that a company issuing only redeemable preference shares may be left without members does not point, as the appellant submitted, to concluding that a share is a preference share only if it has rights which prefer the holder over the holders of other shares that have actually been issued.

[74] It may be accepted that, as the appellant submitted, preference shares were often issued in England during the nineteenth century to raise capital additional to what had been subscribed for the issue of ordinary shares. This observation about commercial practice is, however, not to the point. Likewise, and contrary to the appellant's submissions, it is not useful to consider what issues arose or what orders were made in approving a reduction of capital by cancellation of preference shares. Neither the legislative history concerning statutory provisions for redeemable preference shares nor any wider historical examination of the commercial use of preference shares as a means of raising capital sheds any light on the central issue in this appeal. That issue is what was meant in the 1961 Act by "preference share". The 1961 Act required that what was a preference share be answered by reference to the rights that the company's memorandum and articles of association attached to that share and whether those rights preferred the holder of the share in question over the holder of any other class of share which the company could issue.

[75] The disputed shares had rights which preferred the holder of those shares over the holder of any ordinary share in the company. That no ordinary shares were ever issued does not deny that the disputed shares were preference shares. The company's articles of

association provided that the disputed shares were liable to be redeemed. They were redeemable preference shares.' *Beck v Weinstock* [2013] HCA 15, (2013) 297 ALR 21 at [66]–[75], per Hayne, Crennan and Kiefel JJ

SHELTERED ACCOMMODATION

[2] The issue before the tribunal was whether the respondent resided in sheltered accommodation for the purpose of the Housing Benefit Regulations 2006, SI 2006/213. If the respondent resided in sheltered accommodation he was entitled to have his share of the costs of fuel for, and cleaning of, the rooms of common use in his accommodation included in his eligible rent for the purpose of calculating the amount of his housing benefit.

[4] The First-tier Tribunal concluded that the respondent did not reside in sheltered accommodation. The Upper Tribunal concluded that the First-tier Tribunal had applied an unduly restrictive definition of sheltered accommodation, and that the accommodation occupied by the respondent was sheltered accommodation for the purpose of the 2006 Regulations.

[33] The Upper Tribunal's conclusion that the type of accommodation occupied by the respondent was sheltered accommodation for the purpose of the 2006 Regulations was correct. Parliament did not choose to define sheltered accommodation and the court should not impose a prescriptive definition upon an inherently flexible concept which can take many different forms, and which now includes very sheltered or extra care sheltered accommodation.

[34] At one end of a broad spectrum, sheltered accommodation is distinguishable from "ordinary" accommodation because it will incorporate particular features which are not normally found in "ordinary" accommodation and are designed to meet the needs of occupiers who are vulnerable in some way, often by reason of age, and increasingly by reason of disability. The appellant's six "essential common features" are no more than a non-exhaustive list of examples of such features. The presence, or absence, of a particular feature is not determinative.

[35] At the other end of the spectrum a care home is not sheltered accommodation. The occupiers of a care home may well need a greater level of care than is available in very

sheltered accommodation—see the descriptions of very sheltered housing by Help the Aged and Directgov (see [20], [21], above)—but the level of care may well be determined more by personal choice and/or availability, or more probably lack of provision in a particular area. The emphasis in a care home will usually be rather more on care than accommodation, and this will normally be reflected in the basis upon which such accommodation is occupied. Typically the occupiers will occupy their rooms under licence. Of particular importance for present purposes—eligibility for housing benefit in respect of service charges for heating, lighting and cleaning common rooms in sheltered accommodation—those having exclusive possession of their own living space within that sheltered accommodation will be in occupation, and will be liable to pay the rent and service charges which are eligible for housing benefit, pursuant to a tenancy.’ *Oxford City Council v Basey (by May, his litigation friend)* [2012] EWCA Civ 115, [2012] 3 All ER 71 at [2], [4], [33]–[35], per Sullivan LJ

SHIP

[For (43(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 102 see now 93 Halsbury’s Laws of England (5th Edn) (2008) para 229.]

SHIPMENT

[For 41 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 330 see now 91 Halsbury’s Laws of England (5th Edn) (2012) para 341.]

SHOP

[For 20(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 530 see now 52 Halsbury’s Laws of England (5th Edn) (2014) para 337.]

Large shop

[For 47 Halsbury’s Laws of England (4th Edn) (2001 Reissue) paras 702–711 see now 97 Halsbury’s Laws of England (5th Edn) (2015) paras 1007–1016.]

SIGNIFICANT

‘[31] This appeal raises the important point of the meaning of “significant” injury in [the Limitation Act 1980] s 14(2). Section 14(1) provides that the “date of knowledge” is the

date upon which the claimant first had knowledge of various facts, including “that the injury ... was significant”. A “significant injury” is defined by s 14(2):

“For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.”

‘[32] Section 14(3) then provides that, for the purpose of deciding whether the claimant had knowledge of the various matters listed in s 14(1), including the fact that the injury was significant, one should take into account not only his actual knowledge but also what is usually called his imputed or constructive knowledge. That is defined as “knowledge which he might reasonably have been expected to acquire (a) from facts observable or ascertainable by him; or (b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek.”

‘[33] The question which has arisen is whether the definition of significance in s 14(2) allows any (and if so, how much) account to be taken of personal characteristics of the claimant, either pre-existing or consequent upon the injury which he has suffered. This question was first considered in *McCafferty v Metropolitan Police District Receiver* [1977] 2 All ER 756 at 775, [1977] 1 WLR 1073 at 1081, soon after the 1975 Act [Limitation Act 1975] had come into force. After reading the then equivalent of sub-s 14(2), Geoffrey Lane LJ said:

“[T]he test is partly a subjective test, namely: ‘would this plaintiff have considered the injury sufficiently serious?’ and partly an objective test, namely: ‘would he have been reasonable if he did not regard it as sufficiently serious?’ It seems to me that the subsection is directed at the nature of the injury as known to the plaintiff at that time. Taking that plaintiff, with that plaintiff’s intelligence, would he have been reasonable in considering the injury not sufficiently serious to justify instituting proceedings for damages?”

‘[34] I respectfully think that the notion of the test being partly objective and partly subjective is somewhat confusing. Section 14(2) is a test for what counts as a significant injury. The

material to which that test applies is generally “subjective” in the sense that it is applied to what the claimant knows of his injury rather than the injury as it actually was. Even then, his knowledge may have to be supplemented with imputed “objective” knowledge under s 14(3). But the test itself is an entirely impersonal standard: not whether the claimant himself would have considered the injury sufficiently serious to justify proceedings but whether he would “reasonably” have done so. You ask what the claimant knew about the injury he had suffered, you add any knowledge about the injury which may be imputed to him under s 14(3) and you then ask whether a reasonable person with that knowledge would have considered the injury sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

‘[35] It follows that I cannot accept that one must consider whether someone “with [the] plaintiff’s intelligence” would have been reasonable if he did not regard the injury as sufficiently serious. That seems to me to destroy the effect of the word “reasonably”. Judges should not have to grapple with the notion of the reasonable unintelligent person. Once you have ascertained what the claimant knew and what he should be treated as having known, the actual claimant drops out of the picture. Section 14(2) is, after all, simply a standard of the seriousness of the injury and nothing more. Standards are in their nature impersonal and do not vary with the person to whom they are applied.

‘[39] The difference between s 14(2) and 14(3) emerges very clearly if one considers the relevance in each case of the claimant’s injury. Because s 14(3) turns on what the claimant ought reasonably to have done, one must take into account the injury which the claimant has suffered. You do not assume that a person who has been blinded could reasonably have acquired knowledge by seeing things. In s 14(2), on the other hand, the test is external to the claimant and involves no inquiry into what he ought reasonably to have done. It is applied to what the claimant knew or was deemed to have known but the standard itself is impersonal. The effect of the claimant’s injuries upon what he could reasonably have been expected to do is therefore irrelevant.’ *A v Hoare* [2008] UKHL 6, [2008] 2 All ER 1 at [31]–[35], [39] per Lord Hoffmann

SIMONY

[For 14 Halsbury’s Laws of England (4th Edn) para 832 see now 34 Halsbury’s Laws of England (5th Edn) (2011) para 616.]

SLANDER

[For 28 Halsbury’s Laws of England (4th Edn) (Reissue) para 12 see now 32 Halsbury’s Laws of England (5th Edn) (2012) para 512.]

Slander of goods

[For 28 Halsbury’s Laws of England (4th Edn) (Reissue) para 277 see now 32 Halsbury’s Laws of England (5th Edn) (2012) para 778.]

Slander of title

[For 28 Halsbury’s Laws of England (4th Edn) (Reissue) para 276 see now 32 Halsbury’s Laws of England (5th Edn) (2012) para 778.]

SNOWBALL SWAP

‘[6] The Swaps are long-term interest rate swaps, under which Santander was (with one exception) the floating rate payer and the TCs [Portuguese public sector transport companies] were the fixed rate payers. An unusual feature of the Swaps was that once the reference interest rates (EURIBOR and sometimes LIBOR) moved outside upper or lower “barriers”, the fixed rate payable by the TCs had a “spread” added to it. The spread was cumulative at each payment date and was subject to leverage: hence the Swaps being described as “snowball” swaps.

‘[7] The Swaps initially provided positive cash flows for the TCs. The consequence, however, of sustained near zero interest rates since 2009 and the “snowball” structure of the Swaps is that the interest rates payable under the Swaps have increased very substantially. An agreed table of interest rates payable as at 21 October 2016 under the Swaps shows interest rates of between just under 30% to over 92%. Furthermore, by 1 October 2015 the mark-to-market value of the Swaps had become negative in an amount in excess of EUR 1.3 billion.’ *Banco Santander Totta SA v Companhia Carris de Ferro de Lisboa SA* [2016] EWCA Civ 1267, [2017] 3 All ER 838 at [6]–[7], per Sir Terence Etherton MR

SOLD IN ANY MARKET IN CANADA

Canada [Patent Act, RSC 1985, c P-4, ss. 80(1)(b), 83(1), 85.] '22. But although the parties agreed on the proper interpretive approach, they disputed its application. The Attorney General argued that the phrase "sold in any market in Canada" is broad and should not be given the limited, technical interpretation ascribed to it by Celgene. Celgene, on the other hand, argued that the word "sold" is so "precise and unequivocal" that it must play the determinative role in the interpretive process (*Canada Trustco [Canada Trustco Mortgage Co v Canada*, 2005 SCC 54, [2005] 2 SCR 601], at para 10). Citing *Canada (Deputy Minister of National Revenue) v Mattel Canada Inc*, 2001 SCC 36, [2001] 2 SCR 100, Celgene argued that "sold" is a legal term of art that should presumptively be given its private law, commercial meaning. In its view, the plain meaning of "sold in any market in Canada" connotes a commercial contract of sale occurring in Canada.

'23. *Mattel* is of limited assistance in this case. It involved an interpretation of s 48(5)(a)(iv) of the *Customs Act*, RSC 1985, c 1 (2nd Supp), a provision concerned with whether royalties paid between two private parties in a commercial transaction were "a condition of the sale of the goods for export to Canada". Major J concluded that in the particular context of that provision—which assists in calculating customs duties on items imported into Canada—the word "condition" in the phrase "condition of the sale" had a settled meaning in sale of goods law which governed in interpreting this private transaction (see paras 58–59).

'24. I accept that, as *Mattel* demonstrates, words like "sold" may well have a commercial law meaning in some statutory contexts, including, for example, in other parts of the *Patent Act* (see *Dole Refrigerating Products Ltd v Canadian Ice Machine Co* (1957), 28(2) CPR 32 (Ex Ct); *Domco Industries Ltd v Mannington Mills, Inc* (1990), 29 CPR (3d) 481 (FCA), leave to appeal refused, [1990] 2 SCR vi).

'25. But that does not mean that the Board misinterpreted the words "sold" and "selling" in the context of ss 80(1)(b), 83(1) and 85. In rejecting the technical commercial law definition, the Board was guided by the consumer protection goals of its mandate, concluding that Celgene's approach would undercut these objectives by preventing the Board from protecting Canadian purchasers of Thalomid

and other foreign-sold SAP patented medicines.

... '30. The Board therefore concluded that in order to comply with that mandate, sales "in any market in Canada" for the purposes of the relevant provisions, should be interpreted to "include sales of medicines that are regulated by the public laws of Canada, that will be delivered in Canada, to be dispensed in Canada, and where, in particular, the cost of the medicine will be borne by Canadians—patients or taxpayers, as the case may be" (para 34). All of these prerequisites are satisfied in the case of Celgene's sales of Thalomid to Canadians through the SAP.

'31. The Board also found, and I agree, that a strict commercial law interpretation of "sold" in s 80(1)(b) would give the Board authority over sales which, while technically made "in Canada", are destined for other countries, a result incongruous with the legislative purpose of regulating the price at which patented medicines are sold in *Canadian*, not foreign, markets:

... the Board does not have a statutory mandate to protect European purchasers of patented medicines, regardless of the *locus* of the sale at common law. The *locus* of the sale at common law, does not give rise to jurisdiction when the *locus* is Canada, and does not deprive the Board of jurisdiction when the *locus* is outside of Canada. [para 36]

'32. In my view, therefore, the legislative context and the consumer protection purpose of ss 80(1)(b), 83(1) and 85 of the *Patent Act* support the Board's conclusion that, based on the language of those provisions, it has authority over Celgene's sales of Thalomid to Canadians through the SAP.' *Celgene Corp v Canada (Attorney General)* 2011 SCC 1, [2011] 1 SCR 3 at paras 22–25, 30–32, per Abella J

SOLICITOR

[For 44(1) Halsbury's Laws of England (4th Edn) (Reissue) para 1 et seq see now 65 Halsbury's Laws of England (5th Edn) (2015) para 435 et seq.]

Solicitor on the record

Australia [Federal Court Rules 1979, O 4 r 4, O 9 r 4.] '[46] The expression "solicitor on the

record" is not defined in the Federal Court Act [1976 (Cth)] or Rules. However, it is implicit from the relevant provisions of the Rules that the expression refers to the solicitor who is nominated to act for an applicant, in the commencing application, or to act for a respondent, in a notice of appearance: see O 4 r 4(1)(c) and O 9 r 4(1)(b) respectively.

...
 '[51] Part of the problem in this case was that the solicitor on the record for the Iman #2 claimants was described by reference to the solicitor who held the position of Principal Legal Officer at Queensland South, rather than by describing a particular solicitor by name. The Rules clearly require that the nominated solicitor's name, address, telephone number, facsimile number and email address must be provided: see O 4 r 4(1)(c) and (d) and O 9 r 4(1)(b). Curiously, the latter Rule does not require the solicitor's facsimile number and email address to be stated. None the less, except where there is some statutory provision to the contrary (for example r 994 of the Uniform Civil Procedure Rules 1999 (Qld) providing that the Crown Solicitor or other state official may appear by that person's official title), I do not consider that a party will comply with these Rules by providing the solicitor's job title. ...' *QGC Pty Ltd (ACN 089 642 553) v Bygrave* [2010] FCA 659, (2010) 269 ALR 589 at [46], [51], per Reeves J

SOON AFTER

New Zealand [The Evidence Act 2006, s 45 governs the admissibility of 'visual identification evidence'; s 45(4) deals with circumstance constituting 'good reasons' for not following a formal procedure; and 'good reasons' include identification of a person alleged to have committed an offence made to an officer of an enforcement agency soon after the offence was reported and in the course of that officer's initial investigation (s 45(4)(e)).] '[48] As noted above at [40], Dobson J considered that a gap of four days between the offence and the identification took this case outside s 45(4)(e). Dobson J was, however, measuring the wrong time frame. Section 45(4)(e) takes as its base point the time the offence was reported and not when the offence was committed. In this case, the offence was reported on 10 June and there was a lapse of only one day before Mr Biddle was interviewed.

'[49] Given that the investigation had been underway for only one day, that only Mr August

had been spoken to and that the police were undoubtedly working on other matters, it would be fair to consider that Mr Biddle had been spoken to in the course of the officer's initial investigation "soon after" the offence had been reported. We also note that the officer had not been given the names of the current appellants by Mr August and thus there can be no suggestion that the officer tainted Mr Biddle's identification.

'[50] It appears that the Law Commission had originally intended s 45(4)(e) to apply in situations where identification had taken place soon after the offence itself had occurred (*Evidence: Reform of the Law* at [210]). However, the original intent was not carried through into the statutory wording of s 45(4)(e). The phrase "soon after the offence was reported" cannot, in our view, be interpreted to mean soon after the offence was committed. It may be that s 45(4)(e) takes as its starting point the time of the reporting and the initial police investigation so as to avoid any tainting of the identification evidence by the course of the police investigation. While, of course, there can be tainting of evidence from other sources, particularly where there is a gap between the offence and identification, any formal identification procedure would not eliminate any resulting errors.' *R v Edmonds* [2009] NZCA 303, [2010] 1 NZLR 762 at [48]–[50], per Glazebrook J

SOUNDTRACK

Canada [Copyright Act, RSC 1985, c C-42, s 2.] '1. This appeal concerns the interpretation of the definition of "sound recording" in s 2 of the *Copyright Act*, RSC 1985, c C-42 ("Act"), and specifically, the interpretation of the undefined term "soundtrack" used in that definition. The Act provides that performers and makers of sound recordings are entitled to remuneration for the performance in public or the communication to the public by telecommunication of their published sound recordings, except for retransmissions. Ultimately, the question this Court must answer is whether the broadcasting of sound recordings incorporated into the soundtrack of a cinematographic work can be subject to a tariff under the Act or whether such broadcasts are excluded by virtue of the definition of "sound recording" in s. 2.

'2. The appellant, Re:Sound, argues that the word "soundtrack" as used in s 2 refers only to the aggregate of sounds accompanying a cinematographic work and not to the

soundtrack's constituent parts. In its view, since pre-existing sound recordings incorporated into a soundtrack are constituent parts of the soundtrack and not the aggregate of sounds accompanying the work, they do not fall within the scope of the word "soundtrack" as used in s 2.

'3. For the reasons that follow, the appeal must be dismissed. A proper application of the principles of statutory interpretation leads to the conclusion that the appellant's argument is untenable ...

'25. The main issue in this appeal involves the application of well-known principles of statutory interpretation. The question this Court must resolve is the following: Do pre-existing sound recordings incorporated into a soundtrack fall within the meaning of the undefined term "soundtrack" used in the definition of "sound recording" in s 2 of the Act? In other words, in view of the fact that only a "sound recording" can be the subject of a tariff under s 19, can the reproduction of a pre-existing sound recording that is part of a soundtrack of a cinematographic work be the subject of a tariff when the soundtrack accompanies the cinematographic work?

'26. For the reasons that follow, I conclude that, irrespective of the standard of review, the Board was correct in its interpretation of the word "soundtrack". Consequently, a pre-existing sound recording that is part of a soundtrack cannot be the subject of a tariff when the soundtrack accompanies the cinematographic work.' *Re:Sound v Motion Picture Theatre Associations of Canada* [2012] SCJ No 38, 2012 SCC 38 at paras 1–3, 25–26, per LeBel J

SOVEREIGN GRANT

See CIVIL LIST

SPEAK

Canada '[34] The verb "to speak" refers to more than the faculty of speech. *The Canadian Oxford Dictionary*, 2nd ed., also defines it as:

... **2. transitive** a utter (words). **b** make known or communicate (one's opinion, the truth, etc.) in this way (*never speaks sense*). **3 intransitive** a... hold a conversation (*spoke to him for an hour; spoke with them about their work*). **b**... mention in writing etc. (*speaks of it in his novel*). **c**...

articulate the feelings of (another person etc.) in speech or writing (*speak for our generation*). **4 intransitive** a... address; converse with (a person etc.) ...'

Knopf v Canada (Speaker of the House of Commons) [2008] 2 FCR 327, [2007] FCJ No 1474, 162 CRR (2d) 298, 2007 FCA 308 at [34], per Trudel JA

SPECIAL CIRCUMSTANCES

See also EXCEPTIONAL CIRCUMSTANCES

In Solicitors Acts

[Solicitors Act 1974, s 70(10): solicitor to pay costs of assessment where the amount of the bill is reduced by one-fifth unless special circumstances relating to the bill are certified.] '[25] The real issue in this case is whether the costs judge erred in finding that he should depart from the rule by finding special circumstances. That begs the question of what is meant by "special circumstances". There is very little previous judicial guidance on the meaning of that phrase in sub-s (10), although it does appear in another subsection of s 70, sub-s (3). The case law in relation to that subsection suggests that "special circumstances" means something that is exceptional: see the commentary on s 70(3) in vol 2 of the White Book at para 7C-118 and the cases there referred to. Thus for example in *Falmouth House Freehold Co Ltd v Morgan Walker LLP* [2010] EWHC 3092 (Ch), [2011] 2 Costs LR 292 Lewison J said at para [13] "[w]hether special circumstances exist is essentially a value judgment. It depends on comparing the particular case with the run of the mill case, in order to decide whether a detailed assessment in the particular case is justified despite the restrictions contained in s 70(3)".

'[26] That approach is of limited assistance in the context of s 70(10) because that subsection deals with circumstances justifying depriving the party regarded as the overall winner of the prescribed benefit of his success, whereas a finding of "special circumstances" under s 70(3) operates so as to confer the right to a detailed assessment upon someone who would not ordinarily be entitled to it. In the context of sub-s (10), and on the normal understanding of the language of the phrase, it would appear that there should be grounds which would make it unfair for the normal consequences prescribed by the statute to apply;

and those grounds would have to be exceptional. Therefore, the question that the costs judge has to ask himself is whether or not there is something that has happened in the case which, exceptionally, makes it unfair that the claimant should not get the costs to which it is presumed he is entitled because he has succeeded in reducing the overall bill by more than 20%.

‘[27] Previous cases give some indication of the types of situation in which a claimant will be deprived of the ordinary costs order in this context. They include a situation where the claimant has failed to beat an offer to settle, which is made without prejudice save as to costs; where the claimant has unreasonably failed to engage in negotiations; and, in one recent case, where the claimant, although successful, had racked up the costs of the hearing of the detailed assessment by spending at least two days in arguing pointless matters of law which, at the end of the day, did not avail her. The arguments in that case were described by Proudman J as “tortuous” and it was felt that it was unfair to visit those costs of the prolonged hearing upon the solicitor. In those circumstances, the successful claimant was still awarded costs but at a reduced amount, so as to reflect the non-recovery of the costs that had been racked up by the tortuous arguments.

‘[28] One thread that runs through all of these cases is that they focus upon behaviour by the claimant which is in some way either reprehensible or unreasonable or which causes costs to be incurred unnecessarily. I would not go so far as to say that “special circumstances” must exclusively cover behaviour by the claimant, because it is always possible that there may be exceptional cases which fall outside the scope of that remit, but it is difficult to think of examples.

‘[29] However, I am satisfied that “special circumstances” cannot extend to a situation in which, on examination of the individual bills that make up the total, or some of them, it transpires that the defendant would have been the winner if they had been assessed separately and the one-fifth rule had been applied to each of them. Nor is there anything exceptional about the fact that the issues raised in respect of those bills are more complex or generate more costs in the assessment than the issues in respect of other bills. That is something which could occur in any case like this one, in which the order for assessment covers numerous bills. Examining the outcome on the individual bills is the error into which this very experienced costs judge fell in the present case.

‘[30] Master O’Hare approached the issue of whether there were “special circumstances” by accepting an argument by the defendants that, as to the majority of those costs where 100% reduction was sought, the defendants and not the claimants were the victors. That was because, as regards four of the five bills to which I have referred earlier as representing most of the money at stake, as part of the compromise the defendants had recovered everything that they were claiming. It was only in relation to the fifth of those bills that the claimant had succeeded, because it was agreed that those fees would not be recovered.

‘[31] That approach involved the costs judge going into the minutiae of the merits of the issues on assessment, which had now been compromised, and working out who was the “winner” in relation to each of the bills concerned (which were only a small selection from the 15 that were the subject of the order for assessment). He then came to the view that, because the defendant was the “winner” in relation to the handful of bills on which most of the costs rode, the costs of the assessment should be awarded against the claimant, notwithstanding that the claimant had still managed to reduce the bill overall by more than a fifth.

‘[32] In my judgment, that approach drives a coach and horses through s 70. It is doing precisely what s 70 does not allow. Because the proper approach is one of totality, one must look at the overall amounts and apply the one-fifth rule to that. There is nothing special about these particular circumstances. There may be many cases in which it would be open to a defendant to say “I was the overall winner on the bill which was the hardest one that was fought and on which most of the costs were expended”.’ *Stone Rowe Brewer LLP v Just Costs Ltd* [2014] EWHC 219 (QB), [2014] 3 All ER 723 at [25]–[30], per Andrews J

SPECIAL POLICE SERVICES

[Police Act 1996, s 25(1).] ‘[1] The issue that arises on this appeal is whether the West Yorkshire Police (WYP) are entitled to charge Leeds United Football Club (the club) the cost of public order policing and crowd control outside the immediate environs of the club premises at Elland Road (on land neither owned nor controlled by the club), both before and after football matches. Section 25(1) of the Police Act 1996 (the 1996 Act) provides that the chief officer of police of a police force “may

provide, at the request of any person, special police services at any premises or in any locality in the police area for which the force is maintained, subject to the payment... of charges". It is not in dispute for the purposes of this appeal that the club has requested and WYP has provided police services (i) within the club's stadium, (ii) in the areas immediately outside the stadium that are owned or controlled by the club and (iii) in certain identified streets and public areas beyond the stadium and the areas owned or controlled by the club. The club has always accepted that the police services provided in (i) and (ii) are "special police services" (SPS) within the meaning of s 25 of the 1996 Act. The issue is whether the police services provided in (iii) (which I shall refer to as "the extended footprint") are also SPS. The extended footprint includes public highways, a number of residential streets as well as other public areas such as car parks and open spaces. In a careful and comprehensive judgment, Eady J held that the services provided in the extended footprint are not SPS, but are police services provided in discharge of WYP's ordinary public duty to prevent crime and protect life and property for which they are not entitled to charge the club (see [2012] EWHC 2113 (QB), [2012] All ER (D) 261 (Jul)). WYP appeals from that decision.

...
 '[42] The essential question that arises on this appeal is whether the law and order services provided by WYP in the extended footprint are in discharge of their public duty to maintain law and order and protect life and property or are SPS requested by the club. That is the question mandated by the *Glasbrook Bros* case [*Glasbrook Bros Ltd v Glamorgan County Council* [1924] All ER Rep 579]. In *Harris's* case [*Harris v Sheffield United Football Club Ltd* [1987] 2 All ER 838], Neill LJ suggested four factors which, for the reasons I have given, have varying degrees of utility in pointing to the answer to the essential question. In the *Reading Festival* case [*West Yorkshire Police Authority v Reading Festival Ltd* [2006] EWCA Civ 524, [2006] 1 WLR 2005], Scott Baker LJ suggested that the so-called "benefit" test may also be useful.

'[43] It should be borne in mind that in this case we are concerned with the provision of police services to maintain law and order at and in the vicinity of a football stadium owned by a club whose supporters have a poor record for football-related violence. No doubt most of their supporters and other visitors to matches are law abiding. As the judge said, they do not lose their

status as members of the public when they come to a match. They are entitled to police protection when they come to a match. The police have a duty to maintain law and order and to protect them and their property when they approach and leave the stadium. In *Harris's* case, this court held that, on the facts of that case, the duty did not extend to providing police protection within the land owned and controlled by the club. But it does not follow from that decision that the public duty imposed on the police does not extend to providing protection in public land in the vicinity of the land owned and controlled by the club. Their most important duty is to prevent crime and maintain law and order and protect life and property. If the police consider that the discharge of that duty requires the provision of policing in a public place, it is difficult to see why that is not the end of the inquiry. The provision of *other* policing services in public places raises different considerations.

'[44] It is pertinent to ask why WYP accepts that police protection at Leeds City station on football match days is provided in discharge of their public duty, but the provision of such services in the extended footprint is not. It seems to me that the answer must be that the provision of police protection in the extended footprint is predominantly for the benefit of the club and its customers, whereas the provision of protection at the station benefits not only the club and its customers, but many other members of the public as well. But for the reasons already given, the benefit test has limited value. Perhaps more importantly, it has never been suggested in the authorities that the benefit test is conclusive.

'[45] The policing of the extended footprint on match days is provided in order to maintain law and order and protect life and property in a public place. None of the arguments advanced on behalf of WYP persuades me that the law and order services provided by them in the extended footprint are different in principle from the law and order services that they provide in any other public place. I would dismiss this appeal.' *Leeds United Football Club Ltd v Chief Constable of West Yorkshire Police* [2013] EWCA Civ 115, [2013] 2 All ER 760 at [1], [42]–[45], per Lord Dyson MR

SPONSOR

Canada [Election Act, RSBC 1996, c 106, s 239.] '1. British Columbia's *Election Act*, RSBC 1996, c 106, requires individuals or organizations who wish to "sponsor election advertising" to register with the province's

Chief Electoral Officer. This registration requirement applies to all sponsors of election advertising, regardless of how much they spend during the writ period.

...
 ‘22. Section 239(1) of the Act provides that “an individual or organization who is not registered under this Division must not sponsor election advertising”. The registration requirement is thus directed at a specific activity—the sponsorship of election advertising.

‘23. “Election advertising” is broadly defined in s 228 as “the transmission to the public by any means, during the campaign period, of an advertising message that promotes or opposes, directly or indirectly, a registered political party or the election of a candidate”. This is broad enough to cover the individual expression of a political message by, for example, placing a handmade sign in a window or a bumper sticker on a car, or by wearing a T-shirt with a political message on it. Such activities may “promot[e] or oppos[e], directly or indirectly, a registered political party or the election of a candidate”, particularly since s 228 includes in this category the transmission of “advertising message[s] that tak[e] a position on an issue with which a registered political party or candidate is associated”. Nor do handmade signs, bumper stickers, or T-shirts fall within any of the exclusions from the definition of “election advertising” set out in s 228.

‘24. However, s 239 of the Act limits the registration requirement by requiring registration only by individuals or organizations who “sponsor election advertising”. The ordinary meaning of “sponsor” does not suggest a person engaged in individual self-expression, but rather a person or group that is undertaking or “sponsoring” an organized campaign. A “sponsor” is “a person or group that promotes another person or group in an activity or the activity itself, either for profit or for charity”: *Collins Canadian Dictionary* (2010), at p 911 (emphasis added). One cannot be a “sponsor” in perfect isolation.

‘25. The Act’s use of the word “sponsor” reflects its ordinary meaning. Section 229(1) defines “the sponsor of election advertising” as “the individual or organization who pays for the election advertising to be conducted” (s 229(1)(a)) or, “if the services of conducting the advertising are provided without charge as a contribution, the individual or organization to whom the services are provided as a contribution”: s 229(1)(b). A person who displays a handmade sign in her window or a bumper sticker on her car does not “pa[y] for ... election

advertising to be conducted” in any ordinary sense of those words. No money changes hands. Nor can she be described as an individual to whom advertising “services” have been provided “without charge as a contribution”.

‘26. Under the Act’s definition, an individual or organization cannot “sponsor” election advertising without either “pay[ing] for the election advertising to be conducted” (s 229(1)(a)) or being “provided without charge” the “services of conducting the advertising”: s 229(1)(b). The alternative definitions in s 229(1)(a) and (b) describe the same activity—in each case, someone is the “sponsor” and someone else “conduct[s]” the advertising. The only difference is that, in the first case, the sponsor pays for the election advertising, while in the second case the sponsor receives the services without charge. Whether the individual or group pays for that service (s 229(1)(a)) or receives it without charge (s 229(1)(b)), there must be a service provided for the individual or group to fall within the Act’s definition of “sponsor”. Sponsorship necessarily involves at least two people—the person providing the service (whether for money or without charge) and the sponsor. A person who posts a handmade sign in her window, or puts a bumper sticker on her car, or wears a T-shirt with a political message on it, is neither paying for nor receiving the service of conducting advertising. She is not receiving a service from someone else, and thus is not a “sponsor” under the Act.

...
 ‘31. I therefore conclude that the words of ss 228, 229, and 239 do not support the interpretation given to them by the appellant, British Columbia’s Chief Electoral Officer, or the courts below. The words of the Act, read in their grammatical and ordinary sense and harmoniously with the statutory scheme, limit the registration requirement to “sponsors” – ie, individuals and organizations who receive advertising services from others in undertaking election advertising campaigns. The Act uses the concept of sponsorship to exempt an entire class of political expression—namely, election advertising that is not sponsored—from the registration requirement. Individuals who neither pay others to advertise nor receive advertising services without charge are not “sponsors”. They may transmit their own points of view, whether by posting a handmade sign in a window, or putting a bumper sticker on a car, or wearing a T-shirt with a message on it, without registering.

...

'39. For the reasons discussed, I conclude that a "sponsor" required to register is an individual or organization who receives a service from another individual or organization in undertaking an election advertising campaign, whether in exchange for payment or without charge as a contribution. Individuals engaged in political self-expression do not come within the definition of "sponsor" in s 229(1), and need not register.' *BC Freedom of Information and Privacy Association v British Columbia (Attorney General)* [2017] SCJ No 6, 2017 SCC 6 at paras 1, 22–26, 31, 39, per McLachlin CJ

SPRING GUN

'[11] A spring gun can be described as a gun, often a shotgun, rigged up so as to fire when a string or other triggering device is tripped by contact of sufficient force to "spring" the trigger. Someone stumbling over or treading on the string or triggering device causes it to be discharged and in consequence is wounded. ...' *R v Cockburn* [2008] EWCA Crim 316, [2008] 2 All ER 1153 at [11], per Sir Igor Judge P

STAND DOWN

Australia [Workplace Relations Act 1996 (Cth), s 691B.] '[14] In *Re Textile Industry (Woollen and Worsted Section) Award 1950* (1963) 5 FLR 328 at 333–4, the Commonwealth Industrial Court described a stand down of the type contemplated by Div 7 of Pt 12 of the Act and by cl 10.4 of the agreement in the following way:

... a stand down of its own term implies that the normal working week of the employees is 5 days and the stand down is a special direction to the employee that he need not present himself for work on a particular day or days.

'[15] Properly understood, a stand down, in that context, encompasses a large range of situations where, for various reasons, an employer is unable to provide useful work for its employees, for a particular period of time, for circumstances beyond its control. The employer may be temporarily deprived of electricity to run its operation. It may not have sufficient component supplies to manufacture its goods, due to industrial disputation by the employees of its suppliers. The employer's factory may have been flooded. Numerous examples readily come to mind. The need for clauses in industrial

instruments dealing with stand downs of this type has long been recognised because, in the absence of such a provision, an employee is prima facie entitled to wages for attending work even if no work is available: see *Vehicle Builders Employees Federation of Australia v British Motor Corporation (Aust) Pty Ltd* (1966) 8 FLR 70 at 74–5.' *Coal & Allied Mining Services Pty Ltd (ACN 104 081 290) v MacPherson* [2010] FCAFC 83, (2010) 270 ALR 414 at [14]–[15], per Marshall and Cowdroy JJ

STATE PROTECTION

Canada '[10] State protection is an issue that arises from the very definition of a refugee. A refugee is a person who has "a well-founded fear of persecution" and is "unable or, by reason of that fear, unwilling" to obtain protection from their country of nationality (paragraph 96(a), *Immigration and Refugee Protection Act*, SC 2001, c 27 ...). The definition contains both subjective and objective elements: the claimant must actually fear persecution and that fear must be well founded.

'[11] The issue of state protection arises within the objective branch of the definition of a refugee. Simply put, a person's fear of persecution is not well founded if state protection is available. The contrary is also true — a person's fear of persecution is well founded if state protection is unavailable (see *Ward [Canada (Attorney General) v Ward]* [1993] 2 SCR 689) at page 726). Further, the definition of a refugee goes on to refer explicitly to the person's inability or unwillingness, out of fear, to secure state protection. Accordingly, the issue of state protection can arise in more than one way but, practically speaking, it usually comes up in the consideration of the well-foundedness of a claim (*Zhuravlev v Canada (Minister of Citizenship and Immigration)* [2000] 4 FC 3 (TD), at paragraph 18).

'[12] The question of state protection generally arises only in cases where the person alleges persecution by persons who are not state agents. In those cases where the person claims persecution by the state itself, it can usually be assumed that no state protection is available (*Zhuravlev*, above, at paragraph 19).

'[13] The burden of proof lies on claimants to show that they meet the definition of a refugee. To do so, they must prove that they actually fear persecution and that their fear is "well founded." To establish a well-founded fear, refugee claimants must show that there is a

“reasonable chance,” a “serious possibility” or “more than a mere possibility” that they will be persecuted if returned to their country of nationality (*Adjei v Canada (Minister of Employment and Immigration)* [1989] 2 FC 680 (CA)). (By contrast, a person who claims to be in danger of being tortured, killed or subjected to cruel and unusual treatment must establish his or her claim on the balance of probabilities: *Li v Canada (Minister of Citizenship and Immigration)* [2005] 3 FCR 239 (FCA).) In respect of particular underlying facts, the claimant shoulders a burden of proof on the balance of probabilities (*Adjei*, above, at page 682).

‘[14] In most situations, decision makers are entitled to presume that states are able to protect their citizens (*Ward*, above). Justice La Forest, in *Ward*, stated for the Court: “Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens” (at page 725). The exception is where there has been a complete breakdown of a state’s apparatus (*Canada (Minister of Employment and Immigration) v Villafranca* (1992) 99 DLR (4th) 334 (FCA)).

‘[15] However, from my reading of the cases, the concept of the “presumption of state protection” does not mean that there is a higher burden of proof on claimants in cases involving the question of state protection. It simply means that, in those cases, claimants must tender reliable evidence on the point or risk failing to meet the definition of a refugee. In other words, the presumption is not a special hurdle that refugee claimants must overcome where the issue of state protection arises — rather, it simply establishes a starting point for analysing the well-foundedness of a claim.’ *Carrillo v Canada (Minister of Citizenship and Immigration)* [2008] 1 FCR 3, 2007 FC 320, [2007] FCJ No 439 at [10]–[15], per O’Reilly J (decision revsd *Carrillo v Canada (Minister of Citizenship and Immigration)* [2008] FCJ No 399, 2008 FCA 94, 69 Imm LR (3d) 309, FCA)

STATISTICAL SIGNIFICANCE

‘Statistical significance’ commonly means that the difference in the numbers between two groups, read in conjunction with the total numbers, is wide enough to discount the possibility that the difference may have resulted from chance. In adjudicative decisions, ‘statistical significance’ is usually an irrelevant fine line. (*Professor T G Ison*, 15 *Medico-legal Journal of Ireland* pp 6–15)

STATUTE

[For 44(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 1205–1211, 1212–1220 see now 96 Halsbury’s Laws of England (5th Edn) (2012) paras 606, 619–624, 625–633.]

Codifying statute

[For 44(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 1226 see now 96 Halsbury’s Laws of England (5th Edn) (2012) para 639.]

Consolidating statute

[For 44(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 1225 see now 96 Halsbury’s Laws of England (5th Edn) (2012) para 638.]

Penal statute

[For 44(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 1240 see now 96 Halsbury’s Laws of England (5th Edn) (2012) para 617.]

STATUTORY INSTRUMENT

[For 44(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 1503 see now 96 Halsbury’s Laws of England (5th Edn) (2012) para 1045.]

[See also the Statutory Instruments Act 1946, s 1(1A) (inserted by the Government of Wales Act 1998, s 125, Sch 12 para 2; and substituted by the Government of Wales Act 2006, s 160(1), Sch 10 paras 1, 2).]

STAY OF ENFORCEMENT

Australia [Foreign Judgments Act 1991 (Cth), s 15(2)] ‘[1] At issue in this appeal is whether s 15(2) of the Foreign Judgments Act 1991 (Cth) (the Foreign Judgments Act) prevents a judgment creditor of a bankrupt from obtaining a certificate under that Act to facilitate the enforcement of the judgment in a foreign jurisdiction. In particular, the issue is whether a “stay of enforcement” of a judgment within the meaning of s 15(2) of the Foreign Judgments Act is brought about by s 58(3) of the Bankruptcy Act 1966 (Cth) (the Bankruptcy Act).

...

‘[65] One must focus upon s 15(2) of the

Foreign Judgments Act to determine whether the prevention of the execution of a judgment brought about by s 58(3) of the Bankruptcy Act is a stay of enforcement within the meaning of s 15(2). The meaning of s 15(2) is to be determined by reference to considerations of text, context and purpose.

[66] In Commonwealth legislation, the use of the word “stay” is not confined to stays imposed by courts. It appears that, in addition to s 60(2) of the Bankruptcy Act, as Santamaria JA noted, s 91 of the Insurance Act 1973 (Cth), s 161 of the Life Insurance Act 1995 (Cth), s 189AAA of the Bankruptcy Act itself, s 16 of the Cross-Border Insolvency Act 2008 (Cth) and s 58DD of the Federal Court Act 1976 (Cth) are examples of stays which operate without judicial process. Finally, so far as the text of s 15(2) is concerned, the use of the word “any” in relation to “stay” is some, though perhaps not a decisive, indication of a legislative intention to comprehend any legal impediment to execution upon the judgment.

[67] ... The issue is not whether the expression “stay of enforcement of the judgment in question” in s 15(2) of the Foreign Judgments Act has the same meaning as the expressions “stay [of] legal process” in s 60(1)(b) or “stay” of an action in s 60(2) of the Bankruptcy Act. The issue is whether s 58(3)(a) of the Bankruptcy Act, by preventing the execution of the judgment in the 1998 Proceeding, has the effect of preventing the execution of the judgment for the purpose of s 15(2) of the Foreign Judgments Act.

[68] The evident purpose of s 15(2) is to prevent an application for a certificate which, if granted, would facilitate the enforcement by execution by a foreign legal system of a judgment which is not enforceable by execution under the law in Australia. In this regard, the Explanatory Memorandum for the Foreign Judgments Bill 1991 explained in cl 2 that the Bill was largely modelled on the Foreign Judgments (Reciprocal Enforcement) Ordinance 1954 (ACT), which was in turn substantially modelled on the Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK). The UK Act was the product of the work of the Foreign Judgments (Reciprocal Enforcement) Committee (“the Greer Committee”). In the Report of the Greer Committee in relation to a measure that was the precursor to s 15(2) of the Foreign Judgments Act, it was said that the certified copy of the British judgment was “not to be issued if *execution* has been stayed” (emphasis added).

[69] The “mischief” of concern to the

Committee was that a foreign court might be presented with a certified copy of a British judgment to be carried into execution by that foreign court in circumstances where the judgment could not be executed by a British court. The Committee’s Report did not suggest any reason to differentiate between a stay of execution effected by an order of a court and a stay imposed by statute in relation to the concern at which the measure was directed. And no such reason suggests itself. It is impossible to conceive of any good reason why a judgment that cannot lawfully be executed under Australian law should be allowed to be executed in another country at the behest of an Australian court.

[70] Given that the purpose of s 15(2) is to prevent the possibility of a foreign court acting upon a certificate to allow the execution of a judgment the execution of which would not be permitted under Australian law, there is no reason to distinguish between the case of a stay ordered by a court and a stay imposed by statute. It is not possible to attribute to s 15(2) an intention that a foreign court should enforce a judgment by execution which would not be permitted in Australia simply because the impediment to execution is brought about by statute rather than by an order of a court.

[71] The effect of s 58(3)(a) is to preclude a creditor from enforcing any remedy against “the person or the property of the bankrupt in respect of a provable debt”. One would naturally speak of the effect of s 58(3)(a) as a “stay” of enforcement by execution upon the judgment. To adopt the words of Denning J in describing the effect of a “stay of execution”, it prevents a creditor “from putting into operation the machinery of [the] law” [*Clifton Securities Ltd v Huntley* [1948] 2 All ER 283 at 284]. To remove s 58(3) from the reach of s 15(2) of the Foreign Judgments Act because it does not expressly refer to a “stay” would be to elevate form over substance without any justification.

[72] The reason a judgment creditor seeks to obtain certification under s 15(1) of the Foreign Judgments Act is so that steps can be taken to enforce the judgment in a foreign country. And once documents are issued under s 15(1), there is nothing in Australian law to prevent the certification being relied upon to take steps to enforce the Australian judgment in a foreign country. To exclude the operation of s 58(3) from the reach of s 15(2) of the Foreign Judgments Act would be to undermine “an essential feature” of the Bankruptcy Act—it would enable a judgment creditor to take individual action for the purpose of obtaining

payment of a debt due to them, thus obtaining an unfair advantage over other creditors.

‘[73] The respondents’ contention that s 58(3)(a) of the Bankruptcy Act is to be excluded from the reach of s 15(2) of the Foreign Judgments Act because s 58(3)(a) of the Bankruptcy Act would, itself, prevent action being taken by a judgment creditor in a foreign jurisdiction is also rejected. Section 15(2) of the Foreign Judgments Act is expressed to operate, and does operate, as an absolute bar to an application for a certificate. It neither requires nor permits the Registrar of an Australian court to undertake some assessment about the use to which the documents might be put in a foreign country by the judgment creditor or, as occurred here, by the authorities in that country.’ *Talacko (as appointed representative of the estate of Talacko) v Bennett* [2017] HCA 15, (2017) 343 ALR 242 at [1], [65]–[73], per Kiefel CJ, Bell, Keane, Gordon and Edelman JJ

STEP

[For 2(3) Halsbury’s Laws of England (4th Edn) (Reissue) para 20 see now 2 Halsbury’s Laws of England (5th Edn) (2017) para 521.]

STEP-GRANDCHILD

Canada ‘13. The Respondents argue that a dictionary definition of “step-child”, refers to the fact that this is a child of one of the spouses by a former marriage. This definition applies to Robert Watkins, as he is Rodney Carry’s stepchild, and therefore Ryan Watkins is Rodney Carry’s step-grandchild. However, while Cameron Blain Carry is the stepfather of the Freeman children, the Respondents take the position that it does not fall into place that the Freeman children are, by default, the step-grandchildren of Rodney Carry.

‘14. The Respondents submit that the Freeman children are not the deceased’s step-grandchildren since they are not the grandchildren of the deceased’s wife, and that is the distinguishing factor between them and Ryan Watkins.

‘15. In support of this position the Respondents cite *Matchett Estate* 2007 ABQB 785, 431 AR 384. In *Matchett*, the Court was trying to determine who the grandchildren of the testatrix were and in particular, whether the word grandchildren included step-grandchildren. The testatrix, Adele, at the time of making her Will had four biological grandchildren and five step-grandchildren.

Adele married a man name Frazier Matchett, who had two children of his own, Alex and Richard. These children became Adele’s step-children. Alex and Richard produced five children, who are referred to as Adele’s step-grandchildren.

‘16. The Respondents submit that this case accurately describes what they consider to be the true meaning of step-grandchild, which is the grandchildren of your second spouse.

‘17. In my view, the Court in *Matchett* is simply describing the claimants before it and, as there is no indication that any of Adele’s biological children had married a spouse who already had children, it is therefore impossible to say how the Court would have described them.

...

‘20. The Applicants position is that there is more than one way in which a person can become a step-grandchild. The first is the situation that Ryan Watkins is in. He is the child of Rodney’s stepson. The second way in which a person becomes a step-grandchild is the situation in which Danielle and Nathan find themselves. That is, they are the step children of Rodney Carry’s biological son, Cameron, therefore making them Rodney Carry’s step-grandchildren.

...

‘27. The parties are in agreement that Ryan Watkins meets the definition of step-grandchild. They disagree on whether or not the Freeman children should be included as step-grandchildren. Additionally, the parties, after searching the Canadian, Commonwealth and American authorities, could not find a single case where “step-grandchild” has been definitively defined.

‘28. The cases cited to me by counsel were cases where the court was being asked to include step-grandchildren in the definition of the word grandchild. In many cases the court agreed that a step-grandchild could be included in the definition of the word grandchild. However, Rodney Carry’s Will, section 11 specifically uses the words “step-grandchildren” and “step-grandchild”.

...

‘30. Section 11 expressly uses the word “step-grandchildren” implying that at the time of making the Will, Rodney Carry believed that he had more than one step-grandchild. Looking to the surrounding circumstances known to Rodney at the time of making the Will, it is clear that Rodney intended to include all three step-grandchildren. If Rodney had wanted to include only Ryan Watkins he could have used

the word “step-grandchild” or specifically referred to him by name. Instead, Rodney specifically included step-grandchildren, referring to his three step-grandchildren.

‘31. I do not accept that there is only one way to become a step-grandchild. The distinction that the Respondents are asking me to draw is arbitrary. There is no law in support of the suggestion that there is only one way that a person can become a step-grandchild.’ *Freeman v Carry* [2010] AJ No 425, 2010 ABQB 207, Alta QB, at paras 13–17, 20, 27–28, 30–31, per P M Clark J

STRANDING

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 349 see now 60 Halsbury’s Laws of England (5th Edn) (2011) para 340.]

STREET

[For 21 Halsbury’s Laws of England (4th Edn) (2004 Reissue) para 9 see now 55 Halsbury’s Laws of England (5th Edn) (2012) para 9.]

Private street

[For 21 Halsbury’s Laws of England (4th Edn) (2004 Reissue) para 10 see now 55 Halsbury’s Laws of England (5th Edn) (2012) para 10.]

STRIKE (STOPPAGE OF WORK)

[For 47 Halsbury’s Laws of England (4th Edn) (2001 Reissue) para 1502 see now 41 Halsbury’s Laws of England (5th Edn) (2009) para 1304.]

STRIKE OUT

[CPR 3.4(2) provides that the court may strike out a statement of case if it appears to the court that the statement of case is an abuse of the process of the court.] ‘[T]he expression “strike out” has a time-honoured use and is not apt to describe the decision that a judge makes at the end of the trial. At that stage, the judge either upholds the claim or dismisses it. He does not strike it out.’ *Ul-Haq v Shah* [2009] EWCA Civ 542, [2010] 1 All ER 73 at [29], per Smith LJ

STRUCTURE

[Landlord and Tenant Act 1985, s 11(1)(a). Landlord’s covenant to keep structure in repair;

damage to plasterwork of wall and ceiling of flat; whether plasterwork was part of ‘structure’.] ‘[25] For myself, whilst I would accept and adopt Mr Recorder Thayne Forbes’s observations [in *Irvine v Moran* [1991] 1 EGLR 261] as to the meaning of “the structure ... of the dwelling-house” as providing for present purposes, as Neuberger LJ put it, a good working definition, I am respectfully unconvinced by his holding that the plaster finish to an internal wall or ceiling is to be regarded as in the nature of a decorative finish rather than as forming part of the “structure”. In the days when lath and plaster ceiling and internal partition walls were more common than now, the plaster was, I should have thought, an essential part of the creation and shaping of the ceiling or partition wall, which serve to give a dwelling-house its essential appearance and shape. I would also regard plasterwork generally, including that applied to external walls, as being ordinarily in the nature of a smooth constructional finish to walls and ceilings, to which the decoration can then be applied, rather than a decorative finish in itself. I would therefore hold that it is part of the “structure”. I would accordingly accept that the wall and ceiling plaster in Ms Grand’s flat formed part of the “structure” of the flat for the repair of which Mr Gill was responsible.’

...

‘[34] I would not limit my reasoning, however, to cases where the wall or ceiling is of lath and plaster or similar construction. I agree that plaster as applied to even a solid wall or ceiling is not “in the nature of a decorative finish”, as Mr Recorder Thayne Forbes said, and that it is to be regarded as a part of the wall or ceiling upon or to which a decorative finish, of whatever kind, may be applied. Accordingly I would hold, as a general proposition, that plaster forming part of or applied to walls and ceilings is part of the structure of the relevant premises.’ *Grand v Gill* [2011] EWCA Civ 554, [2011] 3 All ER 1043 at [25], per Rimer LJ and at [34], per Lloyd LJ

Canada ‘[121] “Structure” means [TRANSLATION] “organization of the parts of a whole” (*Trésor de la langue française*); [TRANSLATION] “complex and extensive organization, considered in its essentials” (*Le Nouveau Petit Robert*).’ *Quebec (Attorney General) v Canada* [2008] 2 FCR 230, [2007] FCJ No 1086, 2007 FC 826 at [121], per Lemieux J

SUBJECT TO BE SENTENCED FOR ANY OFFENCE PUNISHABLE BY IMPRISONMENT

Australia ‘[1] Section 44(ii) of the Constitution relevantly provides:

“Any person who:

...

- (ii) ... has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer ...

shall be incapable of being chosen or of sitting as a senator ...”.

...

‘[4] In the reasons which follow, it will be explained that Senator Culleton was a person who had been convicted and was subject to be sentenced for an offence punishable by imprisonment for one year or longer at the date of the 2016 election. That was so, both as a matter of fact and as a matter of law. The subsequent annulment of the conviction had no effect on that state of affairs. It follows from s 44(ii) that Senator Culleton was “incapable of being chosen” as a Senator. In the result, there is a vacancy in the representation of Western Australia in the Senate for the place for which Senator Culleton was returned.

...

‘[32] Senator Culleton submitted that, even if the annulment did not operate retrospectively, he was not “subject to be sentenced ... for any offence punishable ... by imprisonment for one year or longer” at the time of the 2016 election. On behalf of Senator Culleton, it was argued that because Senator Culleton was convicted in absentia, the effect of s 25(1)(a) of the CSP Act [the Crimes (Sentencing Procedure) Act 1999 (NSW)] was that the Local Court could not make an order imposing a sentence of imprisonment on him because he was an “absent offender”.

‘[33] The argument advanced on Senator Culleton’s behalf proceeds on the erroneous assumption that because Senator Culleton was convicted in his absence, he acquired the status of an absent offender, an incident of which status was immunity from imprisonment. This argument cannot be accepted.

‘[34] Section 25(4) of the CSP Act provides that in s 25, the term “absent offender” means “an offender who is being dealt with in his or her absence.” The use of the present tense

indicates that whether or not a person is an absent offender for the purposes of s 25(1)(a) depends on whether the person is absent when being dealt with by the court.

‘[35] Whether or not Senator Culleton was, at any time, an absent offender depended on whether the court was dealing with him in his absence. Once he was present in court, whether in answer to the warrant issued for that purpose or otherwise, he was no longer an absent offender, and a punishment of imprisonment might lawfully be imposed on him.

‘[36] While Senator Culleton was not liable to be sentenced to imprisonment in his absence immediately upon the conviction being recorded on 2 March 2016, once the warrant issued on that day for his arrest, the processes of the law pursuant to which he might lawfully be sentenced to imprisonment were set in train. If those processes took their course, he would be present when sentenced, and so might lawfully be sentenced to a term of imprisonment without offending s 25(1)(a) of the CSP Act. It is not correct to say that at the time of the 2016 election he was not “subject to be sentenced”.’
Re Questions Referred to the Court of Disputed Returns Pursuant to Section 376 of the Commonwealth Electoral Act 1918 (Cth) Concerning Senator Rodney Norman Culleton (No 2) [2017] HCA 4, (2017) 341 ALR 1 at [1], [4], [32]–[36], per Kiefel, Bell, Gageler, Keane JJ

SUBORDINATE LEGISLATION

[For 44(1) Halsbury’s Laws of England (4th Edn) (Reissue) paras 1499–1500 see now 96 Halsbury’s Laws of England (5th Edn) (2012) paras 1030–1031.]

SUBROGATION

[For 16(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 770 see now 47 Halsbury’s Laws of England (5th Edn) (2014) para 207.]

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 490 see now 60 Halsbury’s Laws of England (5th Edn) (2011) para 216.]

SUBSTANTIAL PART

Canada [Copyright Act, RSC 1985, c C-42, s 35. Unauthorised reproduction of a substantial part of an original work constitutes copyright infringement.] ‘26. A substantial part of a work

is a flexible notion. It is a matter of fact and degree. “Whether a part is substantial must be decided by its quality rather than its quantity”: *Ladbroke (Football), Ltd. v. William Hill (Football), Ltd.*, [1964] 1 All E.R. 465 (H.L.), at p. 481, *per* Lord Pearce. What constitutes a substantial part is determined in relation to the originality of the work that warrants the protection of the *Copyright Act*. As a general proposition, a substantial part of a work is a part of the work that represents a substantial portion of the author’s skill and judgment expressed therein.

‘27. A substantial part of a work is not limited to the words on the page or the brushstrokes on the canvas. The Act protects authors against both literal and non-literal copying, so long as the copied material forms a substantial part of the infringed work. As the House of Lords put it,

the “part” which is regarded as substantial can be a feature or combination of features of the work, abstracted from it rather than forming a discrete part [T]he original elements in the plot of a play or novel may be a substantial part, so that copyright may be infringed by a work which does not reproduce a single sentence of the original.

(*Designers Guild Ltd. v. Russell Williams (Textiles) Ltd.*, [2001] 1 All E.R. 700, at p. 706, *per* Lord Hoffmann; see also *Nichols v. Universal Pictures Corporation*, 45 F.2d 119 (2d Cir. 1930), *per* Learned Hand J.)

‘28. The need to strike an appropriate balance between giving protection to the skill and judgment exercised by authors in the expression of their ideas, on the one hand, and leaving ideas and elements from the public domain free for all to draw upon, on the other, forms the background against which the arguments of the parties must be considered.

‘51. In my view, the perspective of a lay person in the intended audience for the works at issue is a useful one. It has the merit of keeping the analysis of similarities concrete and grounded in the works themselves, rather than in esoteric theories about the works. However, the question always remains whether a substantial part of the plaintiff’s work was copied. This question should be answered from the perspective of a person whose senses and knowledge allow him or her to fully assess and appreciate all relevant aspects—patent and latent—of the works at issue. In some cases, it may be necessary to go beyond the perspective of a lay

person in the intended audience for the work, and to call upon an expert to place the trial judge in the shoes of “someone reasonably versed in the relevant art or technology”: Vaver [D. Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2nd ed. 2011)], at p. 187.

‘52. To take an example, two pieces of classical music may, to the untrained ear, sound different, perhaps because they are played on different instruments, or at different tempos. An expert musician, however, might see similarities suggesting a substantial part has been copied—the same key signature, the same arrangement of the notes in recurring passages, or a recurrent and unusual harmonic chord. It will be for the judge to determine whether the similarities establish copying of a substantial part, to be sure. But in making that determination, the judge may need to consider not only how the work sounds to the lay person in the intended audience, but also structural similarities that only an expert can detect.

‘53. In the present case, the necessity criterion of the test for the admissibility of expert evidence is satisfied. First, the works at issue are intended for an audience of young children. A rigid application of the “lay person in the intended audience” standard would unduly restrict the court’s ability to answer the central question, namely whether a substantial part of Robinson’s work was copied. It would shift the question to whether the copied features are apparent to a five-year-old.

‘54. Second, the nature of the works at issue makes them difficult to compare. The trial judge was faced with the task of comparing a sprawling unrealized submission for a television show to a finished product that had aired on television. These are not works that are easily amenable to a side-by-side visual comparison conducted by a judge without the assistance of an expert.

‘55. Finally, the works at issue had both patent and latent similarities. Or, as Dr. Perraton explained it, they shared “perceptible” and “intelligible” similarities. “Perceptible” similarities are those that can be directly observed, whereas “intelligible” similarities — such as atmosphere, dynamics, motifs, and structure — affect a viewer’s experience of the work indirectly. Expert evidence was necessary to assist the trial judge in distilling and comparing the “intelligible” aspects of the works at issue, which he would not otherwise appreciate. Consequently, the trial judge did not err in admitting the expert evidence of Dr. Perraton.’ *Cinar Corp v Robinson* 2013 SCC 73, [2013] 3

SCR 1168 at paras 26–28, 51–55, per McLachlin CJ

SUBSTANTIAL PROPORTION

Australia [Corporations Act 2001 (Cth), s 631(2): ‘A person must not publicly propose, either alone or with other persons, to make a takeover bid if ... (b) the person is reckless as to whether they will be able to perform their obligations relating to the takeover bid if a substantial proportion of the offers under the bid are accepted.’] [280] Section 631(2)(b) requires consideration as to whether a person is reckless in relation to their ability to perform their obligations “if a substantial proportion of the offers under the bid are accepted”.

[281] What is a “substantial proportion” of the offers? This is a tricky issue in the case. The word “substantial” and the phrase “substantial proportion” are not defined.

[282] ASIC has been prepared to accept that “substantial proportion” can mean less than 50 per cent. For example, ASIC has referred to 30% as potentially constituting a substantial proportion. Indeed, on one of its calculations it assumes that 14.12% can be a substantial proportion (being $100/708 \times 100$). But its concession seems to be based on the notion that an offer is made to a shareholder(s) and that a single offer to a shareholder may embrace all its shares. So, acceptance of a modest percentage of offers, if the acceptances were by say the top 10 shareholders, might pick up the vast number of issued shares. So, one might have a very modest percentage as a “substantial proportion”, yet embrace the vast majority of the issued shares.

[283] The term “substantial” has various shades of meaning depending on the context in which it is used. It may mean real or of substance as distinct from ephemeral or nominal. Alternatively, it may mean “large or weighty”. The defendants contend for the former construction. ASIC contends for the latter construction. ...

...
[305] ...[I]n my view, in context, “substantial proportion” means sizeable or large, rather than merely real or of substance. That is consistent with the text, context and purpose of s 631(2) and as informed by the legislative history. I reject the defendants’ submissions to the contrary.’ *Australian Securities and Investments Commission v Mariner Corporation Ltd* (ACN 002 989 782) [2015] FCA 589, (2015) 327 ALR 95 at [280]–[283], [305], per Beach J

SUBSTANTIAL REASON

Australia [83] In *McGinty [v Western Australia]* (1996) 186 CLR 140 at 170, 134 ALR 289 at 296, [1995] HCA 46] Brennan CJ considered the phrase “chosen by the people” [in the Commonwealth Constitution ss 7, 24] as admitting of a requirement “of a franchise that is held generally by all adults or all adult citizens unless there be substantial reasons for excluding them”. This proposition reflects the understanding that representative government as that notion is understood in the Australian constitutional context comprehends not only the bringing of concerns and grievances to the attention of legislators but also the presence of a voice in the selection of those legislators. Further, in the federal system established and maintained by the Constitution, the exercise of the franchise is the means by which those living under that system of government participate in the selection of both legislative chambers, as one of the people of the relevant state and as one of the people of the Commonwealth. In this way, the existence and exercise of the franchise reflects notions of citizenship and membership of the Australian federal body politic.

[84] Such notions are not extinguished by the mere fact of imprisonment. Prisoners who are citizens and members of the Australian community remain so. Their interest in, and duty to, their society and its governance survives incarceration. Indeed, upon one view, the Constitution envisages their ongoing obligations to the body politic to which, in due course, the overwhelming majority of them will be returned following completion of their sentence.

[85] The question with respect to legislative disqualification from what otherwise is adult suffrage (where 18 is now the age of legal majority throughout Australia) thus becomes a not unfamiliar one. Is the disqualification for a “substantial” reason? A reason will answer that description if it be reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government. When used here the phrase “reasonably appropriate and adapted” does not mean “essential” or “unavoidable”. Rather, as remarked in *Lange [v Australian Broadcasting Corp]* (1997) 189 CLR 520, 145 ALR 96, [1997] HCA 25], in this context there is little difference between what is conveyed by that phrase and the notion of “proportionality”. What upon close scrutiny is disproportionate or arbitrary may not answer to the description reasonably appropriate and

adapted for an end consistent or compatible with observance of the relevant constitutional restraint upon legislative power.’ *Roach v Electoral Comr* [2007] HCA 43, (2007) 239 ALR 1, BC200708182 at [83]–[85], per Gummow, Kirby and Crennan JJ

SUBSTANTIALLY DETERMINED, CONTROLLED OR SUGGESTED BY THE FRANCHISOR

Australia [Franchising Code of Conduct, cl 4(1)(b): a franchise agreement is an agreement... in which a person (*the franchisor*) grants to another person (*the franchisee*) the right to carry on the business of offering, supplying or distributing goods or services in Australia under a system or marketing plan substantially determined, controlled or suggested by the franchisor or an associate of the franchisor.] ‘[173] In the ordinary course, whether a system or marketing plan is “substantially determined, controlled or suggested by the franchisor” is closely related to whether there is a scheme or marketing plan at all. Matters relevant to determination, control or suggestion may include: the extent to which the franchisee’s business involves the sale of the franchisor’s goods and services; the degree to which the franchisor assumes responsibility for some centralised management and for uniform standards regarding quality; whether or not the franchisor places the franchisee under an obligation with respect to advertising and promotional campaigns; and the extent to which the franchisor controls the franchisee’s business, having regard to advertising and financial support, auditing of books, inspection of premises, hiring of staff, sales quotas, management training and the like.’ *Rafferty v Madgwicks* [2012] FCAFC 37, (2012) 287 ALR 437 at [173], per Kenny, Stone and Logan JJ

SUBSTANTIALLY IMPAIRED

[Homicide Act 1957, s 2(1)(b): diminished responsibility.] ‘[7] [T]he expression “substantially impaired” has been carried forward from the old Act into its new form. But whereas previously it governed a single question of “mental responsibility”, now it governs the ability to do one or more of three specific things, to understand the nature of one’s acts, to form a rational judgment and to exercise self-control. Those abilities were frequently the focus of trials before the re-formulation of the law. But previously, the question for the jury as

to “mental responsibility” was a global one, partly a matter of capacity and partly a matter of moral culpability, both including, additionally, consideration of the extent of any causal link between the condition and the killing. Now, although there is a single verdict, the process is more explicitly structured. The jury needs to address successive specific questions about (1) impairment of particular abilities and (2) cause of behaviour in killing. Both are of course relevant to moral culpability, but the jury is not left the same general “mental responsibility” question that previously it was. The word used to describe the level of impairment is, however, the same.

...
[‘27] The admirably concise submissions of Mr Etherington QC for the appellant correctly point out that as a matter simply of dictionary definition, “substantial” is capable of meaning either (1) “present rather than illusory or fanciful, thus having some substance” or (2) “important or weighty”, as in “a substantial meal” or “a substantial salary”. The first meaning could fairly be paraphrased as “having any effect more than the merely trivial”, whereas the second meaning cannot. It is also clear that either sense may be used in law making. In the context of disability discrimination, the Equality Act 2010 defines disability in s 6 as an impairment which has a substantial and long-term effect on day to day activities, and by the interpretation section, s 212, provides that “ ‘Substantial’ means more than minor or trivial”. It thus uses the word in the first sense. Conversely, the expression “significant and substantial” when used to identify which breaches by the police of the Codes of Practice under the Police and Criminal Evidence Act 1984 will lead to the exclusion of evidence (see for example *R v Absolam* (1988) 88 Cr App Rep 332 and *R v Keenan* [1989] 3 All ER 598, [1990] 2 QB 54) is undoubtedly used in the second sense. It is to be accepted that the word may take its meaning from its context. It is not surprising that in the context of triggering a duty to make reasonable adjustments to assist the disabled, the first sense should be used by the Equality Act; the extent of adjustments required varies with the level of disability and a wide spectrum of both is to be expected. Mr Etherington additionally submits that this usage shows that the first sense does not entirely strip the word “substantially” of meaning.

‘[28] The foregoing review of the authorities clearly shows that in the context of diminished responsibility the expression “substantially” has always been held, when the issue has been

confronted, to be used in the second of the senses identified above.

[29] True it is that in *Lloyd* [*R v Lloyd* [1966] 1 All ER 107n, [1967] 1 QB 175] Edmund-Davies J observed that that word had been put into the 1957 Homicide Act with a view to it carrying some meaning. If by that he meant that it could have no purpose at all unless it was used in the second sense above, the Equality Act usage may suggest otherwise, although even without the word “substantially” it is perhaps open to doubt that a merely trivial effect would be taken to be included either in “impairment” or in “disability”. But this does not alter the central thrust of the decision in *Lloyd*, which was that in the context of diminished responsibility an impairment of consequence or weight is what is required to reduce murder to manslaughter, and not any impairment which is greater than merely trivial.

[30] There is no basis for thinking that when the same expression was carried forward into the new formulation of diminished responsibility any change of sense was intended. The adverb “substantially” is applied now, as before, to the verb “impaired”. In the absence of any indication to the contrary, Parliament is to be taken to have adopted the established sense in which this word has been used for 50 years.

[39] The sense in which “substantially impaired” is used in relation to diminished responsibility is, for the reasons set out above, the second of the two senses. It is not synonymous with “anything more than merely trivial impairment”. *R v Golds* [2016] UKSC 61, [2017] 1 All ER 1055 at [7], [27]–[30], [39], per Lord Hughes

SUCH SUM AS IS AT THE DATE OF MY DEATH THE AMOUNT OF MY UNUSED NIL-RATE BAND FOR INHERITANCE TAX

[Clause 5 of will provided for the trustees to set aside out of residuary estate ‘assets or cash of an aggregate value equal to such sum as is at the date of my death the amount of my unused nil rate band for Inheritance Tax and to hold the same’ for named beneficiaries.] [4] An issue has arisen as to the amount of the gift comprised within cl 5. The point arises because the testatrix survived her husband and as a result of s 8A of the Inheritance Tax Act 1984 (the 1984 Act), her personal representatives were able to claim for her nil rate band to be increased by the unused nil rate band of her spouse. Mr Smith

died on 4 April 1984 with a nil rate band which was entirely unused. The claimants therefore contend that the amount that passes under cl 5 of the will is not just the level of a single unused nil rate as set out in Sch 1 to the 1984 Act which as at the date of the testatrix’s death was £325,000 but that amount increased to £650,000 as a result of the election made after the death by the personal representatives pursuant to s 8A of the Act. There is no dispute but that the appropriate claim was made within the two-year period and has been accepted by Her Majesty’s Revenue and Customs.

[5] The question of construction which arises therefore is whether as a result of that successful claim the reference to, “such sum as is at the date of my death the amount of my unused nil rate band for inheritance tax purposes” in cl 5 operates so as to pass £325,000 or £650,000 to the beneficiaries who are the members of the testatrix’s family.

[26] Having considered the will as a whole and examined the language of cl 5 in that context and giving those words their ordinary meaning taking account of the relevant background which informed the meaning of the words used, it seems to me that cl 5 should be construed in the manner contended for by the claimants. In my judgment, the natural meaning of the words, “such sum as is at the date of my death the amount of my unused nil rate band for Inheritance Tax” includes an increase to that unused nil rate band which arises as a result of an election and retrospective increase in accordance with s 8A(3). Not only is the statute clear that the effect of a successful claim is retrospective, but also that the effect is that the nil rate band maximum at the time of the survivor’s death is treated as “increased” as at that date. There is no question of any addition or transfer as might appear from the heading of that section, nor is there any question of the increase taking effect other than as at the date of the death.

[27] Accordingly, in my judgment it is of no consequence that the increase arises as a result of an election made at the discretion of the personal representatives after the death. Nor in my judgment does the reference in cl 5 to, “my nil rate band” indicate that the increase is not included. In fact, it seems to me that the use of, “my” has the opposite result. It is the testatrix’s nil rate band or to be precise, the nil rate band maximum which is increased from the date of her death and no one else’s. *Loring v Woodland Trust* [2013] EWHC 4400 (Ch), [2014] 2 All ER 836 at [4]–[5], [26]–[27], per Asplin J

SUE

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

SUFFERED ... IN AN ACCIDENT

Canada [Automobile Insurance Act, CQLR, c A-25: compensation paid in respect of bodily injury ‘suffered ... in an accident’.] ‘4. The basic question in the appeals is whether a person injured in an automobile accident who is eligible to receive compensation under the Act but whose condition is aggravated as a result of a fault committed by a third party can bring a civil action against the third party to seek compensation for bodily injury resulting from that subsequent fault. In other words, the Court must determine the scope of the no-fault scheme under which compensation is paid in respect of bodily injury “suffered ... in an accident” within the meaning of the Act. It must at the same time rule on the corollary to that scheme, namely the prohibition against any civil action where compensation is paid under the Act in respect of the injury in question (s 83.57 of the Act).

...

‘6. For the reasons that follow, I am of the view that the additional bodily injury suffered by Ms Godbout and by Mr Gargantiel, for which they are seeking reparation from the respondents, is an injury “suffered ... in an accident” within the meaning of the Act. As a result, they are entitled to the compensation provided for in the Act but are not entitled to bring further civil liability proceedings against the respondents in order to obtain additional or complementary compensation. I would therefore dismiss the appeals.

...

‘27. The appeals actually raise the following question: Were the injuries suffered by Ms Godbout and by Mr Gargantiel “suffered ... in an accident” within the meaning of the Act (“*causé dans un accident*” in the French version of the Act)? The difficulty in construing the word “*causé*” (caused) used in the French version of the Act in the context of the specific scheme of the Act stems mainly from its evocation of conceptions of causation that apply in the law of civil liability under the *Civil Code of Québec*. If the answer to this question is yes, which it will be in these appeals, then there is no need to consider the faults committed by the third parties who were involved in the accidents or in the injuries that resulted from those faults. In such a case, the victim can turn only to the

SAAQ for compensation for the whole of the bodily injury “suffered ... in an [automobile] accident”.

‘28. In light of the context of the enactment of the Act and the legislature’s intent, on the one hand, and the principles applicable to the interpretation of the Act, on the other, I am of the opinion that the appropriate causal link in the context of the compensation scheme established by the Act cannot be the same as or be derived from the one that prevails in the general law of civil liability: it is *sui generis* in nature. It must be given a large and liberal interpretation that will further the Act’s purpose, although that interpretation must also be plausible and logical. Whether such a link exists is primarily a question of logic and fact, and depends on the circumstances of each case. The appropriate causal link in the context of the Act is of course not as strong as the one that applies in the law of civil liability. We must therefore refrain from borrowing from concepts associated with the traditional form of causality, such as the distinction between the occasion and cause of the injury. For the purposes of the Act, it will be enough to establish a sufficiently close link between the bodily injury and the automobile accident; in contrast, a fortuitous connection will not suffice. Although this causal link has been expressed in different ways in the case law, it has been applied the same way in most of the judicial and tribunal decisions rendered since the Act came into force in 1978.

...

‘70. In light of the above analysis, I find that the Court of Appeal did not err in interpreting the language of the Act—including that with respect to the necessary causal link—and applying it to the facts of these appeals. In the two cases, the bodily injury that—according to the facts, which must be assumed to be true at this stage—resulted from the fault or negligence of third parties was suffered in the automobile accidents of which Ms Godbout and Mr Gargantiel were the victims. It originated in a series of events that have a plausible, logical and sufficiently close link to one another and have, in each case, the automobile accident as their starting point.’ *Godbout v Pagé* [2017] SCJ No 18, 2017 SCC 18 at paras 4, 6, 27–28, 70, per Wagner J

SUFFICIENT

Sufficient consideration

Australia [Whether the expression “sufficient consideration”, as it occurs in the Confiscation

Act 1997 (Vic), s 52(1)(a)(v), includes the consideration of “natural love and affection”.] [60] If property is forfeited under s 35, s 51 permits a person (other than the defendant) who claims an interest in such property to make an application for an exclusion order within 60 days or otherwise with the leave of the court. The application is for “an order under s 52” which provides for “an order excluding property in which the applicant claims an interest from the operation of s 35”. Section 52 contains the conditions for the grant of such an order ...

...
[103] Because the wife obtained her joint interest in the apartment from her husband, she had to satisfy the court that her interest was acquired for “sufficient consideration”. This expression, which occurs in s 52(1)(a)(v) (and also in s 52(1)(b)(ii) and in ss 21, 22, 24, 50 and 54), is not defined in the Act.

[104] The DPP submitted that the policy of the Act is to ensure that criminals, their associates and dependants forfeit the proceeds of crime. It was contended that the policy supported the submission that “sufficient consideration” means “adequate consideration”, which in turn means money or money’s worth. Otherwise, it was contended, criminals could subvert the Act by transferring property to a spouse, partner, child or other relative in order to put the property beyond the reach of the Act. Analogies with bankruptcy legislation and cognate confiscation legislation in other jurisdictions were also relied upon.

[105] The wife sought to sustain the conclusion of all members of the Court of Appeal that “sufficient consideration” includes “valuable consideration” and “good consideration” but not “nominal consideration”.

[106] The general obligations or duties of support owed by married couples to each other, reaffirmed recently in the United Kingdom, often entail legal and equitable joint ownership of marital property such as the matrimonial home. This gives rise to a separate point. In finding that the husband’s transfer to the wife of a “moiety” of his interest in the real property “was no more than fulfilling a matrimonial obligation”, the primary judge treated “natural love and affection” as adequate consideration in all the circumstances of this case.

[107] This court has recognised that consideration may have different meanings in different contexts, and that it has a wider meaning or operation in conveyancing than it does in simple contracts. The “wider” meaning is that in conveyancing consideration is not

treated as requiring consideration sufficient to support a contract.

[108] Speaking generally, and without reference to exceptions, a promise will not be legally binding unless made in a deed or supported by consideration. As Professor Treitel states [G H Treitel, *The Law of Contract*, 11th ed, Sweet & Maxwell, London, 2003, p 67]:

This doctrine [of consideration] is based on the idea of reciprocity: “something of value in the eye of the law” must be given for a promise in order to make it enforceable as contract. [Footnote omitted.]

[109] Because consideration of “natural love and affection” is commonly referred to in deeds of gift or voluntary settlements, a reference to the phrase “strongly suggests a gift” [*Man-sukhani v Sharkey* [1992] 2 EGLR 105 at 106 per Fox LJ]. There are older cases in which it was recognised that “natural love and affection” was not “sufficient consideration” to ground an assumpsit, although it was sufficient to raise a use.

[110] While natural love and affection may not be sufficient consideration to support a contract, it is settled that, at common law, “[a]n antenuptial agreement to settle property in consideration of marriage is backed by good consideration, and may be specifically enforced by the husband, wife and issue of the marriage” [R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies*, 4th ed, 2002, Lexis-Nexis, Sydney, p 654 [20–025] citing *Re Cook’s Settlement Trusts* [1965] Ch 902 at 915–916, [1964] 3 All ER 898 at 904. See also *Attorney-General v Jacobs Smith* [1895] 2 QB 341 at 353 per Kay LJ].

[111] The situation is more complicated in relation to post-nuptial settlements of property, although some post-nuptial promises have been considered to constitute “valuable consideration” or “good consideration”.

[112] Marriage has long been considered “valuable consideration” in the specific context of conveyancing. The principle has been given statutory force and has been reconfirmed on many occasions. In the factual circumstances of the present case, where Mr Le and the wife were married, it is unnecessary to explore the extent to which, in contemporary social circumstances, that learning applies to other marriage-like relationships.

[113] The phrase “sufficient consideration” generally means legally sufficient to enforce a promise; it is specifically defined in a number of

cognate acts to exclude certain forms of consideration which, otherwise, might have been thought sufficient.

[114] In the Court of Appeal, Maxwell P and Chernov JA (with whom Neave JA agreed on this point) noted:

[41] The term "sufficient consideration" is not defined in the Act, although courts have sometimes used it as a synonym for adequate or "valuable" consideration. Thus, for example, in describing as "sufficient" the valuable consideration given by the promisee in *Wigan*, Mason J meant no more than that the consideration was adequate to impose on the promisor an enforceable obligation. [Footnote omitted.]

[115] While the courts have at times used the terms "valuable consideration" and "sufficient consideration" interchangeably, it seems well recognised in the context of contract law that the term "sufficient consideration" can be contradistinguished from the term "adequate consideration", as noted by Professors Carter and Harland [J W Carter and D J Harland, *Contract Law in Australia*, 4th ed, Butterworths, Sydney, 2002, p 112 [323]]:

The rule that consideration must be sufficient requires that what is put forward as consideration reach a threshold of legal recognition. But once this threshold is reached no inquiry is required into how valuable the consideration is. Thus, the rule is frequently expressed in the form "consideration must be sufficient but need not be adequate".

[116] Similarly, Dr Robinson notes that "valuable consideration" has a particular meaning when used in contradistinction to "good consideration" [S Robinson, *The Property Law Act Victoria*, Law Book Co, Sydney, 1992, p 408]:

Formerly no distinction was drawn between "valuable consideration" and "good consideration"... However when contrasted with "valuable consideration", the expression "good consideration" generally means natural affection towards a member of the settlor's family. [Footnote omitted.]

[117] In support of the submission that "sufficient consideration" in this Act should be construed as "adequate", which would mean money's worth, the DPP submitted that the policy considerations underpinning the Act were

more closely aligned with policy considerations relevant to the Bankruptcy Act 1966 (Cth) than they were with policy considerations informing stamp duties and similar legislation. Particular reliance was placed on s 121 of the Bankruptcy Act as it stood prior to its amendment in 1996. That provided that a disposition which was not "for valuable consideration" was void against the trustee in bankruptcy. Section 121(1) was construed in *Cannane v J Cannane Pty Ltd (in liq)* [(1998) 192 CLR 557 at 573 [37], 153 ALR 163 at 173-174, 27 ACSR 603 at 613-614, [1998] HCA 26 per Gummow J] in the light of the principle that fraudulent dispositions made for the purpose of delaying creditors should be set aside. The principle derived from the Statute of Elizabeth (13 Eliz I c 5), which was enacted in 1570. Bankruptcy provided a special context in which "valuable consideration" was construed as consisting of "real and substantial value, and not [consideration] which is merely nominal or trivial or colourable" [*Re Abbott* [1983] Ch 45 at 57, [1982] 3 All ER 181 at 186-187 per Sir Robert Megarry V-C]. By way of contrast, the legislation under consideration in this appeal is relatively new. An applicant for an exclusion order must satisfy a court of his or her non-involvement with criminal conduct before an exclusion order will even be considered. Further, like cognate confiscation provisions, s 121(6)(d) of the Bankruptcy Act as it currently stands expressly provides that "love or affection" has no value as consideration.

[118] The DPP also urged that "sufficient consideration" should be construed in conformity with cognate statutes in other jurisdictions, which reflect similar policy considerations.

[119] In *New South Wales Crime Commission v Mahoney* [(2003) 142 A Crim R 409 at 419 [52], [2003] NSWSC 1030], Grove J construed the term "sufficient consideration" as it appears in s 9(5) of the Criminal Assets Recovery Act 1990 (NSW) as requiring "adequacy... that is to say, something more than nominal". However, it should be noted that that Act expressly provides [s 4(2)] that:

- (2) A reference in this Act to acquiring an interest in property for sufficient consideration is a reference to acquiring the interest for a consideration that, having regard solely to commercial considerations, reflects the value of the interest.

[120] Legislation of the Commonwealth dealing with the proceeds of crime [the Proceeds of Crime Act 2002 (Cth), s 338]

specifically provides that whether or not there has been “sufficient consideration” is to be assessed “having regard solely to commercial considerations”.

[121] The provisions of s 52(1)(a)(i)–(v) inclusive, operating together, support the policy considerations identified by the DPP. They ensure that in circumstances such as those here, an exclusion order will only be made in favour of an applicant found innocent of any involvement in the commission of a Sch 2 offence and found to have no knowledge of circumstances leading to a property being “tainted property”.

[122] Given that “natural love and affection” is “sufficient consideration” for conveying purposes, and given the mutual obligations of support of spouses, if a purpose of the legislation is to provide for the forfeiture of a joint interest in real property of an innocent spouse (who acquired the interest as the wife did here), that would need to be expressly provided. As mentioned above, there are express provisions in cognate legislation, and in s 4(3) of the Confiscation Amendment Act 2007 (Vic), which define “sufficient consideration” to exclude “love and affection”.

[123] In the absence of an express limitation on the meaning of sufficient consideration, the legislative history of the Act “is of insufficient weight... to displace the considerations of justice and fairness which ordinarily attend the administration of a new remedy” [*Mansfield v DPP (WA)* (2006) 226 CLR 486 at 497 [27], 228 ALR 214 at 221, [2006] HCA 38 per Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ].

[124] The Court of Appeal did not err in construing “sufficient consideration”, as it occurred in s 52(1)(a)(v), as encompassing “natural love and affection” in the circumstances of this case.’ *Director of Public Prosecutions (Vic) v Le* [2007] HCA 52, (2007) 240 ALR 204, BC200709716 at [60], [103]–[124], per Kirby and Crennan JJ

Sufficient importance

Canada [Under the Supreme Court Act 1985, s 40(1), an appeal lies to the Supreme Court from certain lower courts where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be

decided by the Supreme Court.] ‘1. The applicant Crown applies for leave to appeal from an order of the Ontario Court of Appeal granting the respondent an extension of time to serve and file his notice of appeal. As a question about the Court’s jurisdiction to grant leave was raised, this Court ordered an oral hearing. I would dismiss the application for leave to appeal as it raises no question of sufficient importance within the meaning of s 40(1) of the Supreme Court Act, RSC 1985, c S-26. Our review of the jurisprudence reveals that the courts of appeal recognize that there are narrow circumstances where a court can reconsider the decision of a judge sitting alone. We are not persuaded from the record that guidance is required on this question or that the circumstances of this case warrant granting the application.

...
‘3. ... Jurisdiction to grant leave under s 40(1) extends to any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province in which judgment can be had in the particular case. On its face, this language is broad enough to include the order which is the subject of this leave application, subject of course to the requirement that the question involved in the case be of sufficient importance. This conclusion is reinforced by the expansive definition of “judgment” in s 2 of the Act. I note that while s 40(3) of the Act, read in conjunction with ss 691–693 of the Criminal Code, RSC 1985, c C-46, excludes many criminal appeals from the ambit of s 40(1), the present application is not so excluded.

...
‘12. I conclude that under s 40(1) of the Act, the Court has jurisdiction to grant leave to appeal from an order “of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case” refusing or granting an extension of time to an appellant in an indictable appeal and that the order from which leave to appeal is sought is such an order. However, I would emphasize that the existence of this jurisdiction does not in any way alter the test applicable under s 40(1), namely that the question “is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reasons, of such a nature or significance as to warrant decision by it”. It seems to me that only in very rare circumstances would a proposed appeal

from an order granting an extension of time for appealing meet this test.’ *R v Shea* [2010] SCJ No 26, [2010] ACS No 26, 2010 SCC 26 at paras 1, 3, 12, per Cromwell J

SUPERIOR COURT OF RECORD

[The Special Immigration Appeals Commission Act 1997, s 1(3) provides that ‘[SIAC] shall be a superior court of record’ and the Tribunals, Courts and Enforcement Act 2007, s 3(5) provides that ‘[UT] is to be a superior court of record.’] ‘[72]... Some courts are liable to judicial review and some are not, in most cases because some courts possess only a limited jurisdiction and some do not. Unreviewable courts of limited jurisdiction are exceptional. It is true that beneath this apparently simple position there lie some taxing complexities; however the considerations I have here set out are sufficient to refute the defendants’ reliance on s 1(3) of the 1997 Act and s 3(5) of the 2007 Act as excluding the judicial review jurisdiction by force of the legislation’s reference to “superior court of record”. The books demonstrate that despite the usage in some of the cases, this expression cannot be taken to delineate, in principle, those courts which are immune from judicial review.

...
 ‘[74] There are two points by way of postscript to this discussion of the superior/inferior dichotomy. First, I have not forgotten the argument advanced by Mr Drabble QC for Mr Cart that the expression “superior court of record” is an English legal term, which has not been recognised by the Scottish courts as having any legal significance. Accordingly the use of the term “superior court of record” in s 3(5) cannot have been intended to exclude the possibility of judicial review in Scotland; and in that case, it cannot have been intended to exclude that possibility in England and Wales, and Northern Ireland, either. I think this argument very doubtful, despite its elegance. It amounts to the assertion that s 3(5) is meaningless in Scotland and must therefore be meaningless altogether. In the debate on the Constitutional Reform Bill in the House of Lords a similar point was taken (in relation to the Supreme Court). The government spokesman observed that, in dealing with United Kingdom-wide legislation, “well established legislative drafting practice is not to disapply for one system of law provisions which clearly relate only to another”. In view of my other conclusions I do not find it necessary to decide

this point raised by Mr Drabble; had it stood alone, however, I think it highly unlikely that it would have carried the day.

‘[75] The second postscript recalls my observation (at [41]) that the expression “superior court of record” denotes characteristics which Parliament by means of ss 1(3) and 3(5) may be taken to have attributed to SIAC and UT. One such characteristic is that SIAC and UT will be presumed to act within their powers until the contrary is shown ... A second attribute of a superior court of record appears to be that its decisions have effect as precedents for lower tribunals. This is no doubt because of the record it keeps. (Originally, a court of record was one whose acts and proceedings were enrolled in parchment.) Thirdly, such a court has power to punish for contempt: see for example *Ex p Fernandez* (1861) 10 CBNS 3 at 57–58, 142 ER 349 at 370–371 per Byles J. Thus my conclusion that ss 1(3) and 3(5) do not have effect to exclude the supervisory jurisdiction by no means deprives the subsections of content.’ *R (on the application of Cart) v Upper Tribunal (Secretary of State for Justice and another, interested parties)* (Public Law Project, intervening) [2009] EWHC 3052 (Admin), [2010] 1 All ER 908 at [72], [74]–[75], per Laws LJ

SUPERIOR COURTS

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

SUPPLY

Australia [A New Tax System (Goods and Services Tax) Act 1999 (Cth), s 9–10; A New Tax System (Goods and Services Tax) Regulations 1999 (Cth), Div 40.] ‘[14] Section 9–10(1) provides that a “supply is any form of supply whatsoever”. Section 9–10(2) amplifies the already general provision of s 9–10(1) by providing that “[w]ithout limiting subsection (1), supply includes” any of a number of specified matters, including “(f) a financial supply”.

‘[15] Section 9–10(4) deals separately with a supply of money. It provides that: “However, a supply does not include a supply of money unless the money is provided as consideration for a supply that is a supply of money”. “[M]oney” is defined in s 195–1 as including “currency (whether of Australia or of any other country)” and “any negotiable instrument used or circulated, or intended for use or circulation, as currency (whether of Australia or of any

other country)". The exceptions to the definition of "money" (which include such things as collectors' pieces, investment articles and items of numismatic interest) may be put aside as irrelevant for present purposes. A sale of foreign currency falls within the "unless" clause in s 9–10(4). In such a sale money is provided as consideration for a supply that is a supply of money (the foreign currency).

[16] As has already been noted, a "financial supply" is a species of supply. "[F]inancial supply" is defined in s 195–1 as having "the meaning given by the regulations made for the purposes of subsection 40–5(2)". Section 40–5(1) provides that a "financial supply is *input taxed*", and subs (2) provides that "[f]inancial supply has the meaning given by the regulations".

[17] Division 40 of the Regulations deals with input taxed supplies, and Subdiv 40-A deals particularly with financial supplies. Regulation 40–5.01 identifies the object of Subdiv 40-A as being "to identify a supply that is or is not a financial supply". Regulation 40–5.09 states what supplies are financial supplies. It does that by requiring the identification of the "provision, acquisition or disposal" of certain interests. Regulation 40–5.02 provides that an "interest is anything that is recognised at law or in equity as property in any form". Regulation 40–5.09(1) provides that "[t]he provision, acquisition or disposal of an interest mentioned in subregulation (3) or (4) is a financial supply" if certain conditions are met. There being no dispute that those conditions were met when Travelex sold foreign currency to a traveller on the departures side of the Customs barrier at an Australian international airport, it is not necessary to set them out here. For present purposes, what is important is that reg 40–5.09(3) identifies a number of interests, the provision, acquisition or disposal of which may constitute a financial supply. So far as presently relevant, reg 40–5.09(3) provides that:

For subregulation (1), the interest is an interest in or under the matter mentioned in an item in the following table:

Item	An interest in or under ...
...	

9	Australian currency, the currency of a foreign country, or an agreement to buy or sell currency of either kind.
---	---

Regulation 40–5.11 provides that examples of the financial supplies identified in items of the table in reg 40–5.09 are given in Sch 7. One example given for item 9 of the table in reg 40–5.09 is "[c]onversion of Australian currency into foreign currency and conversion of foreign currency into Australian currency".

[18] Applying this chain of provisions to a sale of foreign currency, it can be seen that the sale is a "financial supply". It is a financial supply because there is a disposal (by Travelex) of an interest in (the ownership of) the currency of a foreign country. And neither Travelex nor the commissioner contended to the contrary. Rather, as explained at the outset of these reasons, the debate in this appeal focused upon whether s 38–190 of the Act was engaged. It is important to approach that question with a clear recognition of why a foreign currency sale is a financial supply. It is a financial supply because there is a transfer of title to the subject matter of the sale: the foreign currency.'

Travelex Ltd (ACN 004 179 953) v Comr of Taxation [2010] HCA 33, (2010) 270 ALR 253 at [14]–[18], per French CJ and Hayne J

SUPPORT

Easement of

[For 16(2) Halsbury's Laws of England (4th Edn) (Reissue) paras 180, 186 see now 87 Halsbury's Laws of England (5th Edn) (2017) paras 900, 906.]

[For 31 Halsbury's Laws of England (4th Edn) (2003 Reissue) paras 116, 118 see now 76 Halsbury's Laws of England (5th Edn) (2013) paras 117, 119.]

SURETY

[For 20(1) Halsbury's Laws of England (4th Edn) (Reissue) para 106 see now 49 Halsbury's Laws of England (5th Edn) (2015) para 643.]

SURFACE

[For 31 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 19 see now 76 Halsbury's Laws of England (5th Edn) (2013) para 17.]

SURPRISE

[For 16(2) Halsbury's Laws of England (4th Edn) (Reissue) para 434 see now 47 Halsbury's Laws of England (5th Edn) (2014) para 35.]

SURRENDER

[For 27(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 630 see now 62 Halsbury's Laws of England (5th Edn) (2016) para 521.]

SURVIVE—SURVIVOR

[For 50 Halsbury's Laws of England (4th Edn) (2005 Reissue) paras 606–607 see now 102 Halsbury's Laws of England (5th Edn) (2010) paras 317–318.]

SURVIVING SPOUSE

[Administration of Estates Act 1925, s 46(2).] '11] The first question posed by the Official Solicitor is whether the deceased's polygamous marriages under the customary law of Ghana are recognised for the purposes of succession to his real estate in England and Wales.

'12] That involves, in effect, the question whether the surviving polygamous spouses are surviving spouses for the purpose of s 46 of the Administration of Estates Act 1925.

...
'20] It does appear to me that a spouse lawfully married in accordance with the law of his domicile to someone dying intestate, is entitled to be recognised in this country in relation to property, including real property, of the intestate being administered here, as a surviving spouse for the purpose of s 46 of the Administration of Estates Act 1925. In accordance with the law of his domicile, the relevant spouses would properly regard themselves as widows or surviving spouses of the intestate. For that reason principally I have come to the conclusion I have just made. Whilst the draftsman of s 46 may not have had in immediate mind polygamous marriages, he will none the less have had in mind that under s 1(1)(b) of the Interpretation Act 1889 "words in the singular shall include the plural, and words in the plural shall include the singular". Further, by s 6(c) of the Interpretation Act 1978: "words in the singular include the plural and words in the plural include the singular". Reasoning akin to the Interpretation Ordinance point taken in *Coleman's* case [*Coleman v*

Shang (alias *Quarley*) [1961] AC 481, [1961] 2 All ER 406, PC] appear to help the conclusion I have already reached. The answer, therefore, to the first question posed to me by the Official Solicitor is in the affirmative.' *Official Solicitor v Yemoh* [2010] EWHC 3727 (Ch), [2011] 4 All ER 200 at [11]–[12], [20], per Anthony Ellery QC

SUSPENSION

Clerical

[For 14 Halsbury's Laws of England (4th Edn) para 1378 see now 34 Halsbury's Laws of England (5th Edn) (2011) para 1189.]

SUSTAIN INJURY

[Employers' liability insurance policies covering sustaining injury or contracting disease; timing in cases of mesothelioma.] '13] The force of the insurers' case rests in the use of the word "sustain", whether in connection with the phrase "personal injury by accident or disease" or "bodily injury or disease" or in the conjunction "injury or disease ... sustained or contracted" or "injury sustained or disease contracted". Rix and Stanley Burnton LJ concluded that the word "sustain" looked *prima facie* at the experience of the suffering employee rather than its cause ([2010] EWCA Civ 1096, [2011] 1 All ER 605) paras [232] and [343]). Insurances responding to injury or disease sustained during the insurance period would not, on this basis, cover mesothelioma sustained long afterwards. Rix LJ had some compunction about the result because of what he (though not Stanley Burnton LJ) felt was a tension with the commercial purpose of employers' liability insurance in the extraordinary context of mesothelioma (para [235]).

...
'18] ... The insurers' case is, as I have said, rooted most strongly in the word "sustain", particularly when it is used by itself, rather than in conjunction with a more ambivalent alternative in the phrase "sustained or contracted". The natural meaning of the word "sustain", taken in isolation and as defined in the *Shorter Oxford English Dictionary* from an appropriate date (1965, 3rd edn), is, with respect to injury, "undergo, experience, have to submit to", or, possibly, "to have inflicted upon one, suffer the infliction of". But the insurance cover granted (and no doubt required) extended expressly beyond injury by accident to embrace disease.

This was achieved by less natural conjunctions, such as “sustain [any] personal injury by accident or disease” or “sustain [any] bodily injury or disease”. Conscious perhaps that the verb sustain does not fit naturally with the concept of disease, some companies (MMI in its third wording and BAI in its first and second wordings) introduced the different verb “contracted” in the formulations “sustained or contracted” or “injury sustained or disease contracted”. This use of “contracted” with respect to disease is considerably more natural, but is clearly open to an interpretation that it looks back to the initiating or causative factor of the disease, and (whatever the answer on that point) highlights a question whether any substantial difference exists in this connection between such wordings and other wordings referring more awkwardly to the sustaining of personal injury by disease or the sustaining simply of disease.

...
 ‘[50] The majority of the Court of Appeal considered that it was impossible to view policies with pure “sustained” wordings as operating by reference to the initiating or causative factor of a disease. They did so primarily by reference to the wording of the insuring clauses. In my view, as indicated in paras [18]–[19], above, a broader approach is necessary. The general nature and purpose of these policies can be derived from their immediate context and terms, analysed in paras [18] to [28] and [41], above. It is true, as Rix LJ said, that phrases such as “injury sustained” by an employee or an employee who “shall sustain injury”, in either case by accident or disease, appear to address the impact of the accident or disease on the employee. But the underlying focus of the insurance cover is on the employees and activities current during the insurance period. The cover would be potentially incomplete, and employers would be potentially exposed to uninsured risks, were “sustained” to be understood as meaning “developed” or “manifested”. This is so, even before the 1969 Act [Employers’ Liability (Compulsory Insurance) Act 1969] came into force. Any policies written subsequent to the coming into force of the 1969 Act either afford cover consistent with the Act’s requirements by virtue of an 1969 Act extension provision, or, to the extent that this is not the case, should be construed, if at all possible, as meeting employers’ obligations under that Act. In my view, such obligations included taking out insurance in respect of negligence during the insurance period affecting an employee in a

manner giving rise to bodily injury or disease then or at any subsequent time. On this basis, I consider that, although the word “sustained” may initially appear to refer to the development or manifestation of such an injury or disease as it impacts employees, the only approach, consistent with the nature and underlying purpose of these insurances both before and after the 1969 Act, is one which looks to the initiation or causation of the accident or disease which injured the employee. The disease may properly be said to have been “sustained” by an employee in the period when it was caused or initiated, even though it only developed or manifested itself subsequently.

‘[51] Rix LJ was attracted by the submission that, even if sustaining disease meant experiencing or incurring it during the period of the insurance, long-tail diseases could be said to have been sustained during the period of insurance in this sense. He asked rhetorically whether an employee who had inhaled asbestos had not “sustained an injury in the form of an assault of the fibres”, as a result of which he was worse off through having dangerous fibres in his lungs ([2011] 1 All ER 605 at [280]). He noted that, although there was at most trivial injury or damage, and nothing that could create actionable damage, nevertheless, when mesothelioma develops, “it is the risk of mesothelioma created by the exposure which is the damage (see ... *Barker’s case* ...)” and “it is the exposure, and the risk of mesothelioma, that is the damage” (see [281]). He only felt bound to reject this analysis (at [284]) because of the Court of Appeal’s previous decision in the *Bolton Metropolitan BC case* [*Bolton Metropolitan Borough Council v Municipal Mutual Insurance Ltd* [2006] EWCA Civ 50, [2006] 1 WLR 1492].

‘[52] It may be that in the case of some long-tail diseases, the victim can be said to have incurred or caught them at the same time as the initial ingestion or scratch giving rise to them. But it is clear that this is not the position with inhalation of asbestos in relation to either asbestosis or mesothelioma. No cause of action arises from exposure or inhalation alone: *Rothwell v Chemical & Insulating Co Ltd, Re Pleural Plaques Litigation* [2007] UKHL 39, [2007] 4 All ER 1047, [2008] 1 AC 281. Further, for reasons which I develop at paras [64]–[65], below, the exposure and risk are not by themselves damage in any sense known to the law. Damage is only incurred when mesothelioma develops. Only when it develops does the victim incur damage which is legally relevant, and even then this is not

because any physical link necessarily exists or can be proved between the mesothelioma and the original exposure. The rule in *Fairchild's* case and *Barker's* case imposes liability for the mesothelioma upon persons who have exposed the victim to asbestos, and so created a risk of mesothelioma. But it is not a rule which, even as between employers and employees, deems the latter to have suffered injury or disease at the time of any exposure. And, even if it were viewed simply as a rule imposing retrospective liability on employers for exposing their employees to the risk of mesothelioma, the insurance policies do not insure risks of physical injury or disease, but only actual injury or disease.' *Re Employers' Liability Policy 'Trigger' Litigation* [2012] UKSC 14, [2012] 3 All ER 1161 at [18], [50]–[52], per Lord Mance SCJ

See also DISEASE

SYSTEM OR MARKETING PLAN

Australia [Franchising Code of Conduct, cl 4(1)(b): a franchise agreement is an agreement... in which a person (*the franchisor*) grants to another person (*the franchisee*) the right to carry on the business of offering, supplying or distributing goods or services in Australia under a system or marketing plan substantially determined, controlled or suggested by the franchisor or an associate of the franchisor.] '[171] We turn to the second and third elements of cl 4(1)(b) of the Code. The Code does not define the expression "system or marketing plan". In ordinary English usage, the expression would signify a coordinated method or procedure, or scheme whereby goods or services are sold. This is apparently the sense in which the expression is used in the Code. Further guidance can be obtained from cases in the United States of America, where there is

similar, although not identical, legislation: see *Capital Networks Pty Ltd v .au Domain Administration Ltd* [2004] FCA 808 at [101]–[119] (*Capital Networks*), where Bennett J set out the results of her research. See also *Kyloeat [Australian Competition and Consumer Commission v Kyloe Pty Ltd* [2007] FCA 1522] [40] where Tracey J sets out a list of factors derived in part from *Capital Networks*. We are indebted to their Honours for their research and analysis, which forms the basis of the following discussion.

'[172] Broadly speaking, although much depends on the circumstances of the case, these cases indicate that the following factors may be indicative of a system or marketing plan: specific requirements for accounting and record keeping; reservation by the franchisor of a right to audit the books of account and other records; inability of the franchisee to supply goods or services to customers without the franchisor's approval; reservation by the franchisor of the right to approve promotional and advertising material; provision by the franchisor of bonus structures or equivalent for those selling its goods or services; provision by the franchisor of training for staff selling its goods or services; stipulation of retail pricing structures, sales structures, sales quotas and the like; creation of marketing and sales territories; reservation by the franchisor of the right to approve sales staff; reporting systems in relation to profit or turnover; restriction on the franchisee selling competing products; controls on the use of brand and trading names; requirements for signage and merchandising; management structure; and badging requirements (mandatory use of trading name, uniforms, stationery, etcetera).' *Rafferty v Madgwicks* [2012] FCAFC 37, (2012) 287 ALR 437 at [171]–[172], per Kenny, Stone and Logan JJ

T

TAKEN TO THE SCENE

[Criminal Justice Act 2003, Sch 21, para 5A.] [2] The [Criminal Justice Act 2003 (Mandatory Life Sentence: Determination of Minimum Term) Order 2010, SI 2010/197] amended Sch 21 to the Criminal Justice Act 2003. After para 5 a new paragraph was inserted. This provides:

“5A

(1) If—(a) the case does not fall within paragraph 4(1) or 5(1), (b) the offence falls within sub-paragraph (2), and (c) the offender was aged 18 or over when the offender committed the offence, the offence is normally to be regarded as sufficiently serious for the appropriate starting point, in determining the minimum term, to be 25 years.

(2) The offence falls within this sub-paragraph if the offender took a knife or other weapon to the scene intending to—(a) commit any offence, or (b) have it available to use as a weapon, and used that knife or other weapon in committing the murder.”

...

“[12] The primary practical difficulty however arises from the provision that the offender “took a knife or other weapon to the scene”. Miss Sasha Wass QC submitted that the purpose of the new provision is to deter the possession of knives in public (whether or not carried with murderous intent or with a victim in mind) and to underline the additional gravity of committing murder with a knife in those circumstances. In general this reflects the broad guidance already offered on this issue in *R v M* [2010] 2 Cr App R (S) 117, and we agree. However the language of para 5A is not so limited. If a man makes up his mind to kill his partner and walks back to their home, and there picks up a knife in the kitchen and kills her with the knife, he will not have taken the knife to the scene. On the face of it this offence would not fall within para 5A. If a man in exactly the same frame of mind walks home and buys a knife on the way and kills his partner in the kitchen in exactly the

same circumstances, then on the face of it para 5A would apply. We doubt whether anyone would believe that justice would be represented by the assessment of the starting point for respective minimum terms for each of these defendants at 15 years and 25 years respectively. The culpability levels are the same: the consequences are similarly catastrophic. Yet, unless examined in the context of the decisions of this court about the way in which the provisions of Sch 21 should be approached, a literal interpretation of para 5A might produce this disparate result.

“[13] The second of these examples forcefully underlines that para 5A is not confined to murders committed with the use of a knife which has been taken out onto and used on the streets. It does not follow that a murder committed with a knife in the offender’s home, or for that matter in the victim’s house, automatically falls outside the ambit of para 5A.

“[14] Further problems arise in the context of what is meant by “the scene”. If the victim is in the kitchen, and the defendant takes a knife from a drawer and kills him or her, for the purposes of para 5A that knife was not taken “to the scene”. If in the same example the kitchen is at one end of the living room with no partition between the two, the victim is in the living room and the defendant takes a knife from the kitchen drawer and kills her, then again for the purposes of para 5A this knife was not “taken to the scene”. The situation will be additionally complicated if one of the doors in the premises through which the assailant went with the knife had been open, or closed, or locked. The present group of cases demonstrates the difficulties.

...

“[21] The sole ground of appeal advanced by Miss Wass on the applicant’s behalf is that, as a matter of law, the case did not fall within para 5A of Sch 21 to the 2003 Act, since the knife was not “taken to the scene”. For the reasons already given, we agree. We do not consider that a knife taken from the kitchen of a home, whether a flat, maisonette or house, to another room in the same home even if a locked door was forced, falls within “taken to the scene” in para 5A. ...’ *R v Kelly* [2011] EWCA Crim 1462, [2011] 4 all ER 687 at [2], [12]–[14], [21], per Lord Judge CJ

TAX ADVANTAGE

[For the Income and Corporation Taxes Act 1988, s 709(1) see now the Corporation Tax Act 2010, s 1139(1), (2).]

TAXABLE CHEAP LOAN

[Income Tax (Earnings and Pensions) Act 2003, s 175(1): the cash equivalent of the benefit of an employee-related loan is to be treated as earnings from the employee's employment for a tax year if the loan is a 'taxable cheap loan' in relation to that year.] [61] Broadly stated, a taxable cheap loan is one where no interest is paid on the loan in a year when the employee holds the employment or the amount of interest paid on it for that year is less than the interest that would have been paid "at the official rate". The cash equivalent of the benefit of an employment-related loan is the difference between the amount of interest that would have been payable on the loan for that year at the official rate and the amount of interest (if any) actually paid on the loan for that year.' *Revenue and Customs Commissioners v Apollo Fuels Ltd* [2016] EWCA Civ 157, [2016] 4 All ER 464 at [61], per David Richards LJ

TECHNICAL OR COMMERCIAL INFORMATION

[Senior Courts Act 1981, s 72(5). Section 72(1) applies to certain civil proceedings in the High Court including proceedings for infringements of rights pertaining to any intellectual property or for passing off, and s 72(5) provides that 'intellectual property' means 'any patent, trade mark, copyright, design right, registered design, technical or commercial information or other intellectual property'.] [75] As I have said, I accept that the definition of "intellectual property" must be strictly and purposively construed. That does not, however, in my judgment mean that the words "commercial information" must be construed as having no or no significant meaning at all. Ms Marzec's submissions were based on the proposition that the potency or commonly understood meaning of "intellectual property" did not include confidentially confidential information, so that, as Lord Lowry suggested in *AT & T Istel Ltd v Tully* [1992] 3 All ER 523, [1993] AC 45, the words "commercial information" must be construed ejusdem generis as contemplating: "information of the same type (ejusdem generis) as the other examples of intellectual property which are listed in sub-s (5)".

[76] As it seems to me, the following factors are particularly important in arriving at the correct construction of the term "commercial information" in s 72(5). (i) Parliament has, at least on occasions, included commercial and other types of information as being comprised

within the wider meaning of "intellectual property." (ii) It is generally accepted that most kinds of confidential information and commercial information are not properly regarded as "property" at all, even though they may exhibit some attributes usually associated with property. (iii) Confidential commercial information is certainly not any form of statutorily created intellectual property akin to a patent, copyright, trade mark, design right or registered design.

[77] Against these aspects of the legal background, I take the view that Parliament must be taken to have been deliberately expanding the meaning of "intellectual property" when it included the words "technical and commercial information" in the string of meanings alongside patent, trade mark, copyright, and registered design (and the later added "design right" in 1988). As Baroness Hale of Richmond put the matter disarmingly in the *Hello!* case [2007] 4 All ER 545 at [307], [2008] 1 AC 1): "I confess to having some difficulty in understanding what this has to do with the law of intellectual property". The law of confidential information is a particular and developing area. It is sometimes convenient to regard actions brought to protect commercially confidential information, know-how, trade secrets and the like as intellectual property claims. That does not mean they will be regarded as such for all purposes. Nor does it make it helpful to try to over-analyse the similarities and differences between confidential information and a species of traditional intellectual property like patents or copyrights, however academically interesting that exercise may be. Technical and commercial information will not always be regarded as being "intellectual property", nor will actions brought to vindicate such rights always be regarded as "proceedings for infringement of rights pertaining to any intellectual property". But when Parliament has said expressly that "technical and commercial information" should be regarded as a species of "intellectual property" for the purpose of the partial abrogation of the privilege, it seems to me that the courts should not construe the term almost completely out of existence. I note, in particular, the difficulty which Ms Marzec had in defining precisely what kinds of commercial information should be included as a species of intellectual property. In the end, she alighted on an artificial limitation, suggesting that it might include telephone messages describing an innovative design, or including words drafted creatively for a football article in a newspaper. A review of intellectual property textbooks shows that there

is no universal definition of the term, which is no doubt why Parliament has adopted a variety of definitions for differing situations.

[78] I turn then to deal with the aspect of the construction exercise that I have found most difficult, and that concerns the dictum of Lord Lowry in *AT & T Istel Ltd v Tully* [1992] 3 All ER 523, [1993] AC 45 that I understand was not even cited to Mann J in *Phillips's* case [*Phillips v Newsgroup Newspapers Ltd* [2010] EWHC 2952 (Ch).] [2010] All ER (D) 182 (Nov). Lord Lowry's decision (albeit obiter) to the effect that the action for fraud and breach of trust in that case was not "concerned with the infringement of any rights pertaining to intellectual property" was, if I may say so, obviously correct. But his suggestion that the *ejusdem generis* rule applied so as to mean that the " 'commercial information' " which the definition contemplates must be information of the same type (*ejusdem generis*) as the other examples of intellectual property which are listed in sub-s (5)" seems to me to be incorrect. Technical or commercial information cannot naturally be regarded as of the same genus as patents, copyrights or trademarks. Moreover, Lord Campbell's classic statement of the *ejusdem generis* principle in *R v Edmundson* (1859) 23 JP 710 at 711, (1859) 2 E & E 77 to the effect that "... where there are general words following particular and specific words, the general words must be confined to things *ejusdem generis* with those specified", would only apply to limit the meaning of the words "or other intellectual property", not the words "technical or commercial information". It is true that *Bennion* (Pt XXVIII p 1231) defines the principle more widely so as to provide that "wide words associated in the text with more limited words are to be taken to be restricted by implication to matters of the same limited character", but he also, it must be remembered, used s 72 as an example of a clarifying definition, suggesting that the draftsman would have wanted to expand, rather than limit, the meaning of "intellectual property" in the section. Finally in this connection, *Bennion* also considers that for the *ejusdem generis* principle to apply at all, it must be possible to formulate the genus, and that it will not apply at all if no genus can be found. Thus, if "technical or commercial information" is properly to be regarded as of a different genus from a "patent, trade mark, copyright, design right [and] registered design", there would be no room for the application of the *ejusdem generis* doctrine.

[79] In considering the proper construction

of the words "technical or commercial information", I have, of course, considered carefully Mann J's decision in *Phillips's* case. His view was that the telephone messages in that case were "not necessarily information which one could easily sell, or which has the same obviously confidential and commercial quality as, say, a customer list, or a description of a secret process", but that the term "commercial information" was a broad expression that was not confined to such things. He concluded by saying that "it has to be information which relates to commerce (or business) and within that context to have a confidential quality (so as to be properly described as 'intellectual property')". Mann J probably regarded "commercial information" as a species of "intellectual property" because he had not had the benefit of any citation of authority. Having seen a great deal of authority on the point, it seems to me that the better view is that "technical or commercial information", whilst perhaps displaying some of the attributes of property and intellectual property, is not properly to be regarded as a species of either.

[80] More importantly, however, I think Mr Reed was right to say that the species of "technical or commercial information" to which s 72(5) is referring is limited to "protectable" technical or commercial information, or, put another way, to technical or commercial information that can be protected by action. This qualification arises because the types of "intellectual property" are only being defined in order to identify which kinds of proceedings are covered by the section, and in particular which kinds of proceedings are to be regarded as "proceedings for infringement of rights pertaining to any intellectual property". Plainly only "technical or commercial information" that is confidential and can be protected by an action for breach of confidence or breach of contract or breach of another duty can be covered by s 72.

[81] In reaching these conclusions, I have not ignored the fact that s 72 is a derogation from art 6 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms 1950], nor that it was introduced specifically to tackle video piracy. In my judgment, however, Parliament must be taken to have intended the words it used to have a real meaning. I have little doubt that what Parliament was concerned to achieve was to remove the privilege where the action was a claim to protect commercially confidential information, as much as where it was in respect of the infringement of the traditional kinds of intellectual property.

[82] In the course of early argument on this point, counsel engaged in an interesting debate as to when private information crossed the line into becoming commercial information. For example, it was suggested that secret knowledge that a famous actress had cancer might be regarded as commercial information in some contexts, since it would have a value to the tabloid press. Likewise, a distinction was suggested between purely private business information (like, for example, a person's instruction to a broker to sell some privately held shares), and business information that might have a commercial value (like the details of the negotiation of an appearance or performance fee). In the end, however, I have concluded that these distinctions are not central to the issues in this particular case, mainly because of the facts contained in the statements of the claimants, which I shall consider shortly. If, as I have held, any technical or commercial information that can be protected by action is covered by s 72, then the question of to whom the information may have a discrete value will not normally arise. It could arise if, taking one of the examples I mentioned above, a famous actress maintained that the information about her cancer was confidential commercial information rather than confidential private information. That is not this case, and I shall, therefore, say nothing more about it.

[83] To summarise, therefore, I do not accept Ms Marzec's suggested limitation on the meaning of "technical or commercial information". If the information needed also to be a species of intellectual property, it would be very narrow indeed, and there is no limitation of that kind implied from the words of the legislation. Rather, I take the view that the "technical or commercial information" with which s 72(5) is concerned is any such information that can be protected as such by action.

[84] Before leaving the legal questions that have been raised, I should mention that Mr Reed originally sought to argue in the alternative that confidential private information was included within the term "or other intellectual property" in s 72(5), so that the question of whether the voicemail messages included commercial information did not matter. As the argument developed, however, Mr Reed placed less and less emphasis on this argument, ultimately realising, I think, that the authorities he himself had cited demonstrated that the point was probably wrong. Since confidential commercial information would not automatically be regarded as a species of intellectual property without a definition to that

effect, confidential private information would not either. It would, in my judgment, be stretching the statutory definition far too widely to hold that it included confidential private information even where such information could be protected by action.' *Coogan v News Group Newspapers Ltd* [2011] EWHC 349 (Ch), [2011] 2 All ER 725 at [75]–[84], per Vos J; affd [2012] EWCA Civ 48, [2012] 2 All ER 74

[22] It is clear that the only basis upon which it can be said that the information intercepted from the claimants' phones constituted "intellectual property" as defined in s 72(5) is if it is within the closing words "technical or commercial information or other intellectual property".

...
[25] The meaning of the expression "technical or commercial information" has to be assessed by reference to the purpose of s 72, the immediate context of the expression, and the natural meaning of the words.

...
[31] So what is meant by "technical or commercial information"? Subject to what was said by Lord Lowry in the *AT&T Istel* case [1992] 3 All ER 523 at 539–540, [1993] AC 45 at 64–65, which I shall discuss below, it seems to me that the expression means confidential information which is technical or commercial in character. As for the confidential aspect, in order to be protected in law, and to be even arguably characterised as "intellectual property" information must be confidential, or, to use the well-known expression of Megarry J in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 47, it must "have the necessary quality of confidence about it".

[32] As a matter of ordinary language, just as "technical information" means information of a technical nature, it seems to me that "commercial information" means information which is commercial in character, rather than information which, whatever its nature, may have a value to someone. In other words, the word "commercial" appears to be a description of the character of the information rather than the fact that it has value. Furthermore, the expression is unlikely to have been intended to cover all "confidential information", as, if that had been the legislative intention, one would have expected Parliament to use those two familiar words rather than the expression "technical or commercial information".

[33] However, Mr Millar's contention is that confidential information is not intellectual property, as a matter of law, and therefore cannot be within the concept of "commercial

information or other intellectual property”, particularly in the light of the preceding items in the definition which are all properly characterised as intellectual property. The argument which has to be faced, therefore, is whether the expression “technical or commercial information” in s 72(5) can extend simply to information, on the ground that information is not regarded as intellectual property at all.

...
 ‘[39] In my view, the upshot of this summary of the position as discussed in the cases and the books is that, while the prevailing current view is that confidential information is not strictly property, it is not inappropriate to include it as an aspect of intellectual property. Accordingly, unless there is binding authority to the contrary, I am of the view that, given the normal meaning of “commercial information”, the draftsman of s 72 intended confidential information of a commercial nature to be included in the definition of “intellectual property”. *Coogan v News Group Newspapers Ltd* [2012] EWCA Civ 48, [2012] 2 All ER 74 at [22], [25], [31]–[33], [39], per Lord Neuberger MR; *affd* sub nom *Phillips v News Group Newspapers Ltd* [2012] UKSC 28, [2012] 4 All ER 207 at [33]

TENANCY

[For 27(1) Halsbury’s Laws of England (4th Edn) (2006 Reissue) paras 1–2 see now 62 Halsbury’s Laws of England (5th Edn) (2016) paras 1–2.]

[Housing Act 1988, s 34(1).] ‘[12] Section 34 of the 1988 Act provides as follows:

“(1) A tenancy which is entered into on or after the commencement of this Act cannot be a protected tenancy, unless—... (b) it is granted to a person (alone or jointly with others) who, immediately before the tenancy was granted, was a protected or statutory tenant and is so granted by the person who at that time was the landlord (or one of the joint landlords) under the protected or statutory tenancy ...”

‘[13] The material part of s 45(1) provides: “(1) In this Part of this Act, except where the context otherwise requires,—... ‘tenancy’ includes... an agreement for a tenancy ...”.

‘[14] It was common ground, rightly in my view, that an agreement for a tenancy in s 45(1) means a legally enforceable agreement. To comply with s 2 of the Law of Property

(Miscellaneous Provisions) Act 1989 such an agreement must be in writing unless it is for a lease taking effect in possession for a period not exceeding three years. In this case, however, being mindful, perhaps, of the provisions of s 52 of the Law of Property Act 1925, the parties took particular care to ensure that the agreement was embodied in a deed. The agreement was clearly enforceable, therefore. Moreover, although it provided for the Board to grant an assured shorthold tenancy to Mr Foley on 27 September 2001, no such grant was in fact made. Mr Foley went back into possession and both parties treated their relationship as being governed by the agreement.

‘[15] The purpose of s 34(1)(b) appears to be to prevent those who are currently entitled to the full protection of the [Rent Act 1977] from losing that protection as a result of being persuaded to enter into a new tenancy in respect of the same property, a course of action that would normally involve the surrender of the existing tenancy and a consequent loss of full protection. However, the decisions in *Dibbs v Campbell* [[1988] 2 EGLR 122, CA] and *Bolnore Properties v Cobb* [(1997) 29 HLR 202, CA], and indeed earlier cases, make it clear that there is nothing to prevent a contractual or statutory tenant from surrendering his tenancy, and with it his protection, if he chooses to do so, as he may if he perceives it offers him some advantage. One way of achieving that object, as the authorities demonstrate, is for the tenant to surrender possession for a short period of time before the new tenancy is granted, though as appears from *Dibbs v Campbell*, it is unnecessary for there to be an interruption of physical occupation for such an arrangement to be effective. That appears to have been what Mr Foley and the Board had in mind in this case. In exchange for questionable protection under the Rent Acts Mr Foley agreed to accept the certainty of an assured shorthold tenancy for five years. The arrangements for him to spend 24 hours out of occupation appear to have been intended to mirror those in *Bolnore Properties v Cobb*.

‘[16] Mr Watkinson’s submission was simplicity itself: “tenancy” in s 34 includes an agreement for a tenancy and at the time the parties entered into the agreement under which Mr Foley occupied the property from 27 September he was still a protected tenant. There was no intervening period of time between the expiry of his former tenancy and the creation of his right to occupy the property under the agreement. The response of Mr Arden QC to that argument was equally simple: by virtue of

s 45(1) “tenancy” includes an agreement for a tenancy unless the context otherwise requires, and in this case it does.

‘[17] Although I have not found it an easy question to resolve, I think Mr Arden’s submission is correct. If one were construing sub-s (1)(a) in isolation it would be difficult to see how the word “tenancy” could be capable of including an agreement for a tenancy given that a clear distinction is drawn between a tenancy and a contract for a tenancy. The position might be different if one were construing sub-s (1)(b) in isolation (although even then the references to the grant of a tenancy suggest that the provision is concerned only with a grant and not with an agreement), but even so, the opening words of the subsection govern each of the following paragraphs. It follows that the whole of the subsection is dealing with the same subject matter and, as the terms of para (a) show, that is not an agreement for a tenancy but an actual tenancy. Moreover, it seems to me that sub-s (1)(b) scarcely makes sense in relation to an agreement for a tenancy. In my view, therefore, the word “tenancy” in s 34(1) does not include an agreement for a tenancy.’ *Truro Diocesan Board of Finance Ltd v Foley* [2008] EWCA Civ 1162, [2009] 1 All ER 814 at [12]–[17], per Moore-Bick LJ

Periodic tenancy

[For 27(1) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 233 see now 62 Halsbury’s Laws of England (5th Edn) (2016) para 227.]

Tenancy at sufferance

[For 27(1) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 206 see now 62 Halsbury’s Laws of England (5th Edn) (2016) para 200.]

Tenancy at will

[For 27(1) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 198 see now 62 Halsbury’s Laws of England (5th Edn) (2016) para 192.]

Tenancy from year to year

[For 27(1) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 208 see now 62 Halsbury’s Laws of England (5th Edn) (2016) para 202.]

TENANT OF A FLAT

‘[5] My Lords, Ch II of Pt I of the Leasehold Reform, Housing and Urban Development Act 1993 confers a right on “a qualifying tenant of a flat” to acquire a new long lease of the flat from his landlord. The question raised on these two appeals is whether the lessee of premises (such as a block of flats), which includes property other than flats, can be a qualifying tenant of any of the flats comprised in those premises. This issue turns upon the proper construction of the 1993 Act, which has been amended from time to time, most notably by the Housing Act 1996 and the Commonhold and Leasehold Reform Act 2002.

‘[23] The case for the freeholders is that neither of the appellant head lessees is a “qualifying tenant of a flat” for the purposes of Ch II. [Counsel] for the freeholder in Howard de Walden, contends that a lessee cannot be a “qualifying tenant of a flat” if the premises demised by his lease consist of a building which includes a number of flats. [Counsel] for the freeholder in Cadogan, contends that a lessee cannot be “qualifying tenant of a flat” if his lease includes property other than “flats” within the meaning of the 1993 Act. Although they formulate their respective cases slightly differently, the supporting arguments and reasons advanced on behalf of the respondents are not merely mutually consistent, but for all practical purposes identical.

‘[24] The appellant head lessees, through [counsel] contend that, provided, of course, the lease is a long lease, a lessee under a lease, whether it is a head lease or not, of any property (including a block of flats) which is or includes a flat can be a qualifying tenant of that flat, unless, of course, there is an underlessee of that flat who is himself a qualifying tenant.

‘[26] The first subsection of Ch II, namely s 39(1), confers the relevant right on “a tenant of a flat”. That might be said to be a neutral expression in the present context, because it could be limited to the relatively narrow concept of a lessee of a flat and no other property, or the rather wide notion of a lessee of a flat together with other property. However, in the absence of any further indication either way, I would have thought that its natural meaning extended to the lessee of a property which included, but was not limited to, a flat.

‘[27] Having said that, s 39(4) ... makes it clear that, at the very least, the expression “a tenant of a flat” extends to the lessee of a flat

together with another flat or other flats. It is said on behalf of the respondents that the inclusion of s 39(4) is an indication that the narrower meaning was right, because, if the expression had the wider meaning, it would have been unnecessary to include s 39(4). I do not agree. Section 39(4) is not concerned with the definition of "a tenant of a flat" but with who can be a "qualifying tenant of a flat". In other words, it effectively takes it for granted that "a tenant of a flat" in s 39(1) extends to a lessee under a lease of more than one flat, and merely emphasises that such a person can be a "qualifying tenant" of any such flat.

[28] Accordingly, if one confines oneself to s 39, it appears clear that the lessee of a number of flats can, in relation to each flat, be "a tenant of a flat" under s 39(1). In the absence of any clear indication, it is hard to see how it does not follow, as a matter of logic, that the lessee of any property which includes one or more flats is, in relation to each such flat, "a tenant of a flat".

[29] That view appears to me to be strongly reinforced by s 101(3)... Its effect is that where "demised premises consist of or include the flat", the lessee can be a qualifying tenant of the flat. The expressions "the demised premises" and "include" are, importantly for present purposes, unqualified. It was suggested that the bracketed closing phrase of the subsection, "(whether with or without one or more other flats)" effectively amounted to a limitation, and indicated that "the demised premises" other than the relevant flat could only be "one or more other flats", and not other property, such as common parts. As a matter of language, that argument simply does not run, in my judgment. The bracketed words merely emphasise that the fact that more than one flat is included in the demised premises would not prevent the lessee of those premises being a "qualifying tenant" of any of those flats.

[30] The view that a lessee of premises whose lease includes a flat (irrespective of whether there are other flats or any other property included in the demise) can be a qualifying tenant of that flat is reinforced by the reference in s 57(1)(a) to "property" which is "included in the existing lease but not comprised in the flat". If the only other premises which could be included in a lease to a qualifying tenant, in addition to the relevant flat, was another flat or other flats, one would have expected the reference to be to "other flats" rather than to "property".

[31] In these circumstances, it seems to me clear that a lessee under a lease which includes a

flat together with other premises, be it another flat, other flats, or other property of whatever nature, is, according to ordinary principles of interpretation, and subject to any clear indication to the contrary in the 1993 Act, "a tenant of a flat" for the purpose of Ch II. As a matter of language and logic, there is no ground for excluding a lease (be it a head lease or any derivative lease), either of a block of flats, or of property not limited to flats, from the ambit of this conclusion.

[32] At the beginning of her "discussion and conclusions" in the Court of Appeal, at [28], Arden LJ, with whom Mummery and Jacob LJ agreed, said that there was "no express statutory reference to head leases in Ch II", although there were "references to intermediate leasehold interests". She then went on to say that there were "a large number of individual provisions in ... or incorporated into [Ch II] which may or may not indicate that head lessees are treated like other tenants".

[33] In my opinion, this approach appears to me to involve inventing a gap where none exists. Whether one approaches the question by reference to ordinary language or property law, the expression "lease" is apt to include a term of years granted by the freeholder or by someone who himself holds a lease from the freeholder whether directly or not. If there were any doubt about that in relation to Pt I, it must be allayed by the definition in s 101(2), referred to at [20], above. It is also clear beyond doubt that a lessee under a head lease which is subject to an underlease of the flat can be a "tenant of a flat" in the light of s 5(3)-(5)... As a matter of language or legal concept, there is simply no basis for treating a lease of a block of flats as a special type of lease, which, as it seems to me, is what Arden LJ's analysis involves.

[34] For these reasons, it appears to me clear that, at least if one looks at the directly relevant statutory provisions, the two appellants in the present case were "qualifying tenant[s]" of the flats in respect of which they respectively served notices. ...

[73] In summary, my conclusions are as follows:

- (a) As a matter of statutory language, it appears clear that a lessee under a lease of property which includes a flat can be a 'tenant' of that flat for the purposes of Ch II of Pt I of the 1993 Act, irrespective of the nature or extent of the other property included in the demise.
- (b) In particular, there is no reason to exclude a lessee under a lease of a block of flats, or a

lease which includes property other than flats, from being a 'tenant of a flat' for the purposes of Ch II of Pt I of the 1993 Act.

- (c) There is no good argument to the contrary based on the policy of the 1993 Act.
- (d) Nor is there a good argument to the contrary based on the alleged practical difficulties, inconsistencies or oddities resulting from this conclusion.'

Aggio v Howard de Walden Estates Ltd; 26 Cadogan Square Ltd v Earl Cadogan [2008] UKHL 44, [2008] 4 All ER 382 at [5], [23]–[24], [26]–[34], [73], per Lord Neuberger of Abbotsbury

TENANT RIGHT

[For 1(2) Halsbury's Laws of England (4th Edn) (2007 Reissue) para 300 see now 1 Halsbury's Laws of England (5th Edn) (2008) para 364.]

TENEMENT

[For 27(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 161 see now 62 Halsbury's Laws of England (5th Edn) (2016) para 154.]

[For 39(2) Halsbury's Laws of England (4th Edn) (Reissue) paras 74, 79 see now 87 Halsbury's Laws of England (5th Edn) (2017) paras 8, 9.]

TENEMENT, RIGHT OR INTEREST

Australia [Stamp Act 1971 (WA), s 76; definition of 'mining tenement' in s 76(1).] '[96] Paragraph (c) of the definition of "mining tenement" in s 76(1) of the Act refers to a "tenement, right or interest" that is "similar to" a "tenement" or "right" referred to in para (a) or para (b) of the definition.

'[97] Counsel for the respondents submitted that the expression "tenement, right or interest" in para (c) must be construed in the context of the mining tenements referred to in para (a) and the mining tenement or right of occupancy referred to in para (b).

... '[102] It was submitted that the expression "tenement, right or interest" in para (c) of the definition does not include rights of a contractual or personal nature. Counsel argued that the word "right" must be construed in context and consistently with the words "tenement" and "interest", with which it forms a

composite expression. The expression "tenement, right or interest", so it was submitted, refers to rights and interests of a proprietary nature, and not rights of a contractual or personal nature.

... '[106] Issue 1 raises two questions. First, what is the proper construction of the expression "tenement, right or interest" within the chapeau of para (c) of the definition of "mining tenement" in s 76(1)? Second, were the rights or interests granted or conferred on PTAR under the Martabe Contract of Work, as at 30 March 2007, a "tenement, right or interest" within that expression, properly construed?

'[107] As to the first question raised by issue 1, each of the words "tenement", "right" or "interest" within the chapeau of para (c) has an extensive and variable meaning. They are abstract terms. It is necessary, in determining the meaning of "tenement", "right" or "interest" within the chapeau, to consider the apparent purpose or object of para (c) in the context of Pt IIIBA as a whole.

... '[113] The parliament intended that a "tenement, right or interest" may be a "mining tenement", within the definition, even though it is merely "similar to" a mining tenement held under the Mining Act 1978 or merely "similar to" a mining tenement or right of occupancy continued in force by s 5 of the Mining Act 1978. Further, the parliament intended that a "tenement, right or interest" may be a "mining tenement", within the definition, even though it does not exist under the laws of Western Australia (or the laws of the Commonwealth or any territory or other State of Australia).

'[114] It is notorious that mining operations are conducted in foreign jurisdictions which have legal systems and substantive laws that are different from Western Australia. Most foreign jurisdictions do not have an English common law heritage or a parliamentary democracy derived from the Westminster system. This explains, no doubt, the disjunctive use of the words "tenement", "right" or "interest", in the chapeau of para (c), to describe a concept or thing that may not have a direct counterpart in this state. It also explains the use of the word "similar" in subpara (i) of para (c).

... '[116] The word "tenement", in ordinary speech, now refers to a house or building. But its legal meaning "is everything in which a man can have an estate of freehold and which is connected with land": *Re Lehrer and the Real Property Act 1900* [1961] SR (NSW) 365 at 370

per Jacobs J. See also *Australian Shipping Commission v City of Port Melbourne* [1990] VR 439 at 441–3 per Gobbo J; *Western Australia v Ward* (2002) 213 CLR 1; 191 ALR 1; [2002] HCA 28 at [482] fn 572 per McHugh J.

‘[117] In my opinion, in the chapeau of para (c):

- (a) the word “tenement” means anything in which a person can have an estate of freehold and which is connected with land;
- (b) the word “right” means any legally enforceable claim in respect of real or personal property; and
- (c) the word “interest” means any interest in real or personal property.

‘[118] Plainly, there is some overlap between these terms. This is consistent with their broad and general connotation and the intention of the parliament to capture concepts or things that may exist under the law of a foreign jurisdiction but not have a direct counterpart in this state.

‘[119] It follows, on my analysis, that:

- (a) the expression “tenement, right or interest” within the chapeau of para (c) is not confined to estates or interests in land;
- (b) the word “right” within the chapeau extends beyond a concept or thing which is a “tenement” or an “interest”; and
- (c) a “right” within the chapeau need not be a “tenement” or an “interest” within the chapeau.

‘[127] In my opinion, the present rights of PTAR under Art 8 of the Martabe Contract of Work, as at 30 March 2007, are properly to be characterised as legally enforceable claims in respect of property and therefore a “right” within the chapeau of para (c). Those claims were created by the agreement.’

Commissioner of State Revenue v Oz Minerals Ltd (formerly Oxiana Ltd) [2013] WASCA 239, (2013) 304 ALR 602 at [96]–[97], [1–2], [106]–[107], [113]–[114], [116]–[117], [127], per Buss JA

TENURE

[For 39(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 75 see now 87 Halsbury’s Laws of England (5th Edn) (2017) para 4.]

TERM OF YEARS

[For 27(1) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 235 see now 62

Halsbury’s Laws of England (5th Edn) (2016) para 229.]

TERRORISM

‘[1] The appellant uploaded videos onto the internet which the Crown contended encouraged the commission of terrorism as defined in s 1 of the Terrorism Act 2000 (as amended). Included in the videos were scenes showing attacks on soldiers of the coalition forces in Iraq and Afghanistan by insurgents. After retirement the jury asked questions, including a question as to whether such attacks were terrorism within the definition in s 1. The judge told them they were. The issue on this appeal is whether that answer was correct.

‘[35] There is, we think, no doubt that international law has developed so that the crime of terrorism is recognised in situations where there is no armed conflict. However the law has not developed so that it could be said there is sufficient certainty that such a crime could be defined as applicable during a state of armed conflict.

‘[37] Although international law has developed that far in relation to what constitutes the international crime of terrorism (and does not yet make it an international crime to commit an act of terrorism against civilians in the course of armed conflict), we are concerned with a different question. The issue for us is whether, under international law, the definition of terrorism under customary international law has developed so that an attack by insurgents on military forces of a government is not terrorism. Although the discussion as to what amounts to the crime of terrorism under international law assists in the resolution of the issue, the question is a different one. It must be resolved by ascertaining the definition of terrorism in international law.

‘[47]... [W]e conclude that, although international law may well develop through state practice or *opinio juris* a rule restricting the scope of terrorism so that it excludes some types of insurgents attacking the armed forces of government from the definition of terrorism, the necessary widespread and general state practice or the necessary *opinio juris* to that effect has not yet been established.

‘[50] In our view therefore there is no rule of international law which requires this court to

read down s 1 of the 2000 Act. We turn therefore to the domestic authorities.

...
 ‘[60] The definition in s 1 is clear. Those who attacked the military forces of a government or the coalition forces in Afghanistan or Iraq with the requisite intention set out in the Act are terrorists. There is nothing in international law which either compels or persuades us to read down the clear terms of the 2000 Act to exempt such persons from the definition in the Act.’ *R v Gul* [2012] EWCA Crim 280, [2012] 3 All ER 83 at [1], [35], [37], [47], [50], [60], per Sir John Thomas P

TESTAMENT

[For 50 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 301 see now 102 Halsbury’s Laws of England (5th Edn) (2010) para 1.]

TESTAMENTARY

Testamentary expenses

[For 17(2) Halsbury’s Laws of England (4th Edn) (Reissue) paras 432–433 see now 103 Halsbury’s Laws of England (5th Edn) (2010) paras 1012–1013.]

THREAT

Of legal proceedings

[For 35 Halsbury’s Laws of England (4th Edn) (Reissue) para 642 see now 79 Halsbury’s Laws of England (5th Edn) (2014) para 557.]

Threat to liberty

Australia ‘[2] At issue in each appeal is whether, for the purposes of s 91R of the Migration Act 1958 (Cth) (the Act), the likelihood of temporary detention of a person for a reason mentioned in the refugees convention is, of itself and without more, a threat to liberty within the meaning of s 91R(2)(a) of the Act. Each claimant argued that the likelihood of any detention is such a threat, and therefore an instance of serious harm for the purposes of s 91R(1)(b) of the Act, irrespective of the frequency, length or conditions of that detention and its consequences for the detainee.

‘[3] In the matter involving the claimant

WZAPN [*WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947], the Federal Court of Australia (North J) upheld this argument on appeal from the Federal Magistrates Court. ...

‘[4] In *SZTEQ v Minister for Immigration and Border Protection* [[2015] FCAFC 39], the Full Court of the Federal Court of Australia (Robertson, Griffiths and Mortimer JJ) rejected the argument which had been upheld by North J in *WZAPN*. The Full Court held that “s 91R(2)(a) should not be construed as meaning that any deprivation of liberty constitutes serious harm for the purposes of s 91R(1)(b) and Art 1A(2)” of the convention. The Full Court was of the view that “‘liberty’ is a nuanced concept which takes its meaning from the context in which it appears, namely the requirement that the persecution involve serious harm”.

‘[5] These appeals are not the occasion for a comprehensive consideration of what is encompassed by the phrase “a threat to liberty” in s 91R(2)(a) of the Act. The critical question is whether the likelihood of future episodes of temporary detention constitutes a threat to liberty within s 91R(2)(a) of the Act, irrespective of the circumstances and consequences of that detention for the person seeking refugee status. The text of s 91R of the Act, understood in its context, is determinative of this question. The decision of the Full Court in *SZTEQ* was correct, and North J’s construction of s 91R(2)(a) in *WZAPN* cannot be sustained.’ *Minister for Immigration and Border Protection v WZAPN (Matter No M17/2015)* [2015] HCA 22, (2015) 320 ALR 467 at [3]–[5], per French CJ, Kiefel, Bell and Keane JJ

THROUGH OR UNDER

Australia

[Clause in mining agreement: obligation to pay royalties to ‘all persons or corporations deriving title through or under’ MBM.] ‘[74] That question raises a constructional choice. Is the phrase “persons or corporations deriving title through or under” MBM limited to succession, assignment or conveyance or is it sufficiently broad to cover a close practical or causal connection between the rights exercised by the Channar Joint Venturers and the rights which MBM obtained from Hanwright under the 1970 Agreement? The Court of Appeal adopted the former, narrow construction and held that the Channar Joint Venturers’ rights in respect of Channar A could not be traced back to any

"title" of MBM to the land.

[75] The text of the 1970 Agreement itself provides indications that the phrase "through or under" is broader than formal succession, assignment or conveyance.

...

[81] For those reasons, the Court of Appeal erred in adopting a narrow construction of the phrase "through or under". The Court of Appeal correctly identified that it was faced with a constructional choice that had to be resolved not by reference to authority but by reference to the text and context of the 1970 Agreement. However, the Court took as its starting point its decision in *Sahab Holdings Pty Ltd v Registrar-General (No 2)* [(2012) 16 BPR 30,353, [2012] NSWCA 42 at [28]], which concerned the statutory phrase "any person claiming through or under that person" in the Real Property Act 1900 (NSW). It did not follow from *Sahab* that continuity of a chain of title is always invoked by the phrase any person "deriving title through or under". Having regard to the proper construction of "through or under" in the context of the 1970 Agreement, the want of unbroken chain of "title" which the Court of Appeal relied upon was not determinative. The Court's reasoning would have had more force if cl 3.1 of the 1970 Agreement (incorporating cl 24(iii) of the 1962 Agreement) had referred to deriving title "from" MBM. That was not the language of the clause.' *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37, (2015) 325 ALR 188 at [74]–[75], [81], per French CJ, Nettle and Gordon JJ

TILLAGE

[For 1(2) Halsbury's Laws of England (4th Edn) (2007 Reissue) para 301 see now 1 Halsbury's Laws of England (5th Edn) (2008) para 365.]

TIMBER

[For 19(1) Halsbury's Laws of England (4th Edn) (Reissue) para 32 see now 52 Halsbury's Laws of England (5th Edn) (2014) para 55.]

TIME

[For 45(2) Halsbury's Laws of England (4th Edn) (Reissue) paras 215–216 see now 97 Halsbury's Laws of England (5th Edn) (2015) paras 315–316.]

At the time the period of detention was imposed

[Magistrates' Courts Act 1980, s 79(2): 'Where, after a period of imprisonment or other detention has been imposed on any person in default of payment of any sum adjudged to be paid by the conviction or order of a magistrates' court ... payment is made ... of part of the sum, the period of detention shall be reduced by such number of days as bears to the total number of days in that period less one day the same proportion as the amount so paid bears to so much of the said sum ... as was due at the time the period of detention was imposed'.] [2] The issue in the case is whether the words "the said sum ... as was due at the time the period of detention was imposed" in s 79(2) of the Magistrates' Courts Act 1980 ("MCA") should be construed in the case of confiscation orders made under the Drug Trafficking Act 1994 ("DTA") as meaning either:

- (i) the sum due when the default term was fixed by the Crown Court judge (the appellant's case); or
- (ii) the sum due when the default term was activated by the magistrates' court (the respondent's case).

[3] The answer has a potential for impact on the number of days that an offender is entitled to have remitted against the default term as a result of payments made against the order. The differing contentions dispute whether interest accruing on an unpaid order under the DTA is to be added to the original sum ordered, thus affecting the amount of time in custody to be remitted since any repayment made will be credited in terms of time to be served by reference to a formula which will diminish the value of a repayment if interest is to be added to the original amount ordered.

...

[45] Thus, when one considers s 79(2) of the MCA, the reference at the start of sub-s (2) to "after a period of imprisonment or other detention has been imposed on any person in default of payment of any sum" and the reference at the end of the sub-s (2) to "the said sum ... as was due at the time the period of detention was imposed" should be construed as references to the imposition of the default term by the magistrates' court rather than by the Crown Court.

[46] The effect of this will be that the default term will remain that specified by the Crown Court but that the amount which has accrued by way of interest will, by reason of s 10(1) of the DTA, have increased the amount

due under the order. As already stated, the increase in that sum cannot and does not increase the default term unless separate application is successfully made by the prosecutor to the Crown Court under s 10(2) of the DTA.

‘[47] I accept that there is a potential difficulty in that if the enforcing magistrates’ court is to be seen as imposing the default term, a literal reading of s 79(2) would seem only to provide for a reduction through payments of the default term if such payments are made after the imposition of that term. In other words, payments made prior to the imposing of detention by the magistrates’ court would not be able to reduce the term. It seems to me that that point is insufficient to displace the clear legislative regime which is in place indicating that the proper construction of s 79(2) is that it is the magistrates’ court which imposes the default term rather than the Crown Court. It may be that the difficulty referred to is the product of applying the fines enforcement regime to the confiscation regime without sufficient consideration of differences between them.

...
 ‘[51] I am satisfied that, approaching the matter with due caution, the three identified conditions are met in this case. In the circumstances, as Mr Stanbury conceded in argument was possible whilst urging us not to do so, I would interpret the opening words of s 79(2) of the MCA as if they read “where, before or after a period of imprisonment or other detention has been imposed ...”. This has the result of giving effect to the clear intention of Parliament. The draftsman’s failure to recognise the difficulty now identified clearly arises from the technique of drafting by reference without a consideration of all potential ramifications, as opposed to drafting from a blank sheet of paper. I consider the court justified in taking this course in circumstances where the appellant’s construction is the one which in practice would be unworkable, not least because one consequence would be that notwithstanding the clearest indications by Parliament to the contrary, an offender could secure his release no matter how much interest had accrued prior to the default term being imposed simply by paying the original sum ordered in full.’ *R (on the application of Gibson) v Secretary of State for Justice* [2015] EWCA Civ 1148, [2016] 4 All ER 244 at [2]–[3], [45]–[47], [51], per Treacy LJ

TIME IMMEMORIAL

[For 6 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 485 see now 13 Halsbury’s Laws of England (5th Edn) (2017) para 370n.]

[For 12(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 607 see now 32 Halsbury’s Laws of England (5th Edn) (2012) para 7.]

TIME-SHIFTING

Australia ‘[61] A person who makes a recording of a broadcast for his or her personal and domestic use, solely for the purpose of viewing or listening to it at a more convenient time, is described as having “time-shifted” the broadcast: compare: Laddie, Prescott and Vitoria, *The Modern Law of Copyright and Designs* (Vol 1, 4th ed, LexisNexis, 2011) at p 913 [21.107].’ *Singtel Optus Pty Ltd (ACN 052 833 208) v National Rugby League Investments Pty Ltd (ACN 081 778 538) (No 2)* [2012] FCA 34, (2012) 285 ALR 157 at [61], per Rares J

TITHES

[For 14 Halsbury’s Laws of England (4th Edn) paras 1209–1201, 1212 see now 34 Halsbury’s Laws of England (5th Edn) (2011) paras 975–976, 978.]

TOLL

Toll thorough

[For 21 Halsbury’s Laws of England (4th Edn) (2004 Reissue) para 201 see now 55 Halsbury’s Laws of England (5th Edn) (2012) para 213.]

Toll traverse

[For 21 Halsbury’s Laws of England (4th Edn) (2004 Reissue) para 210 see now 55 Halsbury’s Laws of England (5th Edn) (2012) para 213.]

TONTINE

[For 19(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 107n see now 48 Halsbury’s Laws of England (5th Edn) (2015) para 561n.]

TORT

[For 45(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 301 see now 97 Halsbury’s

Laws of England (5th Edn) (2015) para 401.]

TOTAL LOSS (MARINE INSURANCE)

[For 25 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 282 see now 60 Halsbury's Laws of England (5th Edn) (2011) para 424.]

TOWAGE

[For 43(1) Halsbury's Laws of England (4th Edn) (Reissue) para 789 et seq see now 93 Halsbury's Laws of England (5th Edn) (2008) para 587 et seq.]

TOWN OR VILLAGE GREEN

See **GREEN**

TRADE

[For 47 Halsbury's Laws of England (4th Edn) (2001 Reissue) para 5 see now 18 Halsbury's Laws of England (5th Edn) (2009) para 369.]

In Income Tax Acts

[For the Income and Corporation Taxes Act 1988, s 832(1) see now the Income Tax Act 2007 s 989 and the Corporation Tax Act 2010, s 1119.]

In trade

New Zealand [Claims relating to statements made by developer in relation to residential development affected by leaky building syndrome. The Fair Trading Act 1986, s 9, provides that no person shall, 'in trade', engage in conduct that is misleading or deceptive or is likely to mislead or deceive.] '[69] Even on the narrow approach, liability under s 9 depends on the impugned conduct having been "in trade". For instance, it is self-evident that the driver of a vehicle who signals left but turns right and thereby causes an accident is not liable under s 9 despite being a trader, driving a business vehicle and being on business at the time of the accident (see the comments in *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at p 603).

'[70] On the other hand, where a person's conduct is "in trade", it could accurately be said that that person is "in trade" engaging in the relevant conduct. This suggests that the

requirement that the conduct be "in trade" is not only a necessary precondition, but is also a sufficient basis, for concluding that the defendant "in trade" engaged in that conduct.

'[71] "Trade" is defined in s 2 of the Fair Trading Act in these terms:

trade means any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services or to the disposition or acquisition of any interest in land.

While this definition is not, in itself, conclusive, it is at least consistent with the broad approach contended for by the owners. The words "profession" and "occupation" can easily encompass a person who is not trading on his or her own account. For instance, it could be said of Mr Taylor that his relevant conduct was "in trade" as it occurred in the context of his "occupation" as a senior employee of a property development company.

'[72] So the narrow approach rests on the assumption that there is an ellipsis in the drafting of s 9 and that the section should be construed as if it read:

No person who is in trade on his or her own account shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

As to this, reference can be made to two articles written by Professor Watts (the principal academic proponent of the narrow approach) (see "Directors' and Employees' Liability under the Fair Trading Act 1986 – The Scope of 'Trading'" [2002] CSLB 77 and "Employee Liability under the Fair Trading Regime: A Lost Opportunity in the High Court of Australia" (2007) 13 NZBLQ 152).

'[73] It is also necessary to refer to s 45(2), which relevantly provides:

45. Conduct by servants or agents —

...

- (2) Any conduct engaged in on behalf of a body corporate —
 - (a) By a director, servant, or agent of the body corporate, acting within the scope of that person's actual or apparent authority; or
 - (b) By any other person at the direction or with the consent or agreement (whether express or implied) of a director, servant, or agent of the body corporate, given within the scope of the

actual or apparent authority of the director, servant or agent – shall be deemed, for the purposes of this Act, to have been engaged in *also* by the body corporate. (Emphasis added.)

Section 45(3), which addresses related issues in the case of a principal who is not a body corporate, is in similar terms. In some of the cases, the word “also”, which we have emphasised, has been taken as presupposing that where a body corporate incurs liability by reason of the conduct of its agent or director, both the body corporate and the agent and director are responsible (see, for instance, the comments of Tipping J in *Megavitamins [Megavitamin Laboratories (NZ) Ltd v Commerce Commission]* (1995) 6 TCLR 231; 5 NZBLC 103,834 at p 103, 838). On the other hand, as proponents of the narrow view have pointed out, the provenance of s 45(2) rather detracts from the significance which can be placed on the use of the word “also”. The Fair Trading Act is largely based on provisions which first appeared in the Trade Practices Act 1974 enacted by the Commonwealth of Australia. These provisions apply directly only to corporations and thus cannot impose direct liability (that is, as a principal) on someone who is a director or employee. As to this, see the two articles by Professor Watts already referred to and also Wilson and Trotman, “Personal Liability of Directors under the Fair Trading Act” (2006) 12 NZBLQ 201. It is right to recognise, however, that the force of this argument is somewhat diminished by the reality that by reason of s 6 of the Trade Practices Act, s 52 sometimes applies to natural persons (being natural persons who are otherwise subject to federal jurisdiction).

[74] So far the courts in New Zealand have held that liability under s 9 (or its equivalents) can extend to a defendant who was not trading directly on his or her own account, but rather was acting as a director or senior employee (see, for instance, *Megavitamins* at pp 103,844–103,845; *Gloken Holdings Ltd v The CDE Company Ltd* (1997) 8 TCLR 278; *Kinsman v Cornfields Ltd* (2001) 10 TCLR 342 (CA) at para [27] and *Specialised Livestock Imports Ltd v Borrie* (Court of Appeal, CA 72/01, 28 March 2002) at para [27], although compare the comments in *Newport v Coburn* (2006) 8 NZBLC 101,717 at para [56]). Reference can also be made to the judgment of this Court in *Giltrap City Ltd v Commerce Commission* [2004] 1 NZLR 608 at paras [51]–[56], a case

which concerned similar provisions in the Commerce Act 1986. Significantly, the same approach has been taken by the High Court of Australia (see *Houghton v Arms* (2006) 225 CLR 553). If *Kinsman*, *Borrie* and *Houghton v Arms* were correctly decided, the first of the questions identified at para [67] above must be answered adversely to Mr Taylor.

[75] The broad approach has been criticised by both Professor Watts and Wilson and Trotman in the articles which we have already cited, and also by Beck, “Misleading Business Sales: Who Foots the Bill?” [2002] CSLB 81. This Court in *Newport v Coburn* [(2006) 2 NZCCLR 1126; 8 NZBLC 101, 717] indicated at para [56] that the views of Professor Watts “may have some validity”. It is therefore appropriate that we review the arguments expressed by those who favour the narrow approach.

[76] Broadly (and to the extent that they are material to the New Zealand legislation), these arguments are along the following lines:

- (a) For reasons already given, the word “also” in s 45(2) is not of controlling significance in favour of the broad approach.
- (b) The provisions as to accessory liability either indicate a legislative intention to specify the circumstances in which employees and directors are liable (effectively only where they act dishonestly) or at least provide a basis upon which unmeritorious employees/directors can be held to be liable. The broad approach cuts across these provisions.
- (c) Given the absolute nature of liability under s 9, the broad approach favoured by the owners has the potential to render employees (perhaps quite junior) sureties for the accuracy of representations that they make on behalf of their employers. While some amelioration may be possible in circumstances in which the employee is a mere conduit for representations which originate elsewhere, it will not protect an employee who was responsible for the error. Nor will the sort of responsibility for an error which would be inconsistent with the conduit defence necessarily mean that the employee was careless, as the employee’s error may have been reasonable. The broad approach cuts across accepted concepts of limited liability and has the tendency to expose employees to unexpected liabilities which are unlikely to be covered by insurance.
- (d) A narrow approach which excludes

employees from liability would be consistent with the usual rule, already discussed, that an employee cannot generally be sued for negligent representations made on behalf of his or her employer. The relevant line of authority was not addressed in *Houghton v Arms*, where the Court cited *Standard Chartered Bank [Standard Chartered Bank v Pakistan National Shipping Corporation (No 2) [2000] 1 Lloyd's Rep 218, CA; [2003] 1 AC 959; [2003] 1 All ER 173, HL]* but not *Williams [Williams v Natural Life Health Foods Ltd [1998] 1 WLR 830, HL]* or *Trevor Ivory [Trevor Ivory Ltd v Anderson [1992] 2 NZLR 517, CA]*.

- (e) The imposition of direct liability on employees is not justified by consumer protection considerations to cover the contingency that the employer may have no resources. As to this, Professor Watts observed in "Employee Liability under the Fair Trading Regime" (2007) 13 NZBLQ 152, p 158:

"There is something to be said for the view that the privileges of incorporation and limited liability are too freely available. But that problem should not be cured with a solution that imposes strict liability on employees, and that makes victims of the staff of companies that were adequately capitalised but have fallen unexpectedly on hard times."

- (f) The discretionary nature of relief under the Fair Trading Act does not justify the rough edges associated with a broad approach to s 9. In the first place, s 9 is based on Australian statutes under which damages are available as of right, and the section presumably was intended to have the same meaning as the corresponding provisions in the equivalent Australian legislation. Secondly, it is not right to leave the "exculpation" of employees to judicial discretion.

"[77] These arguments are plainly cogent but they are not of compelling significance:

- (a) The narrow approach is not consistent with the words which actually appear in s 9. The definition of "trade" might be thought to favour the broad approach. And s 45(2), although not a decisive consideration, is at least consistent with the broad approach. On the broad approach the accessory liability provisions still have a role to play in circumstances where the impugned

conduct cannot be attributed directly to the defendant. Indeed, where the conduct of the director/employee infringes s 9, the language of s 43(1)(b) ("[a]iding, abetting, counselling, or procuring") is far from apt (see, for instance, the comments of Lord Rodger of Earlsferry in *Standard Chartered Bank* at p 971). There is thus nothing in the wording or scheme of the statute which dictates the conclusion that there was a drafting flaw in s 9 as contended for by Professor Watts and other proponents of the narrow approach.

- (b) The risk of unexpected and unacceptable liabilities being imposed if the broad approach is adopted has been overstated. The only cases in which the broad approach has been applied have involved senior employees. In *Gloken*, for instance, the defendant was described as the "alter ego" of the company. Senior employees are likely to be able to arrange insurance to cover the risk of litigation under the Fair Trading Act. In contradistinction, plaintiffs may not have been in a position to obtain insurance in relation to their losses. Further, the broad approach does not mandate the conclusion that particular misleading or deceptive conduct in which a director or employee participated necessarily amounts to conduct on the part of that director or employee which was misleading and deceptive. We will revert to this point when we discuss the second of the two questions referred to at para [67] above. If the courts keep steadily in mind the requirement that a plaintiff must point to conduct of the defendant which is, in itself, misleading and deceptive, the scope for unexpected and unacceptable outcomes is much diminished. As well, the discretionary nature of relief provides a further safeguard.

- (c) While it is right that the judgment in *Houghton v Arms* did not substantially address the general rule that employees are not liable for negligent misrepresentations, the *Trevor Ivory* line of cases was referred to in *Kinsman*. So it is not a situation where the New Zealand courts have overlooked the tension between the *Trevor Ivory* approach to negligence and a broad approach to liability under s 9. Indeed, and in defence of the judgment of the High Court of Australia in *Houghton v Arms*, that Court presumably cited the *Standard Chartered Bank* case and not *Williams*

because an assumption of responsibility was not an element of the statutory tort under consideration.

- (d) Obviously the Fair Trading Act cannot be applied in a legal vacuum. The policy reasons which have resulted in the common law developing in particular ways may well have a bearing on its proper interpretation. But, equally obviously, the Fair Trading Act changed pre-existing legal principles. There is nothing in the Act to suggest that in relation to representations made by employees and directors, s 9 is confined to circumstances in which the common law would impose liability in negligence or fraud. Further, given the extraordinarily broad and untechnical language of s 9, there is no reason to suppose that a person who engages in misleading or deceptive conduct in trade is exempt from liability if that person was acting on behalf of another legal entity.

‘[78] At this point, the issue comes down to competing policy considerations: on the one hand, consumer protection considerations which are best served by a broad approach to liability; and on the other, the undesirability of imposing unexpected liabilities on employees (along with an associated weakening of the usual protection afforded by limited liability status). Although both the broad and narrow approaches are tenable, we see no reason why we should depart from the broad approach given its congruity with the words of the statute, the most recent and authoritative Australian decision on similar legislation and, most significantly, the pattern of New Zealand authority, including judgments of this Court.’ *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17 at [69]–[78], per William Young J

Part of a trade

[Under the Capital Allowances Act 1990, s 18(2), the provisions of s 18(1) (defining ‘industrial building or structure’) are to apply in relation to a part of a trade or undertaking as they apply in relation to a trade or undertaking except that where part only of a trade or undertaking complies with the conditions set out in s 18(1), a building or structure is not by virtue of s 18(2) an industrial building or structure unless it is in use for the purposes of that part of the trade or undertaking.] ‘[13] My Lords, this is a corporation tax appeal concerned with capital allowances for industrial buildings. The respondent Maco Door & Window Hardware (UK) Ltd (Maco) has claimed a

writing-down allowance under s 3 of the Capital Allowances Act 1990 for its accounting periods ending on 31 December 1999 and 31 December 2000, but the Revenue amended Maco’s self-assessments so as to disallow the claims. The issue turns on the definition of “industrial building or structure” in s 18 of the 1990 Act, and in particular on the meaning of the expression “a part of a trade” in s 18(2).

...

‘[22] ... Whether the requirements of the section are met may depend both on the way in which an enterprise divides its activities between different buildings, and on the way in which those activities are arranged within its corporate structure. It is common ground that in this case the conditions would have been satisfied if Maco had traded simply as a storage company, with its stock remaining the property of Mayer until sooner or later it was sold to customers. The Special Commissioner observed that it made little sense to restrict the relief to the case of a warehousing subsidiary. But it would also have been available, under s 18(1)(e), if the warehouse had belonged to Mayer, trading through a United Kingdom branch (rather than a subsidiary). In any case it is a commonplace of tax law that different corporate structures often produce different fiscal consequences, even if the economic results are the same from the consumer’s point of view.

‘[23] The other essential point to note is that s 18(1)(e) is concerned with “a trade which consists in the manufacture of goods [etc]”. A trade must by definition be conducted with a view to profit. A do-it-yourself enthusiast is not a trader. Making goods out of raw materials is an activity which becomes a trade only if the goods are to be turned to account—normally by sale, occasionally by hire. Mr Goodfellow QC (for Maco) rightly pointed out that some manufacturers, for instance in the tailoring trade, work on goods which they do not own, and charge for their time and skill without any sale of goods. But that does not affect the general principle. A trading manufacturer who does own the finished goods is in the ordinary course of things going to sell them either by wholesale or by retail. If a manufacturing company has a chain of retail shops, it may decide to set up a retailing subsidiary, and in that case there would be two traders and two trades, with a wholesale transaction between them (as in this case, between Mayer and Maco). But if only a single company is involved, it would not be a correct legal analysis to describe it as carrying on two trades (rather

than two vertically integrated activities). To do so would involve positing a fictitious sale in which the same company was both seller and buyer. Occasionally an appropriation similar to a fictitious sale is required for some particular tax purpose (see for instance *Watson Bros v Hornby (Inspector of Taxes)* [1942] 2 All ER 506, approved by this House in *Sharkey (Inspector of Taxes) v Wernher* [1955] 3 All ER 493, [1956] AC 58) but there is no warrant for it here. The Court of Appeal were rightly unanimous in the view that capital allowances should not be over-complicated.

[24] There is therefore a clear and important distinction, in my opinion, between a trade and an activity undertaken in the course of a trade. The expression “a part of a trade” is a simple phrase which is no doubt capable of bearing different meanings according to the context. The second half of s 18(2), which refers to the case where “part only of a trade or undertaking complies with the conditions set out in subsection (1)” suggests that the “part” must be something that has the same sort of characteristics as the trade as a whole—what Patten J ([2007] STC 721 at [40]) called an activity in the nature of a trade. That was also the approach adopted by Lightman J in *Bestway (Holdings) Ltd v Luff (Inspector of Taxes)* [1998] STC 357 at 383–384, (1998) 70 TC 512 at 543, citing Rowlatt J in *Graham v Green (Inspector of Taxes)* [1925] 2 KB 37 at 40, [1925] All ER Rep 690 at 692:

“a conception of a trade... differs in its nature, in my judgment, from the individual acts which go to build it up, just as a bundle differs from odd sticks. You may say, I think, without an abuse of language, that there is something organic about the whole which does not exist in its separate parts.”

[25] In my opinion that approach is the right one. To come within s 18(2) “a part of a trade” must be not simply one of the activities carried out in the course of a trade, but a viable section of a composite trade which would still be recognisable as a trade if separated from the composite whole: for instance, a garage business that sells cars from its showroom and services and repairs cars in its workshop, the example given in argument by Mr Brennan QC in the *Bestway* case. If the proprietor was to close the showroom, or alternatively were to close the workshop, he would still have part of his original trade.

[26] It is not enough, in my view, to be able

to isolate (by horizontal division as it were) some activity carried on in the course of a vertically-integrated trade, even if that activity is (in the words of Lightman J in the *Bestway* case) “significant, separate and identifiable”. I consider that the *Bestway* case was rightly decided, but I see force in Mr Goodfellow’s criticism of the test that I have just referred to. Storage was not a part of the wholesale cash and carry trade considered in that case, not so much because it was insignificant as because you cannot trade by storing your own goods.’

[50] ... The issue ultimately turns on the meaning of “a part of a trade” in s 18(2) of the Capital Allowances Act 1990. Maco Door & Window Hardware (UK) Ltd (Maco) contends that it refers to any activity which forms a component of the taxpayer’s trade, such as an activity which is ancillary to, or inherent in, that trade. The commissioners argue that it only applies to any activity which is itself a trade, although carried on as part of a taxpayer’s composite trade.

[51] The difference between the two positions can be illustrated by an example of a trader who manufactures motor vehicle components, some of which he sells through retail outlets to the public, and some of which he supplies to motor vehicle manufacturers. There could be said [to be] three separate “part[s]” of the business, namely (a) the manufacture of components, (b) the supply of components to the motor manufacturing industry, and (c) the retail sale of components. Both parties accept that, as a result of applying s 18(2), in so far as a building was used by the trader for purpose (a), eg a factory, it would fall within s 18(1)(e), but, if a building was used by the trader for purpose (c), eg a shop, s 18(1) would not apply, as retail use is not within s 18(1).

[52] If the components were stored in a separate building by the trader so that, in connection with purpose (b), they could be supplied to motor vehicle manufacturers as and when they were needed, on Maco’s case the building would satisfy s 18(1)(f)(i), as the components would be in “storage”, an aspect (and hence under s 18(2) “a part”) of the trader’s business, and they would be intended to “be used in the manufacture of other goods”, namely motor vehicles. However, as the storage of the components in preparation for providing them to motor vehicle manufacturers could not sensibly be characterised as a separate trade of the trader, on the commissioners’ case the use of the building would not fall within the ambit of s 18(2), and hence could not benefit from

s 18(1)(f)—at least unless it could be said to be used for the purposes of the component manufacturing business.

‘[53] While Maco’s interpretation is generally more generous to taxpayers, there will be cases where, on the commissioners’ case, a building would fall within s 18(1), but on Maco’s approach it would not do so. If a building was used by the trader in my example for research into the design or efficiency of motor vehicle components, Maco would presumably accept that the building was used for research, which is not within any of the categories of s 18(1). However, the commissioners would, I think, accept that it fell within s 18(1)(e), at least provided that the research was devoted to improving the quality of the components manufactured by the trader: in such a case, the building would be used ‘for the purposes of’ the trader’s manufacturing trade.

‘[54] In my judgment, the commissioners’ interpretation is to be preferred. First, I think it is more in accordance with the language and structure of s 18. Secondly, it seems to me to make better sense so far as the purpose of s 18 is concerned. Thirdly, I believe that it is the more practical interpretation.

‘[55] I accept that either interpretation is possible if one merely looks at the way in which s 18(2) is expressed. However, I agree with what Lawrence Collins LJ said in the Court of Appeal ([2007] STC 1442 at [48]), namely that “the language of s 18(2) and its place within s 18 show that it is concerned with part of a trade which is a qualifying trade under s 18(1)”. Applying s 18(2) to, for instance, s 18(1)(e) or (f), the section extends to a building “in use for the purposes of part of a trade which consists in [X]”. On the commissioners’ argument, this is perfectly simple: one simply asks whether the trader in question carries on a business, part of which is trade X.

‘[56] This appears to me to fit in well with the structure and wording of the two subsections. Section 18(2) is simply clarifying or extending s 18(1) so far as composite trades are concerned. To put the point another way, both linguistically and in the light of the way in which the two subsections are structured, the “part of a trade” envisaged by s 18(2) has the same characteristics as the “trade” envisaged by s 18(1): as Patten J put it ([2007] STC 721 at [40]), it has to be “an activity in the nature of a trade”.’ *Maco Door & Window Hardware (UK) Ltd v Revenue and Customs Comrs* [2008] UKHL 54, [2008] 3 All ER 1020 at [13], [22]–[26], per Lord Walker of Gestingthorpe,

and at [50]–[56], per Lord Neuberger of Abbotsbury

TRADE UNION

[For 47 Halsbury’s Laws of England (4th Edn) (2001 Reissue) para 1001 et seq see now 40 Halsbury’s Laws of England (5th Edn) (2009) para 846 et seq.]

TRADING CORPORATION

Australia [Commonwealth Constitution, s 51(xx).] ‘[26] The test to be applied when considering whether a corporation is a “trading corporation” under s 51(xx) has been the subject of much judicial consideration. As Black CJ and French J (as he was then) said in *Quickenden v O’Connor* (2001) 109 FCR 243; 184 ALR 260; [2001] FCA 303 at [41] (*Quickenden*):

[41] The criteria for identifying a corporate entity as a trading or financial corporation have evolved out of a contest between narrow and more expansive approaches adopted by Justices of the High Court, generally reflecting like approaches to Commonwealth power and the scope of federal jurisdiction.

‘[27] The CFA [Country Fire Authority] contends that it is not a “trading corporation”. Although the issue is not without difficulty, for the reasons I set out below I consider that it is.

‘[41] ... [S]ervices of a type analogous to those provided by the CFA are not excluded from the ambit of trading activities. Although the CFA may not seek to produce profits or to expand its market share for the benefit of its private interests, its activities may still mean that it is properly seen as a trading corporation. The fact that it conducts its activities in the public interest also does not exclude the activities from being trading: *Aboriginal Legal Service [Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)]* (2008) 37 WAR 450; 252 ALR 136] at [68(5)] and [70]–[71]. For example, in *Bankstown [Bankstown Handicapped Children’s Centre Association Inc v Hillman]* (2010) 182 FCR 483; 265 ALR 23], although the activities of the corporation were focused on the provision of welfare services to handicapped children the corporation was found to be engaging in trading activities: *Bankstown* at [55].

‘[87] It may be accepted, as the CFA contends, that it is properly categorised as a

"volunteer and community based fire and emergency services organisation". But whether it is also a trading corporation requires consideration of how the trading activities of the CFA sit within the organisation overall and whether they are "substantial" or "not insubstantial", to apply the test used in *Adamson* [R v Judges of the Federal Court of Australia; Ex p Western Australian National Football League (1979) 143 CLR 190; 23 ALR 439].

[88] In *Adamson* Barwick CJ held at CLR 208; ALR 452 that if trading was "substantial" then the corporation would be a constitutional corporation. At CLR 234; ALR 473 Mason J, with whom Jacobs J agreed at CLR 237; ALR 475-6, described the question of whether a corporation was a trading corporation as "very much a matter of fact and degree". His Honour elaborated in explaining that a corporation should not be considered a trading corporation if the trading activities were so slight and incidental to some other principal activity that the corporation could not be correctly defined as a trading corporation. Murphy J characterised the matter slightly differently again, explaining (at CLR 239; ALR 477):

A trading corporation may also be a sporting, religious, or governmental body. As long as the trading is not insubstantial, the fact that trading is incidental to other activities does not prevent it being a trading corporation.

[89] Both parties made submissions about whether the substantiality of trading activities must be assessed in absolute terms, or whether it should be assessed relative to the corporation's overall activities. In *Bankstown* the majority of the Full Court said (at [52]):

[52] There is no bright line delineating what is or is not a trading corporation. That is exemplified by the division of opinion in *Aboriginal Legal Service of Western Australia (Inc)* where a minority of the Court characterised the Service's activities as that of a trading corporation but the majority did not. As Black CJ and French J observed in *Quickenden* 109 FCR 243 at [52] "... the characterisation of a body corporate as a trading corporation is a matter of fact and degree" repeating similar observations of Mason J in *Actors and Announcers Equity* 150 CLR at 211.

I respectfully agree. It is this which guides my analysis.

[102]... While I consider that the CFA's trading revenue is plainly significant if considered in absolute terms, I do not approach the issue that way. Considering its trading revenue relative to its non-trading activities, the question is not without difficulty and is one of fact and degree. In my opinion the CFA undertakes sufficient trading for it to be seen as "not insubstantial", not trivial, insignificant, marginal, minor or incidental, and I find that it is a trading corporation.' *United Firefighters Union of Australia v Country Fire Authority* [2014] FCA 17 (2014) 308 ALR 438 at [26]-[27], [41], [87]-[89], [102], per Murphy J

Australia [Commonwealth Constitution s 51(xx). Contention that rail authority was a 'trading corporation within the meaning of that phrase in s 51(xx), such that it was a 'constitutional corporation' to which the Fair Work Act 2009 (Cth) applied.] '[10] The questions stated by the parties assume that it is useful to direct separate attention to what is a "corporation" and what is a "trading corporation" within the meaning of s 51(xx). The validity of the assumption was not directly challenged by any party or intervener and it is convenient to proceed without examining that issue. But this must not obscure the obvious importance of recognising that the subject matter of s 51(xx) is not "corporations"; it is "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". And neither the word "corporations", where twice appearing, nor the collocation "trading or financial corporations formed within the limits of the Commonwealth" is to be construed without regard to the context within which the expression appears.

...
[39] As already noted, the authority submitted that its activities were not such as to make it a trading corporation. In its written submissions, the authority submitted that it dealt only with a related entity, QRL, and made no profit from those dealings, and that these "peculiar" activities did not make it a trading corporation. The authority did not elaborate on these matters in oral argument.

[40] By contrast, some of the interveners, especially the Attorney-General of the Commonwealth and the Attorney-General for Victoria, advanced detailed submissions about what test or tests should be applied in deciding whether a corporation is a trading corporation. In order to decide this case, however, it is not necessary to examine those submissions in any detail. Instead, it is enough to conclude that no

matter whether attention is directed to the constitution and purposes of the authority, or what it now does, or some combination of those considerations, the authority must be found to be a trading corporation.

[41] The QRTA Act established the authority as an entity having functions which included “managing railways”, “controlling rolling stock on railways”, “providing rail transport services, including passenger services” and “providing services relating to rail transport services”. The QRTA Act provides that the authority is to “carry out its functions as a commercial enterprise”. Provision is made for the authority to pay dividends to the state and, to that end, the authority is obliged to give the responsible ministers in May each year an estimate of its profit for the financial year. Not only that, the authority is liable to pay to the treasurer, for payment into the consolidated fund of the state, amounts equivalent to the amounts for which the authority would have been liable if it had been liable to pay tax imposed under a Commonwealth Act. In light of these provisions, the conclusions that the authority was constituted with a view to engaging in trading and doing so with a view to profit are irresistible.

[42] Even if the authority is treated as now doing nothing more than supplying labour to QRL (a related entity) for the purposes of QRL providing rail services and even if, as the authority submitted, the authority chooses to supply that labour at a price which yields it no profit, those features of its activities neither permit nor require the conclusion that the authority is not a trading corporation. Labour hire companies are now a common form of enterprise. The engagement of personnel by one enterprise for supply of their labour to another enterprise is a trading activity. That the parties to the particular supply arrangement are related entities does not deny that characterisation of the activity. That the prices for supply are struck at a level which yields no profit to the supplier likewise does not deny that the supplier is engaged in a trading activity.

[43] In combination, these considerations require the conclusion that the authority is a trading corporation. It is not necessary to consider which of them is or are necessary or sufficient to support the conclusion.’ *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* [2015] HCA 11, (2015) 318 ALR 1 at [10], [39]–[43], per French CJ, Hayne, Kiefel, Bell, Keane and Nettle JJ (footnotes omitted)

TRADING STOCK

[For the Income and Corporation Taxes Act 1988, s 100(2) see now the Income Tax (Trading and Other Income) Act 2005, s 174(1), (2).]

TRANSACTION

[For the Income and Corporation Taxes Act 1988, s 392 see now the Income Tax Act 2007, s 152.]

TRANSIT

[For 41 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 259 see now 91 Halsbury’s Laws of England (5th Edn) (2012) para 257.]

TRANSMISSION

In the course of transmission

[Regulation of Investigatory Powers Act 2000, ss 1(1), 2(7). By s 1(1) it is offence for a person intentionally and without lawful authority to intercept, at any place in the United Kingdom, any communication in the course of its transmission by means of—(a) a public postal service; or (b) a public telecommunication system.] [7] ... At the heart of this appeal is the effect of s 2(7) which provides:

“For the purposes of this section the times while a communication is being transmitted by means of a telecommunication system shall be taken to include any time when the system by means of which the communication is being, or has been, transmitted is used for storing it in a manner that enables the intended recipient to collect it or otherwise to have access to it.”

...

[12] The issue to be determined therefore is whether, on the proper construction of s 2(7), the period of storage referred to comes to an end on first access or collection by the intended recipient or whether it continues beyond such first access for so long as the system is used to store the communication in a manner which enables the intended recipient to have subsequent or even repeated access to it.

...

[26] The scope of the provision is put beyond doubt, in our view, by the reference in s 2(7) to the system by means of which “the

communication is being, or has been, transmitted". The words "has been transmitted" are totally inconsistent with the appellants' suggestion that the extension is limited to transient storage prior to first access. These words make entirely clear that the course of transmission may continue notwithstanding that the voicemail message has already been received and read by the intended recipient.

'[27] In our view these words in their natural meaning are entirely apt to cover a situation, such as that presently under consideration, where a message having been initially received by the intended recipient is stored in the communications system where the intended recipient may thereafter have access to it by playing back the message. In this regard it is significant that the intended recipient cannot gain access to the voicemail message without resort to the telecommunication system, but is totally dependent on the system. In these circumstances, there is no good reason why the first receipt of the communication should be considered as bringing the transmission to an end nor is there any support for this within the statutory language. We consider that it is readily apparent from the plain words that it was the intention of Parliament that s 2(7) should extend the course of transmission to include this situation.' *R v Coulson* [2013] EWCA Crim 1026, [2013] 4 All ER 999 at [7], [12], [26]–[27], per Lord Judge CJ

TREASON

[For 11(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 363 see now 26 Halsbury's Laws of England (5th Edn) (2016) para 419.]

Treason felony

[For 11(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 367 see now 26 Halsbury's Laws of England (5th Edn) (2016) para 423.]

TREASURE TROVE

[For 12(1) Halsbury's Laws of England (4th Edn) (Reissue) para 373 see now 29 Halsbury's Laws of England (5th Edn) (2014) para 297.]

TREASURY BILL

[For 4(1) Halsbury's Laws of England (4th Edn) (2002 Reissue) para 513 see now 49 Halsbury's

Laws of England (5th Edn) (2015) para 395.]

TREATING

[For 15(4) Halsbury's Laws of England (4th Edn) (2007 Reissue) para 724 see now 38A Halsbury's Laws of England (5th Edn) (2013) para 721.]

TREATMENT

Canada [Whether withdrawal of treatment constitutes 'treatment' under the Health Care Consent Act, 1996, SO 1996, c 2, Sch A, requiring consent.] '29. The *HCCA* requires consent to all measures that constitute "treatment". ...

30. "Treatment", in turn, is broadly defined as care given for a *health-related purpose*. Section 2(1) provides:

... anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course of treatment, plan of treatment or community treatment plan ...

'31. The issue raised in this case thus comes down to the interpretation of "treatment" and "health-related" purpose under s. 2(1) of the *HCCA*.

...
'33. There is no dispute between the parties that, in general, the provision of life support constitutes treatment under the *HCCA* and therefore requires consent. The question is whether withdrawal of life support constitutes treatment on the facts of this case. The physicians argue that it does not. They raise three arguments: (1) life support that is not "medically indicated" is not "treatment" under the *HCCA*; (2) in any case, withdrawal of treatment does not itself constitute "treatment" under the *HCCA*; and (3) requiring consent for withdrawal of life support will place them in an untenable ethical position. I will consider each argument in turn.

...
'68. In summary, withdrawal of life support aims at the health-related purpose of preventing suffering and indignity at the end of life, often entails physical interference with the patient's body, and is closely associated with the provision of palliative care. Withdrawal of life support is inextricably bound up with care that serves health-related purposes and is tied to the objects of the Act. By removing medical services that are keeping a patient alive,

withdrawal of life support impacts patient autonomy in the most fundamental way. The physicians' attempt to exclude withdrawal of life support from the definition of "treatment" under s. 2(1) of the *HCCA* cannot succeed.

...
 '70. These considerations lead me to conclude that "treatment" in the *HCCA* should be understood as extending to withdrawal of life support in the situation at issue here and as that process is described in these proceedings. This case does not stand for the proposition that consent is required under the *HCCA* for withdrawals of other medical services or in other medical contexts.' *Cuthbertson v Rasouli* 2013 SCC 53, [2013] 3 SCR 341 at paras 29–31, 33, 68, 70, per McLachlin CJ

Treatment for the termination of pregnancy

[Abortion Act 1967, s 1(3). The British Pregnancy Advisory Service brought a claim under CPR Pt 8 for a declaration that for the purposes of the Abortion Act 1967, s 1, a pregnancy was 'terminated by a registered medical practitioner' where the registered medical practitioner prescribed an abortifacient drug with the intention of terminating a pregnancy and the administration of that drug to the pregnant woman was not 'any treatment for the termination of pregnancy'.] '[3] The purpose of the claimant's application is to establish that it would be lawful, under the Abortion Act 1967, to pilot and if successful adopt, subject to regulation, a process of providing "early medical abortion" (EMA) whereby part of the treatment is self-administered by the woman at home.

...
 '[5] The 1967 Act as amended provides that any treatment for the termination of pregnancy (whether surgical or medical) must be carried out in a hospital vested in the Secretary of State, a NHS Trust, Primary Care Trust (PCT) or Foundation Trust, or in a place approved for the purpose by the Secretary of State: s 1(3). The Secretary of State for Health is therefore responsible for approving independent sector service providers for the purpose of treatment for the termination of pregnancy. Independent sector providers, after having registered with the Care Quality Commission (CQC) and on receipt of approval from the Secretary of State for Health, can carry out abortions up to 24 weeks' gestation.

...
 '[23] The claimant's case is that the concept

of treatment does not include the taking of an abortifacient because treatment refers only to the act of prescription of such a drug. The Secretary of State submits that "treatment" includes the use or administration of the abortifacient drug. In my view the claimant's submission runs counter to the natural and ordinary meaning of the word "treatment". The Oxford English Dictionary defines "treatment", in the medical context, as "management in the application of remedies; medical or surgical application or service". The words "medical... application" plainly, in my view, embrace the taking of an abortifacient drug.

'[24] The critical phrase in s 1(3) is "any treatment for the termination of pregnancy". "Treatment" is not, in my view, properly restricted to the act of diagnosis and the prescription of drugs or medicine. If the drugs or tablets were prescribed by the registered medical practitioner and not taken by the woman, the opportunity for treatment would have been available but it would not have been taken. The aim of the treatment, whether medical or surgical, must be the termination of a pregnancy. Termination is the consequence of the treatment; it is not itself treatment.

'[25] The interpretation put by the claimant on the words "any treatment for the termination of pregnancy" requires it to submit that the pregnancy is terminated by a registered medical practitioner in s 1(1) when that person merely prescribes an abortifacient drug. However termination may or may not be the consequence of the prescription. A woman may decide not to proceed to take the drug.

...
 '[33] In [*Royal College of Nursing of the UK v Dept of Health and Social Security*] Lord Diplock noted ([1981] 1 All ER 545 at 568, [1981] AC 800 at 826) that "What the [1967] Act sets out to do is to provide an exhaustive statement of the circumstances in which treatment for the termination of a pregnancy may be carried out lawfully." Ms Lieven submits that the position now is that the safety of the abortion is unaffected by whether the relevant medication is taken in an approved place or at home. Accordingly, she submits, that the mischief of the 1967 Act (see the *Royal College of Nursing* case [1981] 1 All ER 545 at 568–569, [1981] AC 800 at 827 per Lord Diplock, above) is met by defining the treatment as the prescription of the medication rather than the administration. However, in my view it is clear that in s 1(3) Parliament has placed responsibility for approving a place of treatment (other than those specified) on the

Secretary of State, and in s 1(3A) it has done so for approval of a wider range of place and in relation to types of medicine and the manner of their administration or use. The claimant acknowledges that the effect, and indeed the very purpose, of the declaration sought would be that the Secretary of State's approval is no longer needed to enable the home to be designated as an approved place for the purposes of s 1 of the 1967 Act. In my view this would be directly contrary to Parliament's clear intention.

'[34] The development in medical science on which the claimant relies is that the drug, misoprostol, is capable of being administered by the woman to herself at home. However in the light of the express wording of s 1(3) and (3A) I am of the view, applying the test of Lord Wilberforce in the *Royal College of Nursing* case [1981] 1 All ER 545 at 565, [1981] AC 800 at 822, this "new state of affairs, or ... fresh set of facts ... fall within the same genus of facts as those to which the expressed policy has been formulated"; alternatively, in my view, there is a clear purpose in the legislation which can only be fulfilled if the Secretary of State's interpretation of the concept of treatment is adopted.

'[35] The wording of s 4 of the 1967 Act also, in my view, supports the Secretary of State's submission that "treatment" includes the use or administration of abortifacient drugs. Section 4 provides that "no person shall be under any duty ... to participate in any treatment authorised by this Act to which he has a conscientious objection". In [*Janaway v Salford Health Authority* [1988] 3 All ER 1079, [1989] AC 537] the House of Lords held that the word "participate" in s 4(1) should be given its ordinary and natural meaning and that to "participate in any treatment authorised by this Act" meant actually to take part in treatment administered in a hospital or other approved place in accordance with s 1(3) for the purpose of terminating a pregnancy. The declaration sought by the claimant would cover the administration of abortifacient drugs not only at home, but also at a hospital or any place approved by the Secretary of State. The drugs can be self-administered, however there may be many situations in which nurses and midwives and other medical professionals are asked to administer them. If the claimant's construction of what constitutes "treatment authorised by this Act" is correct, no such person will be entitled to the protection of s 4. Ms Lieven accepts that there would be this lacuna but she points to the lacuna created by the decision in *Janaway's*

case where the House of Lords held that the applicant, a secretary, in typing a letter referring a patient to a consultant with a view to a possible termination of pregnancy under s 1 would not have been participating in treatment authorised by the 1967 Act, and that, accordingly her refusal to do so had not been protected by s 4(1). The principle would apply equally to doctors in a similar situation. That is no answer, in my view, to Ms White's submission that Parliament clearly did not intend that an action which directly causes the termination of pregnancy should be outside the scope of s 4. I am also not persuaded by Ms Lieven's response that in practice the position of nurses and midwives can be dealt with by regulations and codes of conduct. The advice that the Nursing and Midwifery Council can give necessarily depends on the statutory right in the 1967 Act as construed by the courts.

'[36] In the *Royal College of Nursing* case Lord Diplock referred ([1981] 1 All ER 545 at 566, [1981] AC 800 at 824) to "[t]he legalisation of abortion, at any rate in circumstances in which the termination of the pregnancy is not essential in order to save the mother's life, [as] a subject on which strong moral and religious convictions are held" (see also Lord Wilberforce's description ([1981] 1 All ER 545 at 565, [1981] AC 800 at 822) of the 1967 Act as "dealing with a controversial subject involving moral and social judgments on which opinions strongly differ"). Yet, as Mr Eadie submits, the consequences of the claimant's interpretation of the concept of treatment in the 1967 Act include the following: first, the declaration the claimant seeks would apply to the prescription and administration of the abortifacient drug at any stage of pregnancy, not merely up to nine weeks' gestation. Second, the declaration refers to "an abortifacient drug" which is wide enough to cover the administration of mifepristone, the first-stage drug, outside the clinical setting as well as the administration of misoprostol, the second-stage drug. Third, the Secretary of State has not entered into debate in these proceedings as to whether what is proposed by the claimant is safe. However, the declaration the claimant seeks would apply equally to the administration of abortifacients which do not enjoy the same record of safety and effectiveness, at home, as those currently administered have demonstrated in countries outside Great Britain.

'[37] The response of Ms Lieven to these concerns is that the regulatory regime (see paras [5]–[8], above) is entirely effective to protect the safety of patients. She submits that

the consequences that the Secretary of State identifies are unrealistic and ignore all the other statutory safeguards. In my view this is not a satisfactory answer to the point that Parliament has decided by s 1(3A) to give the Secretary of State the responsibility for approval of the types of medicine that can be used, the manner in which they can be used and the places where they can be used. Moreover the regulatory regime is not subject to the same controls as the statutory regime (see paras [7], [8], above, for example, in relation to sanctions). Mr Eadie makes the additional point, which I accept, that there is a possibility that different standards or measures may be adopted by the Westminster authorities and the devolved administrations. Health and Social Care is a devolved matter (for Wales, see the Care Standards Act 2000, and for Scotland, see the Regulation of Care (Scotland) Act 2001), whereas abortion is a “reserved matter” for the Westminster Parliament (for Wales see para 9 of Sch 7 to the Government of Wales Act 2006, and for Scotland, see section J1 of Sch 5 to the Scotland Act 1998).

‘[38] In my judgment, for the reasons that I have given, this claim fails.’ *British Pregnancy Advisory Service v Secretary of State for Health (Society for the Protection of Unborn Children, intervenor)* [2011] EWHC 235 (Admin), [2011] 3 All ER 1012 at [3], [5], [23]–[25], [33]–[38], per Superstone J

TRESPASS

Trespass ab initio

[For 45(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 510 see now 97 Halsbury’s Laws of England (5th Edn) (2010) para 568.]

Trespass to goods

[For 45(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 659 see now 97 Halsbury’s Laws of England (5th Edn) (2015) para 686.]

Trespass to land

[For 45(2) Halsbury’s Laws of England (4th Edn) (Reissue) paras 505–596 see now 97 Halsbury’s Laws of England (5th Edn) (2015) paras 563–564.]

Trespass to the person

[For 45(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 425 see now 97 Halsbury’s

Laws of England (5th Edn) (2015) para 525.]

TRIBUNAL

Tribunal established by law

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

Tribunal exercising jurisdiction ... outside New Zealand

New Zealand [Evidence Act 2006, ss 182, 184.] ‘[1] The applicant, who is a party to a proceeding to be heard in the London Court of International Arbitration (LCIA) scheduled to commence on 23 February 2015, wishes to have the respondent participate in the hearing as a witness. The respondent is unwilling to do so.

‘[2] The LCIA Tribunal having requested the assistance of this Court in obtaining evidence from the respondent, the present application is made under s 184 of the Evidence Act 2006 for an order of subpoena requiring the respondent to provide evidence for use in the arbitration. Specifically the order sought is that the respondent attends the London hearing for examination remotely by audio/video link or in the alternative that he be deposed in Christchurch by an examiner appointed by the High Court with counsel in the arbitration participating in the examination.

‘[3] The grounds of opposition raise an issue of jurisdiction which derives from the definition of “requesting court” in s 182 of the Act:

requesting court means any court or tribunal exercising jurisdiction in a country or territory outside New Zealand.

‘[4] The issues which arise for determination are:

- (a) is the LCIA Tribunal a tribunal exercising jurisdiction in a country or territory outside New Zealand?
- (b) if so, should the Court exercise the discretion to make an order for the evidence of the respondent to be obtained in New Zealand for the purposes of the proceeding in the LCIA Tribunal?
- (c) if so, is the form of order that the respondent attend the London hearing for examination remotely by audio/video link one which the Court can and should make?

...

‘[26] The task is to ascertain the meaning of

"tribunal" in the definition of requesting court in s 182. The starting point is the guidance of the Supreme Court in *Commerce Commission v Fonterra* [[2007] NZSC 36, [2007] 3 NZLR 767 at [22]]:

[22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[27] The plain meaning advanced by the respondent is said to be "courts or tribunals exercising public judicial authority over a geographic area". That interpretation involves reading "in" as "over". Secondly, it equates "exercising jurisdiction" with the exercise of public judicial authority.

[28] I have difficulty with the first proposed construction. The reference to "a country or territory" is part of the identification of a place "outside New Zealand". The relevant requesting entity must be exercising jurisdiction at that place, namely outside New Zealand. I do not see why the requesting entity should be exercising jurisdiction not only at that place but "over" the country or territory itself. That contention appears to me to confuse the concept of jurisdiction which can be delimited in a number of ways.

[29] As Diplock L J stated in *Garthwaite v Garthwaite* [[1964] P 356 at 387, CA]:

In its narrow and strict sense, the "jurisdiction" of a validly constituted court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference (1) to the subject-matter of the issue or (2) to the persons between whom the issue is joined or (3) to the kind of relief sought, or to any combination of these factors.

[30] Turning to the second aspect of the respondent's favoured interpretation, namely that "tribunal exercising jurisdiction" connotes the exercise of public judicial authority. That

interpretation appears to import the concept described by Moore-Bick J [in *Commerce & Industry Insurance Co v Lloyd's Underwriters* [2002] 1 WLR 1323 at 1327 (the *Viking* case)] as "judicial bodies exercising functions on behalf of other states". That description is similar in tenor to the definition of court in art 2(a) of sch 1 of the Arbitration Act 1996, namely "a body or organ of the judicial system of a State".

[31] A difficulty which I have with this contention is that it has the potential to elevate "tribunal" to the status of a court and thereby render otiose the inclusion of the reference to tribunal in the definition. In *Waikato/Bay of Plenty District Law Society v Harris* [[2006] 3 NZLR 755 (CA)] four factors were identified as relevant to the determination whether a tribunal was a court:

- (a) whether the members of the tribunal are appointed by the State?
- (b) whether the tribunal fulfils any public functions?
- (c) whether the tribunal has power to enforce any orders it makes?
- (d) whether the proceedings before the tribunal are stated to be "judicial proceedings".

[32] The description of Moore-Bick J, which seems to be embodied in the respondent's "public judicial authority" interpretation, coupled with the emphasis which the respondent places on the fact that private arbitral tribunals are not able to enforce their decisions, in my view, points to a conclusion that a qualifying tribunal would be to all intents and purposes a court. If that were so, then it is not easy to see how the definition of requesting court was extended by the addition of the word tribunal.

[33] The respondent went further than submitting that a private arbitral tribunal does not "exercise jurisdiction in a country"; he contended that a private arbitral tribunal does not exercise jurisdiction at all. However, he then qualified that broad assertion in this way:

The most that could be said is that a private arbitral tribunal has jurisdiction over parties due to their agreement to arbitrate. More correctly that simply forms the jurisdictional basis that entitles the court to intervene.

[34] It is undoubtedly true that the authority of an arbitrator is derived from the agreement of the parties to submit their dispute to arbitration. But the fact remains that arbitrators exercise "jurisdiction": a glance at art 16 of sch 1 of the

Arbitration Act 1996 demonstrates the point.

‘[35] Furthermore, the operation of such a contractual term will preclude the High Court having jurisdiction, as the Supreme Court noted in *Redcliffe [Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd]* [2012] NZSC 94, [2013] 1 NZLR 804 at [25]] in the context of a discussion about r 5.49 of the High Court Rules. The mechanism lies in art 8(1) of sch 1 whereby a court “shall” stay proceedings and refer the parties to arbitration in the circumstances there stated. Hence, in such circumstances the arbitrator and not the Court will have jurisdiction.

‘[36] It follows in my view that the phrase “tribunal exercising jurisdiction” is not inapt to describe an arbitral tribunal. Where an arbitral tribunal is conducting an arbitration at place which is not in New Zealand, then I consider that the plain meaning of the definition of requesting court extends to such an arbitral tribunal.’ *Dalian Deepwater Developer Ltd v Dybdahl* [2015] NZHC 151, [2015] 3 NZLR 260 at [1]–[4], [26]–[36], per Brown J (footnotes omitted)

TRINITY HOUSE

[For 43(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 1102 see now 94 Halsbury’s Laws of England (5th Edn) (2008) para 1069.]

TRUST

[For 48 Halsbury’s Laws of England (4th Edn) (2007 Reissue) paras 601, 604, 624 see now 98 Halsbury’s Laws of England (5th Edn) (2013) paras 1, 5, 24.]

Constructive trust

[For 16(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 852 see now 47 Halsbury’s Laws of England (5th Edn) (2014) para 229.]

[For 48 Halsbury’s Laws of England (4th Edn) (2007 Reissue) para 687 see now 98 Halsbury’s Laws of England (5th Edn) (2013) para 124.]

Discretionary trust

[For 48 Halsbury’s Laws of England (4th Edn) (2007 Reissue) para 679 see now 98 Halsbury’s Laws of England (5th Edn) (2013) para 94.]

Executed or executory trust

[For 48 Halsbury’s Laws of England (4th Edn) (2007 Reissue) para 626 see now 98 Halsbury’s Laws of England (5th Edn) (2013) para 33.]

Express trust

[For 16(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 851 see now 47 Halsbury’s Laws of England (5th Edn) (2014) para 228.]

Precatory trust

[For 48 Halsbury’s Laws of England (4th Edn) (2007 Reissue) para 627 see now 98 Halsbury’s Laws of England (5th Edn) (2013) para 34.]

Private trust

[For 48 Halsbury’s Laws of England (4th Edn) (2007 Reissue) para 631 see now 98 Halsbury’s Laws of England (5th Edn) (2013) para 38.]

Public trust

[For 48 Halsbury’s Laws of England (4th Edn) (2007 Reissue) para 630 see now 98 Halsbury’s Laws of England (5th Edn) (2013) para 37.]

Resulting trust

[For 16(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 853 see now 47 Halsbury’s Laws of England (5th Edn) (2014) para 230.]

[For 48 Halsbury’s Laws of England (4th Edn) (2007 Reissue) para 705 see now 98 Halsbury’s Laws of England (5th Edn) (2013) para 132.]

Secret trust

[For 48 Halsbury’s Laws of England (4th Edn) (2007 Reissue) paras 628, 672 see now 98 Halsbury’s Laws of England (5th Edn) (2013) paras 35, 87.]

Voluntary trust

[For 48 Halsbury’s Laws of England (4th Edn) (2007 Reissue) para 629 see now 98 Halsbury’s Laws of England (5th Edn) (2013) para 36.]

TRUST CORPORATION

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

TRUSTEE

Bare trustee

[For 48 Halsbury’s Laws of England (4th Edn) (2007 Reissue) para 755 see now 98 Halsbury’s Laws of England (5th Edn) (2013) para 195.]

TURBARY

[For 6 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 471 see now 13 Halsbury’s Laws of England (5th Edn) (2017) para 356.]

U

ULTRA VIRES

[For 7(1) Halsbury's Laws of England (4th edn) (2004 Reissue) para 420 see now 14 Halsbury's Laws of England (5th Edn) (2016) para 258.]

UNACCEPTABLE RISK

Australia [Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic), s 9.] '[110] The competing considerations adverted to in *Fardon* [*Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; 210 ALR 50; [2004] HCA 46] were identified in *GTR [Director of Public Prosecutions (WA) v GTR* (2008) 38 WAR 307; [2008] WASCA 187] as the nature of the risk (the commission of a serious sexual offence with serious consequences for the victim) and the likelihood of the risk coming to fruition, on the one hand, and the serious consequences for the offender, on the other, if an order is made (either detention, without having committed an unpunished offence, or being required to undergo what might be an onerous supervision order).

'[111] An unacceptable risk thus requires consideration of the likelihood of offending and, if it eventuates, what the consequences of such offending are likely to be. Whether a risk is unacceptable will depend not only upon the likelihood of it becoming reality but also on the seriousness of the consequences if it does.' *Nigro v Secretary to the Department of Justice (Appeal 79/2012)* [2013] VSCA 213, (2013) 304 ALR 535 at [110]–[111], per Redlich, Osborn and Priest JJ

UNAVAILABLE

Australia [Migration Act 1958 (Cth), s 422: another member must constitute the Refugee Review Tribunal to finish a review where the first member is 'unavailable'.] '[86]... The Minister contended the Court should infer the Tribunal was reconstituted in accordance with the power in s 422 of the Act. He contended that the expression "not available" should be

construed as including "not permitted to sit" which was, in effect, the position of Member Corrigan at the relevant time because the terms of the Federal Circuit Court order quashing the Tribunal's decision required that the Tribunal be differently constituted. The Minister seeks to draw comfort from the terms of s 422(2) to support the approach taken by Member Boddison in copying Member Corrigan's decision.

'[87] In our view the expression "not available for the purpose of the review at the place where the review is being conducted" in s 422(1)(b) should be construed as meaning "unavailable" in a practical and personal sense, by reason of such matters as long leave, ill-health, inability to travel and the like. We see no basis to construe it as extending to a member who is, by order of a superior court, precluded from being constituted as the Tribunal on a particular review. ...' *MZZW v Minister for Immigration and Border Protection* [2015] FCAFC 133, (2016) 328 ALR 433 at [86]–[87], per Tracey, Murphy and Mortimer JJ

UNAVOIDABLE CAUSE

[For 15(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 521 see now 35 Halsbury's Laws of England (5th Edn) (2015) para 447.]

UNCONSCIONABLE

Australia [Fair Trading Act 1999 (Vic), s 8(1): unconscionable conduct.] '[37] As other courts have observed, it is undesirable to attempt a comprehensive definition of the word "unconscionable" as it appeared in s 8(1) of the Act and in cognate provisions. That said, some general observations can be made.

'[38] First, it has now been firmly decided that the use of the word in s 8 is intended to have its ordinary meaning, and is not to be confined, as s 7 is confined, to notions of unconscionability that have developed in courts of equity.

'[39] Second, the word "unconscionable" is an epithet, and, in the provision, it is predicated of "conduct". Care has to be taken when one's attention is drawn to the circumstances that afflict some people. For example, it may be said that a party gained "an unfair or unconscientious advantage", or that a mortgage was "unfair, unjust or unreasonable". Obviously enough, a person's conduct is to be distinguished from the consequences that that

conduct may have on the lives of other people. As the High Court recently said, albeit in the context of a claim under the equivalent of s 7 of the Act: “the principle which the appellant invokes is not engaged by the circumstance that a plaintiff’s transaction with a defendant has resulted in loss to the plaintiff, even loss amounting to hardship”. Well intentioned conduct may have dire consequences for other people; malign conduct may be without consequence; adventitiously, it may have benign consequences. Generally speaking, it will be the consequences of one person’s conduct upon others that attracts the attention of the law. The problems of some vulnerable groups of people have been exacerbated by another person’s conduct. However, those consequences having, as it were, attracted the attention of the law, attention then properly shifts back to the nature of the conduct of the putative defendant. The fact that the circumstances of a person or a group of persons, or the circumstances of some transaction they entered into, may reasonably be described as “unfair” is the commencement of the inquiry, not its terminus.

‘[40] Third, equity’s exploration over the years of the manifold and novel ways in which the strong can exploit the weak, in trade and commerce or otherwise, will usually be of assistance in assessing whether it should be said that conduct has been unconscionable.

‘[41] Fourth, the third observation is borne out by the content of s 8(2). It describes several matters to which a court or tribunal may have regard in determining whether a person may be said to have engaged in conduct that is, in all the circumstances, unconscionable. The presence of one or more of those matters, without more, does not mean that conduct has been unconscionable.

‘[42] However, even though the concept of unconscionability is not closed and will be apt to describe exploitative conduct that has yet to be observed, the matters referred to in s 8(2) help illuminate its meaning. As Macaulay AJA said in *Body Bronze International [Body Bronze International Pty Ltd v Fehcorp Pty Ltd]* (2011) 34 VR 536; 282 ALR 571] (at [76]):

[76] Not only do these factors assist in comprehending the intended scope and meaning of unconscionable conduct prohibited by the section, but they also provide a useful, although non-exhaustive, set of factors by which to test the particular conduct in question.

‘[43] So, suppliers may be at risk if they simply

disregard the “relative strengths of the bargaining positions” that may in some cases exist between themselves and particular purchasers: s 8(2)(a). A disproportion in the bargaining positions of a particular supplier and a particular purchaser will not, of itself, make the conduct of the supplier unconscionable. But, where the scales are weighted against a purchaser, opportunities for the exploitation of the vulnerable arise more readily and, if taken advantage of, may well involve conduct that is, “in all the circumstances” unconscionable. Or, take s 8(2)(c): “whether the purchaser was able to understand any documents relating to the supply or possible supply of the goods or services”. Contractual documents are in English, but the range of possible purchasers includes many people who have no grasp of the significance of words that they are asked to subscribe. There was a time when, whatever equity had to say, the law simply cautioned the buyer to beware. If nothing else, the matters in s 8(2)(c) have made it plain that public policy and the law is no longer indifferent to the morality of what has taken place between supplier and purchaser.

‘[44] Fifth, s 8(2) makes clear that qualities of unreasonableness and unfairness in the circumstances it specifies are not to be regarded as automatically rendering conduct unconscionable, but rather are matters to which regard is to be had in determining whether conduct is unconscionable. They are indicia of unconscionability.

‘[45] Sixth, a court must explain what it understands by the words and phrases in a statutory provision and, in order to do so, will necessarily use words and phrases different from those contained in the provision. But, the use of the latter words and phrases is for a strictly limited purpose: they are to explain the former, not to replace them. As French CJ, Hayne, Crennan, Bell and Gageler JJ said in *Commissioner of Taxation v Consolidated Media Holdings Ltd* [(2012) 293 ALR 257; 91 ACSR 359; 87 ALJR 98; [2012] HCA 55 at [39]]: “This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text”. And, it must not drift from that text; the statutory text must anchor the “task of construction”. There is much force in the caution given, in *Canon Australia Pty Ltd v Patton* [(2007) 244 ALR 759; [2007] NSWCA 246], by Basten JA against substituting what might be thought to be helpful synonyms for the statutory words. He said (at [4]):

[4] ... However, to treat the word “unconscionable” as having some larger meaning, derived from ordinary language, and then to seek to confine it by such concepts as high moral obloquy is to risk substituting for the statutory term language of no greater precision in an attempt to impose limits without which the Court may wander from well-trodden paths without clear criteria or guidance. That approach should not be adopted unless the statute clearly so requires.

[46] Seventh, s 8 of the Act applies to conduct “in trade or commerce, in connection with the supply or possible supply of goods or services”. That context is itself largely governed by existing legal principle. ... The law of contract and that of property, and the principles that constitute them, are the very things which make trade and commerce possible. Without these legal principles, and the existence of institutions such as the courts that are constrained to apply them, the strong would prevail and the weak would go to the wall. It cannot have been the legislature’s intention to interfere with arm’s length commercial transactions by reference to loose notions of unreasonableness and unfairness. The contention favoured by the appellant that conduct may be found to be unconscionable within s 8(1) of the Act if it can be found to be irreconcilable with what was right and reasonable overlooks the force of the observation of Deane J in *Muschinski v Dodds* [(1985) 160 CLR 583 at 616; 62 ALR 429 at 452] that judges in equity, whose jurisdiction was discretionary, had long since abandoned recourse to undefined notions of justice and what was fair. The legislature is presumed not to alter basic common law doctrines and not to interfere with proprietary rights.

[47] Eighth, s 8(1) uses the phrase “in all the circumstances”. The characterisation demanded by the provision is one that is to be made “in all the circumstances”. Consideration of “all the circumstances” can cast a different complexion on things. A failure to fulfil a contractual promise may visit unwanted consequences on the innocent party. But, under s 8(1), it is the conduct of the contract breaker that must be shown to be unconscionable. That party may have had sound reasons for breaking the contract, reasons that involve no wish to exploit any vulnerability in the innocent party. While these sound reasons will be of no significance in defence of a claim for breach of contract, they may be highly relevant in a defence to a claim that conduct has been unconscionable. ...

[48] Ninth, a distinctive quality of unconscionable conduct as against unreasonable or unfair conduct is that it is unethical. The characteristic of unreasonableness or unfairness may form the basis (or a significant part of the basis) of a conclusion that conduct is unconscionable. As Allsop P said, in *Tavares* [(2011) 15 BPR 29,699; [2011] NSWCA 389 at [293]], it is necessary to show at least “some degree of moral tainting in the transaction of a kind that permits the opprobrium of unconscionability to characterise the conduct of the party”.

[49] Tenth, it is a noticeable feature of all the cases, thus far, in which conduct has been held to be “unconscionable” that the conduct has been found to be unethical in some manner or other. For example, in *ACCC v Lux Distributors* [(2013) FCAFC 90], a case which involved door to door sales of vacuum cleaners, the court found that a defendant had practised a “deceptive ruse” to take advantage of an 89-year-old woman living alone. The ruse involved salesmen cold calling and offering a free maintenance check on existing cleaners.

[56] Eleventh, the intentional breach or reckless disregard of certain norms or standards amounts to statutory unconscionability. Those norms or standards must be more than those that happen to be personal to the court or tribunal charged with the responsibility of deciding whether conduct is unconscionable. Certainly, they will include norms of honesty and fair dealing and norms which exclude exploitation and deception. Some such norms and standards may be detected in the principles of public policy immanent in legislation such as the Competition and Consumer Act and the Australian Consumer Law and Fair Trading Act 2012. ...

[59] In considering whether the conduct he had to evaluate was unconscionable the trial judge was required to reveal the way in which he understood that word. In his reasons he did so, and they are more subtle than the notice of appeal would suggest. It was not the case that he simply substituted the phrase “moral obloquy” for the word “unconscionable”. Rather, we accept the submission of Gilfillan that the trial judge understood statutory unconscionability as involving moral taint and, that absent such taint, conduct which might be thought otherwise to be unfair or unreasonable should not be held to be “unconscionable”. The conduct of a defendant should be deserving of reproach, hence the aptness of the phrase “moral obloquy”.

[60] The trial judge applied the existing

tests for the determination whether conduct is unconscionable within s 8(1) of the Act. I am not convinced that those tests are plainly wrong.’ *Director of Consumer Affairs Victoria v Scully* [2013] VSCA 292, (2013) 303 ALR 168 at [37]–[49], [56], [59]–[60], per Santamaria JA

UNCONSCIONABLE BARGAIN

[For 31 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 854 see now 76 Halsbury’s Laws of England (5th Edn) (2013) para 850.]

UNDER AN ACT OF PARLIAMENT OR OTHERWISE

Canada [Federal Courts Act, RSC 1985, c F-7, s 23(c): jurisdiction of Federal Court in cases in which a claim for relief is made or a remedy is sought ‘under an Act of Parliament or otherwise’ relating to works and undertakings connecting a province with any other province or extending beyond the limits of a province.]

‘46. This phrase cannot be ignored or rendered superfluous. Section 23(c) confers jurisdiction “in all cases in which a claim for relief is made or a remedy is sought under an Act of Parliament or otherwise in relation to [an extra-provincial undertaking]”. If Parliament had intended the Federal Court to have jurisdiction whenever relief is sought in relation to an extra-provincial undertaking, *whether or not that relief is sought under federal law*, it would not have added the qualifier that the relief must be sought “under an Act of Parliament or otherwise”. The explicit language of s 23 requires that the relief be sought under—and not merely in relation to—federal law. This is even clearer in the French version of s 23, which requires relief to be sought “*sous le régime d’une loi fédérale ou d’une autre règle de droit*”.

...
‘52. Effect must still be given to the words “is sought under an Act of Parliament or otherwise” in s 23. Had Parliament intended the *Federal Courts Act* to grant jurisdiction to the Federal Court to provide any relief (as defined broadly) in relation to the classes of subjects enumerated in s 23, it would simply have said so. It would be circular to reason that s 23 is self-referential: it is not itself a federal law under which the Company can seek relief, however “relief” is defined. Rather, as Shore J found at first instance, s 23 confers on the Federal Court jurisdiction over certain claims, including certain claims for declarations, but

does not confer on *parties* the right to make those claims in the first place. For that right, parties must look to other federal law.

...
‘55. When a party seeks relief under provisions such as these, s 23 may grant jurisdiction to the Federal Court, assuming the other requirements of s 23 are met. But a person cannot seek relief under s 23 itself. It does not create any right of action. It merely confers on the Federal Court jurisdiction to provide relief that a person can otherwise seek “under an Act of Parliament or otherwise”.

...
‘59. A party seeking relief under constitutional law is not seeking relief “under an Act of Parliament or otherwise” within the meaning of s 23. I agree with the City and the interveners, including the Attorney General of Canada, that constitutional law cannot be said to be federal law for the purposes of s 23 (see also, eg, P W Hogg, *Constitutional Law of Canada* (5th ed Supp), at p 7–27; B J Saunders, D J Rennie and G Garton, *Federal Courts Practice* 2014 (2013), at p 9).’ *Windsor (City) v Canadian Transit Co* [2016] SCJ No 54, [2016] 2 SCR 617 at paras 46, 52, 55, 59, per Karakatsanis J

UNDER AN ENACTMENT

Australia [Health Insurance Act 1973 (Cth), s 19AB: preliminary decision on exemption for overseas doctors.] [37] The making of a PADWS [Preliminary Assessment of a District of Workforce Shortage] is neither expressly nor impliedly required or authorised by the HIA. True it is, as Nicholl Holdings submitted, that the making of these guidelines was authorised by s 19AB(4B) of the HIA. But all that means is that the guidelines are an instrument and, definitionally by the ADJR Act, an “enactment”. Neither expressly nor impliedly do either the 2001 or the 2012 guidelines authorise or require the making of any preliminary assessment and certainly not a PADWS. The first of the two necessary criteria mentioned in the passage quoted from *Griffith University* [*Griffith University v Tang* (2005) 221 CLR 99; 213 ALR 724; 82 ALD 289; [2005] HCA 7] is not present. That means that the decision of 22 October 2012 was not one “under an enactment”. That being so, it was not amenable to review under the ADJR Act.

‘[38] The PADWS system adopted within the department and decision made thereunder were analogous to the decision made under the guidelines issued by the Commissioner of

Taxation with respect to access to accountant's papers, considered by Lindgren J in *White Industries Australia Ltd v Federal Commissioner of Taxation* (2007) 160 FCR 298; 240 ALR 792; 95 ALD 30; [2007] FCA 511 and the decision under the Australian Taxation Office Practice Statement, considered by Edmonds J in *Macquarie Bank Ltd v Federal Commissioner of Taxation* (2013) 215 FCR 403. Each of these cases concerned a decision under a lawfully adopted system of public administration but neither was regarded as entailing a decision "under an enactment".

...
 '[40] Contrary to the view of the primary judge (reasons for judgment at [47]) and to a submission made for Nicholl Holdings, no "two step" process is entailed in an exemption decision under s 19AB(3) of the HIA. The minister (or his delegate) is required to determine an application for exemption by reference to the guidelines in force at the time. Neither s 19AB(3) itself nor the guidelines made provision for two stages or "steps" in the exemption decision-making process. Further, that process was initiated only by the lodgement of an exemption application. A PADWS was an administratively adopted precursor to that statutory process, not part of it. There was no exemption decision under s 19AB(3). ...'.
Minister for Health v Nicholl Holdings Pty Ltd (ACN 063 703 748) [2015] FCAFC 73, (2015) 321 ALR 340 at [37]–[38], [40], per Greenwood and Logan JJ

UNDER WAY

[For 43(1) Halsbury's Laws of England (4th Edn) (Reissue) para 805 see now 94 Halsbury's Laws of England (5th Edn) (2008) para 720 et seq.]

UNDERGOING MEDICAL TREATMENT

New Zealand [New Zealand Bill of Rights Act 1990 (NZBORA), s 11: everyone has the right to refuse to undergo medical treatment.]
 '[87] Summarising this point, we agree with the Judge for the reasons he gave that the right guaranteed by s 11 to refuse to undergo medical treatment does not extend to public health measures such as the fluoridation of drinking water intended to benefit the public at large. As the Judge said, it would be a significant step to extend the s 11 right beyond its application to medical treatment in a therapeutic relationship. To take such a step is not justified for three

reasons: the language of the provision itself; the common law as it stood at the time the NZBORA was enacted; and the human rights values underlying s 11.

'[88] As to the first, we agree with the Judge that to interpret s 11 as conferring on an individual the right to refuse the addition of fluoride to drinking water is a significant strain on the language of s 11. To describe a person drinking fluoridated water as "undergoing" medical treatment is inapt. We agree with the Judge that the ordinary and natural meaning of undergoing medical treatment describes a process in which something is "done" to a patient in a therapeutic setting.

'[89] As to the second, we acknowledge that the rights and freedoms guaranteed by the NZBORA are not to be confined to those existing under the common law. But, as Dickson J noted in the *Big M Drug Mart* case [*R v Big M Drug Mart Ltd* [1985] 1 SCR 295], the Charter must be placed "in its proper linguistic, philosophic and historical contexts". As the White Paper identified, the focus was on the circumstances in which people could be treated against their will, as well as related issues, such as the capacity of minors to consent. These concerns are consistent with the common law relating to consent for the purposes of both the criminal and civil law.

'[90] Of course, medical treatment in terms of s 11 is not confined to medical procedures involving physical interventions to bodily integrity. As the White Paper contemplated, it includes other forms of medical treatment, such as psychiatric and psychological treatment. But there is nothing in the Parliamentary materials to suggest the legislature intended s 11 to embrace public health measures of the kind at issue here as medical treatment.

'[91] Dealing with the third point in [87] above, there is nothing in the human rights norms underlying s 11 to suggest or require that the right should be extended to measures such as the fluoridation of drinking water. As the Judge found, s 11 stands on its own and is not reflected in any of the international human rights instruments. There have been a number of challenges to the fluoridation of drinking water in overseas jurisdictions on various grounds, alleging the practice breaches rights of bodily integrity, privacy and liberty. These were canvassed by the Judge but, as he found, none of the challenges was successful. The consequence, as Mr Powell put it, is that when Parliament enacted the NZBORA there was no heritage of case law or recognised human rights norms to suggest the legislature intended the

s 11 right to extend to public health measures of the type at issue here.' *New Health New Zealand Inc v South Taranaki District Council* [2016] NZCA 462, [2017] 2 NZLR 13 at [87]–[91], per Randerson J

UNDERWRITING

[For 7(1) Halsbury's Laws of England (4th edn) (2004 Reissue) para 577 see now 15A Halsbury's Laws of England (5th Edn) (2016) para 1344.]

UNDUE INFLUENCE

[For 9(1) Halsbury's Laws of England (4th Edn) (Reissue) para 712 see now 22 Halsbury's Laws of England (5th Edn) (2012) para 294.]

[For 16(2) Halsbury's Laws of England (4th Edn) (Reissue) para 417 see now 47 Halsbury's Laws of England (5th Edn) (2014) para 18.]

[For 17(2) Halsbury's Laws of England (4th Edn) (Reissue) para 323 see now 102 Halsbury's Laws of England (5th Edn) (2010) para 56.]

[For 31 Halsbury's Laws of England (4th Edn) (2003 Reissue) para 839 see now 76 Halsbury's Laws of England (5th Edn) (2013) para 836.]

UNFAIR

[Consumer Credit Act 1974, s 140A: 'unfair' relationships between creditors and debtors.] '[17] The view which a court takes of the fairness or unfairness of a debtor-creditor relationship may legitimately be influenced by the standard of commercial conduct reasonably to be expected of the creditor. The ICOB [Insurance Conduct of Business] rules are some evidence of what that standard is. But they cannot be determinative of the question posed by s 140A, because they are doing different things. The fundamental difference is that the ICOB rules impose obligations on insurers and insurance intermediaries. Section 140A, by comparison, does not impose any obligation and is not concerned with the question whether the creditor or anyone else is in breach of a duty. It is concerned with the question whether the creditor's relationship with the debtor was unfair. It may be unfair for a variety of reasons, which do not have to involve a breach of duty. There are other differences, which flow from this. The ICOB rules impose a minimum standard of conduct applicable in a wide range

of situations, enforceable by action and sounding in damages. Section 140A introduces a broader test of fairness applied to the particular debtor-creditor relationship, which may lead to the transaction being reopened as a matter of judicial discretion. The standard of conduct required of practitioners by the ICOB rules is laid down in advance by the Financial Services Authority (now the Financial Conduct Authority), whereas the standard of fairness in a debtor-creditor relationship is a matter for the court, on which it must make its own assessment. Most of the ICOB rules, including those relating to the disclosure of commission, impose hard-edged requirements, whereas the question of fairness involves a large element of forensic judgment. It follows that the question whether the debtor-creditor relationship is fair cannot be the same as the question whether the creditor has complied with the ICOB rules, and the facts which may be relevant to answer it are manifestly different. An altogether wider range of considerations may be relevant to the fairness of the relationship, most of which would not be relevant to the application of the rules. They include the characteristics of the borrower, her sophistication or vulnerability, the facts which she could reasonably be expected to know or assume, the range of choices available to her, and the degree to which the creditor was or should have been aware of these matters.

'[18] I turn therefore to the question whether the non-disclosure of the commissions payable out of Mrs Plevin's PPI premium made her relationship with Paragon unfair. In my opinion, it did. A sufficiently extreme inequality of knowledge and understanding is a classic source of unfairness in any relationship between a creditor and a non-commercial debtor. It is a question of degree. Mrs Plevin must be taken to have known that some commission would be payable to intermediaries out of the premium before it reached the insurer. The fact was stated in the FISA borrowers' guide and, given that she was not paying LLP for their services, there was no other way that they could have been remunerated. But at some point commissions may become so large that the relationship cannot be regarded as fair if the customer is kept in ignorance. At what point is difficult to say, but wherever the tipping point may lie the commissions paid in this case are a long way beyond it. Mrs Plevin's evidence, as recorded by the Recorder, was that if she had known that 71.8% of the premium would be paid out in commissions, she would have "certainly questioned this". I do not find that evidence surprising. The information was of critical

relevance. Of course, had she shopped around, she would not necessarily have got better terms. As the Competition Commission's report suggests, this was not a competitive market. But Mrs Plevin did not have to take PPI at all. Any reasonable person in her position who was told that more than two thirds of the premium was going to intermediaries, would be bound to question whether the insurance represented value for money, and whether it was a sensible transaction to enter into. The fact that she was left in ignorance in my opinion made the relationship unfair.' *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61, [2015] 1 All ER 625 at [17]–[18], per Lord Sumption

UNFETTERED DISCRETION

See also APPEAL

Australia [Criminal Code 1899 (Qld), s 669A.] '[2] The question in this appeal is whether the Court of Appeal has the power under s 669A(1) to vary a sentence absent any demonstrated or inferred error on the part of the sentencing judge. The Court of Appeal answered that question in the affirmative. It held that the "unfettered discretion" conferred by s 669A(1) meant that the court (at [147]):

[174] in exercising its discretion must have regard to the sentence imposed below, but come to its own view as to the proper sentence to be imposed. In doing so, it must act in conformity with the principles relevant to the exercise of judicial power.

Based on that construction of s 669A(1) the Court of Appeal, by majority, increased the sentence imposed upon the appellant for the crime of manslaughter. The construction was erroneous. For the reasons that follow the appeal should be allowed, the order made by the Court of Appeal set aside and, in its place, an order dismissing the appeal to that court made.

...
[49] The jurisdiction conferred on the Court of Appeal under s 669A(1) is authority to determine an appeal to the court by the Attorney-General against any sentence imposed by the court of trial or a court of summary jurisdiction dealing summarily with an indictable offence. The scope and limits of the court's jurisdiction are to be derived from the word "appeal". Its powers are to be found in the final words of s 669A(1), which refer to its "unfettered discretion" to "vary the sentence

and impose such sentence as to the court seems proper".

...
[60] The appellate jurisdiction conferred by s 669A(1) must be confined, at least when the Attorney-General is asserting that the sentence should be increased, to the evidence before the primary judge, including evidence given at trial, what the jury necessarily found and evidence, if any, given at the sentencing hearing. Having regard to the categories of appellate jurisdiction and the confinement of the Court of Appeal to evidence before the primary judge, it is open to construe s 669A(1) as creating an appeal by way of rehearing and conferring appellate jurisdiction to determine only whether there has been some error on the part of the primary judge. Such error having been detected, the court has a wide power, indicated by the words "unfettered discretion", to vary that sentence.

[61] ... Neither expressly nor by necessary implication do the words of s 669A(1) define the jurisdiction simply by reference to the power to vary sentences if the Attorney-General chooses to appeal. Such a construction would require clear language to overcome the intention which the common law imputes to the legislature that it does not require the court to consider an appeal on the basis that it might be persuaded to disagree with a sentence which could not be challenged as manifestly inadequate or excessive or otherwise affected by error.

[62] In our opinion, the appellate jurisdiction conferred upon the Court of Appeal by s 669A(1) requires that error on the part of the sentencing judge be demonstrated before the court's "unfettered discretion" to vary the sentence is enlivened. The unfettered discretion may be taken to confer upon the Court of Appeal in such a case the power to substitute the sentence it thinks appropriate where error has been demonstrated. The appeal should be allowed. The question that then arises is whether the matter should be remitted to the Court of Appeal on the basis that it did not determine whether the trial judge erred in principle or imposed a manifestly inadequate sentence indicative of such error.

...
[94] ... The appellant submitted that the selection of the word "appeal" in s 669A(1) indicated that the process was one involving the correction of error in the relevant sense. The submission assumes that all procedures described in legislation as "appeals" must involve the correction of error in the relevant sense. That assumption is unsound. The

construction of “unfettered discretion” adopted by the Court of Appeal majority is not antithetical to the word “appeal” in s 669A(1). The legislature is at liberty to fashion what particular types of appeal it wishes to create. The word “appeal” covers a variety of processes, and the list of them is not closed. The potential reach of the expression in any particular enactment is confined only by any limit to the fertility of parliament. Section 669A(1) empowers the Attorney-General to apply to the Court of Appeal in order to complain about a sentence. It confers on the Court of Appeal a jurisdiction to consider the appeal and a duty to do so. In carrying out its duty to consider that kind of appeal against sentence, the Court of Appeal has at the first stage a duty to consider whether the sentence imposed was such as to merit variation. If it decides that it did merit variation, at the second stage its duty is to decide what variation should be made. Nothing in s 669A(1) requires a search for error at the first stage. In carrying out the duty arising at the first stage, however, the Court of Appeal would be entitled to decline to enter upon the sentencing task involved at the second stage if, for example, it thought that any insufficiency in the sentencing judge’s sentence was only minor. It would be so entitled partly to discourage frivolous Crown appeals, partly because re-sentencing in those circumstances would be a waste of its time, and partly because it is inherent in the nature of sentencing that different minds will arrive at different sentences on identical facts. At that first stage the Court of Appeal has a discretion which is not fettered to decline to interfere even though it disagrees with the sentence. At the second stage, if it decides to embark on it, the Court of Appeal has a discretion which is not fettered to determine what the increase should be. The statutory language which creates this structure may be unusual, it may be wanting in sense, but it was open to the legislature to use it, and it has done so.’ *Lacey v Attorney-General (Qld)* [2011] HCA 10, (2011) 275 ALR 646 at [2], [49], [60]–[62], [94], per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ

UNHEATED

Canada [Exclusion in insurance policy for water damage caused by freezing in an ‘unheated portion of the dwelling’.] ‘6. The plaintiffs submit that the presence of a hot water pipe running along the ceiling of the Cold Storage Room was a source of heat for that

room. Secondly, they submit that while the Cold Storage Room does not itself contain any form of heating radiators, the basement contains several, and at the time of the loss, the door between the Cold Storage Room and the basement was open. They submit the presence of radiators in the basement area other than the Cold Storage Room was sufficient to render the Cold Storage Room not an “unheated” portion of the plaintiffs dwelling.

‘13. The first step in interpreting an insurance contract, as with other contracts, is to use the “plain, ordinary and popular meaning” in order to give effect to the intention of the parties. I find, based on the facts presented and on the plain, ordinary and popular meaning of the words in the policy, the Cold Storage Room was an “unheated” portion of the dwelling.

‘14. The Cold Storage Room was not connected to the dwelling’s heating system in the sense there were no radiators or other typical heating apparatuses installed in the Cold Storage Room. It is true there was a small portion of copper pipe running along a portion of the ceiling in the Cold Storage Room. From the photos, I would estimate that pipe to be approximately 5 feet in length. When certain radiators in the house were engaged, that pipe would carry hot water. On those occasions, that pipe would provide some minimal incidental amount of heat to that room. However, that does not convert what in ordinary language would be an “unheated” portion of the dwelling into a “heated” portion of the dwelling. It would strain the plain, ordinary, and popular meaning of the words to say it was not an “unheated” portion of the dwelling.

‘20. The question is not whether there is a modicum of heat incidentally present in the room, but rather whether the room constitutes “an unheated portion of the dwelling.” The “cold room area”, as Smith describes it, is an unheated portion of the dwelling.

‘21. I do not find any ambiguity to be present in the pertinent terms of the insurance policy. While each case will depend on its own facts, I find the Cold Storage Room in this case was, in accordance with the plain and ordinary meaning of the words, “an unheated portion of the dwelling.” I therefore dismiss the plaintiffs’ claim against the defendant.’ *Cameron v Economical Mutual Insurance Co* [2016] PEIJ No 7, 2016 PESC 6 at paras 6, 13–14, 20–21, per G L Campbell J

UNINCORPORATED ASSOCIATION

[For the Income and Corporation Taxes Act 1988, s 832(1) see now the Income Tax Act 2007, s 992(1) and the Corporation Tax Act 2010 s 1121(1).]

UNIT TRUST

Australia [Income Tax Assessment Act 1936 (Cth), Div 6C.] '[12] In the absence of focused submissions, based upon concrete facts, it is not appropriate in this case, assuming it to be possible, to attempt to formulate a single, comprehensive definition of "unit trust" for the purposes of Div 6C that applies in every instance. It is also not necessary to attempt to formulate a single test for a unit trust in this case because this appeal can be resolved on the short point that whatever is encompassed within the concept of a unit trust within Div 6C there is a necessity for something which fits a description of "units" within the functional, and descriptive, notion of a unit trust. This includes a focus upon one of the core indicia of a unit, namely a beneficial interest in any of the income or property of the estate.

...
 '[30] This context and background to the introduction of Div 6C reveals a focus upon a "unit trust" in a functional way involving the existence of "unitholders" as beneficiaries under a trust who are involved in a collective trust investment scheme.

...
 '[95] Ultimately, it is neither necessary nor appropriate to attempt a conclusive definition of a "unit trust" in this appeal for the purposes of Div 6C. It is sufficient to say that whether a trust is a "unit trust" within the undefined meaning of that term in Div 6C requires the text of that Division (including its definitions) to be construed in light of a functional and descriptive understanding of the nature of a unit trust. It also requires a close examination of the particular trust deed in order to determine whether the functional nature of the trust operates as a unit trust. The text, context, and purpose of Div 6C illustrates that this examination will be assisted by consideration of the core concept of whether persons have (i) a beneficial interest in the income or property of the trust estate, which is (ii) capable of being functionally described as involving units. But even the absence of (i) will not necessarily be determinative.' *Commissioner of Taxation v Elecnet (Aust) Pty Ltd (as trustee for the*

Electrical Industry Severance Scheme) (ACN 080 344 458) [2015] FCAFC 178, (2016) 329 ALR 310 at [12], [30], [95], per Pagone and Edelman JJ

UNLAWFUL

[European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), art 5(1)(a), (4): lawful detention; indeterminate prison sentences.] '[16]... Mr James Eadie QC for the Secretary of State invites the Supreme Court to rule on the legal position under United Kingdom law, and submits that, whatever the position in Strasbourg, we should declare life and IPP [imprisonment for public protection] prisoners' continuing detention to be lawful, unless and until the Parole Board determines such detention to be unnecessary—subject only to the remote possibility, identified by the House in *R (James) [R (on the application of James) v Secretary of State for Justice]* [2009] UKHL 22, [2009] 4 All ER 255, [2010] 1 AC 553] that a complete breakdown of the parole system might destroy the causal link between the original sentence of life or IPP and the continuing detention. We should in short adhere in this respect to the House's previous reasoning and decision in *R (James)*.

...
 '[22] The starting point, when considering Mr James Eadie QC's submission, must be the language of art 5. Article 5 lists the cases in which a person may, in accordance with a procedure which must be prescribed by law, be deprived of his or her liberty. The first (art 5(1)(a)) is lawful detention after conviction by a competent court. Article 5(4) entitles anyone detained purportedly pursuant to this or any other of the listed grounds 'to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'.

'[23] On the face of it, the express wording of art 5(1) and of the last ten words of art 5(4) contemplate that any detention not authorised by art 5(1) should lead to release. On the reasoning of the ECtHR in *James v UK [James v UK]* (2012) 56 EHRR 399, ECt HR], failure after the tariff period properly to progress a life or IPP prisoner towards release makes detention during the period of such failure "arbitrary" and therefore unlawful. If that reasoning be adopted, then such detention is in breach of the express

language of art 5(1)(a), and the prisoner should (in the eyes of the ECtHR) be entitled to an immediate order for speedy release under art 5(4). Under United Kingdom domestic law, release would however be impossible, since primary legislation requires such a prisoner to remain in detention unless and until the Parole Board is satisfied that this is no longer necessary for the protection of the public and s 6(2)(a) of the Human Rights Act 1998 would apply. But, even so, it would then be open to the prisoner under s 4 of the Act to seek a declaration of incompatibility if domestic courts were to interpret the convention rights scheduled to the Act in the same way as the ECtHR interprets the ECHR at the international level. Considerable importance may therefore attach to the question whether the reasoning of the ECtHR in *James v UK* is followed and adopted domestically.

‘[24] The reasoning in *James v UK* has, as its premise, that whether detention is lawful is not conclusively decided by the fact that there has been a valid conviction by the domestic court. In its previous case law the court had made clear that, although the “primary” requirement of art 5(1)(a) is that the detention should have a legal basis in domestic law, the article “also relates to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the articles of the convention”: *Stafford v UK* (2002) 13 BHRC 260 (para 63); *Amuur v France* (1996) 22 EHRR 533 (para 50); *Saadi v UK* (2008) 47 EHRR 427 (para 67); *Kafkaris v Cyprus* (2008) 25 BHRC 591 (para 117); *M v Germany* (2009) 28 BHRC 521 (para 90); see also *Radu v Germany* App No 20084/07 (16 May 2013, unreported) (para 112).

‘[25] In this as in other contexts, the ECHR has not infrequently resorted to a concept of “arbitrariness” to explain what it means by unlawfulness. The natural meaning of this English word connotes some quite fundamental shortcoming. But it is also clear that, when used at the international level, its sense can depend on the context. Thus, in *Saadi v UK* (2008) 47 EHRR 427, the Grand Chamber identified a distinction between arbitrariness in the context of art 5(1)(a) and in the context of other subparagraphs of art 5(1). ...

‘[30] The present appeal does not in any event concern procedural fairness. It concerns alleged failures in the provision of appropriate opportunities to prisoners to progress towards release from sentences about the imposition of which, as such, no complaint is or can be made.

In this context, there is a real difficulty about accepting a proposition that the convention rights require a life or IPP prisoner’s release, before the Parole Board is satisfied that his detention is no longer required for the protection of the public. Not only would this in the United Kingdom context mean that primary legislation—28(6)(b) of the Crime (Sentences) Act 1997 (para [10], above)—was in conflict with the convention rights. It would also involve the release of someone whose safety for release had not been established; and, as soon as he could be offered appropriate facilities to make progress towards eventual release, it would involve re-detaining him—always assuming that he either surrendered voluntarily or could be found and rearrested.

‘[31] In *Re Corey* [[2014] 1 All ER 863] at [63]–[69], Lord Mance questioned whether the ECtHR could have meant this. He identified certain features of its reasoning which suggest that it did not. We will treat them as repeated here, without setting them out. However, if the ECtHR did not mean this, that seems to undermine the central part of its reasoning—that detention becomes arbitrary and unlawful under art 5(1) after the expiry of the tariff period, if the prisoner is not given the facilities to enable him to progress towards release. Detention which is unlawful under the express wording of art 5(1) is, as we have said, detention from which a person is under art 5 entitled on the face of it to be released.

‘[32] The central part of the court’s reasoning in *James v UK* under art 5(1) finds little if any support in the previous Strasbourg authority. The need for “a coherent framework for progression towards release” of persons subject to a measure of preventive detention is mentioned in *M v Germany* [(2009) 28 BHRC 521, ECt HR] (at para 129) but in a quite different part of the judgment from that dealing with the lawfulness of detention—namely in the context of considering whether the extension of such a measure from ten years to an unlimited period after six years in preventive detention constituted the introduction of a retrospective penalty. In *Grosskopf v Germany* (2011) 53 EHRR 280 (paras 50–52) the court again expressed concern about the apparent absence of any special measures, instruments or institutions to address the danger presented by persons subject to preventive detention and to limit the duration of their detention, but did so purely in the context of considering whether a sufficient causal connection existed between the applicant’s original conviction and his continuing preventive detention. If anything, the court’s

reference to its concern, coupled with its decision to uphold the continuing detention as not “unreasonable in terms of the objectives of the preventive detention order”, suggest that the court did not see the absence of any special measures as capable of affecting the lawfulness of the detention, so long as the causal connection based on danger to the public existed.

[33] In *James v UK* the Fourth Section of the ECtHR did however unequivocally identify the absence of measures to assist progression through the prison system as arbitrariness making the detention unlawful. It treated the situation as falling within the language of art 5(1)(a), despite the continuing existence of sufficient causal link between sentence and detention (see para 198). On this basis, it had also to identify the period of detention which was unlawful. It did so by referring, in its holding, to the “detention following the expiry of their tariff periods and until steps were taken to progress them through the prison system”. That exposes a problem. Particularly where a tariff is of a relatively long period, a prisoner’s progression towards release through courses and experience in open conditions should, where and to the extent feasible, be facilitated not merely after but also in advance of the tariff period, so as to keep open the possibility of release on or shortly after its expiry. That is indeed Mr Haney’s complaint in the present case. Yet, on the ECtHR’s approach, treating the present issue as falling within the text of art 5(1)(a), no complaint can apparently arise until the expiry of the tariff period, and any complaint can then only arise if the failure to provide courses, etc continues after the expiry of the tariff period.

[34] The second, much more substantial problem about the Fourth Section’s approach is that logically it would, if followed in the United Kingdom, mean, as we have stated, that any prisoner not being progressed through the system should be released, and that the Crime (Sentences) Act 1997 s 28(6)(b) should be declared incompatible with the convention rights in so far as it precludes this. As noted in para [15], above, the ECtHR in para 217 of its judgment avoided, rather than addressed, this difficulty. Mr Southey QC for the appellants suggested, ingeniously, that the difficulty could not arise, because, as soon as a prisoner gets to court and establishes that he is not being duly progressed towards release, the court’s order would redress the situation. This does not however follow. Many of the failings revealed by the cases which have come before the courts

to date are simply incapable of being redressed at the drop of a hat or wig. Systems failed, due to lack of resources and facilities, and it takes time to mend such failures, whatever order a court might make. Moreover, in a case where the failure was repaired, as it might be by the time a court came to consider the case, by the provision of adequate opportunity to the prisoner, then the court would be left, on this view of the ECtHR decision, with detention which had been unlawful for a time but was no longer.

[35] For the reasons which we have given, we do not think that it is possible to follow the reasoning of the Fourth Section of the ECtHR in *James v UK*. It appears to us to be based on an over-expanded and inappropriate reading of the word “unlawful” in art 5(1)(a), which would not give rise to a sensible scheme. That does not however mean that we would revert to the House’s decision in *R (James)*. The Fourth Section has underlined the link which should be recognised between preventive detention and rehabilitation, and has also concluded that there should be an individual remedy in damages under the ECHR for failure to provide prisoners serving indeterminate sentences with proper means of progression towards release. The House’s refusal of a convention remedy in *R (James)* was based on a contrary conclusion that the aim of a life or IPP sentence does not include rehabilitation, at least for the purposes of the ECHR, as well as upon the House’s view that the continuing causal link between sentence and detention prevented any breach of art 5.

[36] We consider that the Supreme Court should now accept the Fourth Section’s conclusion, that the purpose of the sentence includes rehabilitation, in relation to prisoners subject to life and IPP sentences in respect of whom shorter tariff periods have been set. We also consider that the Supreme Court can and should accept as implicit in the scheme of art 5 that the state is under a duty to provide an opportunity reasonable in all the circumstances for such a prisoner to rehabilitate himself and to demonstrate that he no longer presents an unacceptable danger to the public. But we do not consider that this duty can be found in the express language of art 5(1). Treating it as an aspect of the duty to avoid “arbitrariness” under art 5(1)(a) has unacceptable and implausible consequences which we have already identified. The Grand Chamber decision in *Saadi* also remains important authority that arbitrariness has a confined meaning, when used as a test of lawfulness in the context of art 5(1)(a).

[37] Article 5(4) would be a more

satisfactory home for any duty of the nature identified in the previous paragraph, if its language covered it (which it does not). Article 5(4) gives rise to an ancillary duty on the state, breach of which does not directly impact on the lawfulness of detention. The duty is to make available access to judicial review by a court or here the Parole Board, which will consider whether the information put before it justifies continued detention or release. Speedy access to the Parole Board like reasonable access to proper courses and facilities represents an important aspect of a prisoner's progression towards release. But the language of art 5(4) is in terms confined to access to judicial review by the Parole Board on the basis of the information available from time to time. It does not cover the prior stage of provision of courses and facilities in prison, which gives rise to the information necessary on any Parole Board review.

‘[38] The duty to facilitate the progress of such prisoners towards release by appropriate courses and facilities cannot therefore be brought, in our opinion, within the express language of either art 5(1)(a) or art 5(4). But it is on any view closely analogous, at an earlier stage, to the duty involved under art 5(4), and it is far more satisfactory to treat it as an analogous duty arising by implication at an earlier stage than that covered by art 5(4), rather than to treat art 5(1)(a) as incorporating it. We consider that a duty to facilitate release can and should therefore be implied as an ancillary duty—a duty not affecting the lawfulness of the detention, but sounding in damages if breached. Such a duty can readily be implied as part of the overall scheme of art 5, read as a whole, as suggested in *Re Corey*.’ *R (on the application of Haney) v Secretary of State for Justice* [2014] UKSC 66, [2015] 2 All ER 822 at [16], [22]–[25], [30]–[38], per Lord Mance and Lord Hodge

Australia [Civil Liability Act 2002 (NSW), s 52: no civil liability for acts in self-defence in response to unlawful conduct.] ‘[202] As a matter of ordinary English, the word “unlawful” means “contrary to law; prohibited by law; illegal”: Oxford English Dictionary. Whilst a crime is conduct that is contrary to law, the word “unlawful” is not so confined. It includes a civil wrong. Further, the context in which s 52 appears, namely, an Act relating to civil claims for personal injuries, also points to “unlawful” within the meaning of the section as including conduct which is tortious as well as criminal.

‘[203] The language of s 52(2) points to the

same conclusion. The subsection provides an exhaustive list of the circumstances which a defendant must believe exists in order to make out the defence, including “unlawful deprivation” of liberty: s 52(2)(b) and “unlawful taking, destruction, damage or interference” of or with property: s 52(2)(c). Such conduct may be either a civil wrong or a crime. Further, the specification of “criminal” trespass in s 52(2)(d) indicates that when the legislature intended to refer to criminal conduct only, it expressly did so. Indeed, there would be no need for the specification of “criminal” trespass in s 52(2)(d) if s 52 as a whole were confined to criminal conduct.

‘[204] The State also pointed to the language of s 54 which uses the language of the criminal law in its reference to an “offence” in contradistinction to the use of the word “unlawful” in s 52. I agree that that is a further statutory indicator that the conduct to which s 52(1) refers is not confined to criminal conduct.’ *New South Wales v McMaster* (2013/385833) [2015] NSWCA 228, (2016) 328 ALR 309 at [202]–[204], per Beazley P

UNLAWFUL CONFINEMENT

Canada [Criminal Code, RSC 1985, c C-46, ss 231(5)(e), 279(2). Under s 279(2), every one who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of an offence. By s 231(5), murder is first degree murder when the death is caused by a person while committing or attempting to commit an offence under, inter alia ‘(e) section 279 (kidnapping and forcible confinement)’. Whether confinement alleged to have occurred in the course of a robbery constituted forcible confinement for the purpose of classifying a death as first degree murder under s 231(5)(e).] ‘[24] The authorities establish that if for any significant period of time Mrs Skolos was coercively restrained or directed contrary to her wishes, so that she could not move about according to her own inclination and desire, there was unlawful confinement within s 279(2): see *Luxton*, at p 723; *R v Gratton* (1985) 18 CCC (3d) 462 (Ont CA), per Cory JA, at p 475; *R v Tremblay* (1997) 117 CCC (3d) 86 (Que CA), per LeBel JA (as he then was), at pp 91–92; and *R v Mullings*, 2005 Carswell Ont 3022 (SCJ), per Durno J, at para 39.

‘[25] Some confusion is caused by the words “forcible confinement” appearing in parenthesis in s 231(5)(e). The parenthetical note is not an

operative part of s 231(5)(e) but is inserted only for ease of reference. In s 279(2) itself, the adverb “forcibly” is used only to qualify the verb “seizes”. It is not used to qualify either “confines” or “imprisons”. The word “forcible” in s 231(5)(e) adds nothing to the elements of the offence set out in s 279(2). What is important to note about s 231(5), however, is not only that it refers to the enumerated offences (such as s 279(2)) but that it requires a temporal and causal relationship between the killing and commission of the enumerated offence, as will be discussed.’ *R v Pritchard* [2008] 3 SCR 195, [2008] SCJ No 61, 299 DLR (4th) 81, 2008 SCC 59 at [24]–[25], per Binnie J

UNREASONABLE

Unreasonable in the circumstances

Australia [Fair Work Act 2009 (Cth), s 326(1).] [148] Whether a deduction from an employee’s pay that is directly or indirectly for the benefit of the employer is unreasonable in the circumstances calls for an evaluative judgment in which competing considerations need to be assessed. That interpretative task is unassisted by any guiding considerations expressly identified by s 326(1). As always, and particularly when faced with the interpretation of a broadly-expressed standard, the task of statutory construction must give effect to the evident purpose of the legislation and be consistent with its terms: *AB v Western Australia (Matter No P15/2011)* (2011) 244 CLR 390; 281 ALR 694; 46 Fam LR 1; [2011] HCA 42 at [23] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

[149] Relevantly, the *Oxford English Dictionary* contains the following definitions of “unreasonable:”

Not within the limits of what would be rational or sensible to expect; excessive in amount or degree.

3.a. Of an idea, attitude, action, etc.: not guided by, or based upon, reason, good sense, or sound judgement; illogical.

b. Inequitable, unfair; unjustifiable. *Obs.*

Of the three senses of the word “unreasonable” there identified, it is the third (“inequitable, unfair; unjustifiable”) that best captures the use made by s 326(1)(c) of the word “unreasonable”. Beyond that observation, as *Stroud’s Judicial Dictionary of Words and Phrases* (4th

ed, Sweet & Maxwell Limited, 1974, at 2258) says in its definition for the word “reasonable” — “it would be unreasonable to expect an exact definition of the word ‘reasonable.’” Whilst the word “unreasonable” is used in various provisions of the FW Act, the context is different to that of s 326(1)(c) and no useful guidance can be drawn from cases where the term has been judicially considered. It is the genesis of the scheme established by Div 2 and the origin of s 326(1)(c) itself that shed greater light on the mischief being addressed and the considerations that are likely to be of greatest relevance in an assessment of whether a deduction is “unreasonable in the circumstances”.

...
[174] Apart from what may be drawn from its origin, the terms of Div 2 also make it apparent that s 326(1) was intended to provide “stronger protections” to employees where the deduction concerned was directly or indirectly for the benefit of the employer or a related party of the employer. That is apparent from the fact that only that nature of deduction is subject to the unreasonableness criterion.

[175] There is, therefore, an additional concern expressed by s 326(1) in relation to deductions that are directly or indirectly for the benefit of the employer. The legislation evinces a suspicion about deductions that benefit the employer. Terms that provide for deductions of that kind are of no effect, where the deduction is unreasonable in the circumstances.

[176] Whether a deduction is unreasonable in the circumstances will, of course, depend upon relevant surrounding circumstances. It will be a question of fact and degree...’ *Australian Education Union v Victoria (Department of Education and Early Childhood Development)* [2015] FCA 1196, (2015) 333 ALR 1 at [148]–[149], [174]–[176], per Bromberg J

UNREASONABLY DISPROPORTIONATE

Australia [Crimes (Sentencing Procedure) Act 1999 (NSW), s 23.] [71] Section 23 of the Sentencing Act allows the court to impose a lesser penalty than it would otherwise impose taking into account the degree to which the offender has assisted (or undertaken to assist) law enforcement authorities in the prevention, detection or investigation of the offence (or any other offence). Section 23(3) provides that a lesser penalty imposed under the section must not be “unreasonably disproportionate to the nature and circumstances of the offence”.

...
 '[77] CMB's disclosures were of offences of a similar character and seriousness to the offences that were the subject of the daughter's complaint and they had been committed over the same period as the offences to which the Diversion Act [the Pre-Trial Diversion of Offenders Act 1985 (NSW)] applied. The objective seriousness of the offences and the fact they extended over a lengthy interval and involved a gross breach of trust support the conclusion that the non-custodial penalties imposed by Ellis DCJ are disproportionate. However, it was open to Ellis DCJ to impose penalties that were disproportionate to the nature and circumstances of the offences in light of his finding that without CMB's honest compliance with the program the offences would have remained undetected.

'[78] The mandate of s 23(3) is that a lesser penalty imposed to take account of the offender's assistance to the authorities must not be unreasonably disproportionate to the nature and circumstances of the offence. The term "unreasonably" in this context has been given a wide operation. Whether a sentence is unreasonably disproportionate necessarily is a judgment about which reasonable minds may differ. In determining whether the sentences imposed by Ellis DCJ were manifestly inadequate, the issue for the Court of Criminal Appeal was not whether it regarded non-custodial sentences as unreasonably disproportionate to the nature and circumstances of the offences but whether, in the exercise of the discretion that the law reposed in Ellis DCJ, it was open to his Honour upon his unchallenged findings to determine that they were not.' *CMB v Attorney-General (NSW)* [2015] HCA 9, (2015) 317 ALR 308 at [71], [77]–[78], per Kiefel, Bell and Keane JJ

UNREASONABLY IMPEDES NORMAL PASSAGE

New Zealand [Offence of obstructing a public way under the Summary Offences Act 1981, s 22(1)(a).] '[5] Section 22 of the Summary Offences Act 1981 provides as follows:

22. Obstructing public way—(1) Every person is liable to a fine not exceeding \$1,000 who, without reasonable excuse, obstructs any public way and, having been warned by a constable to desist,—

(a) Continues with that obstruction;
 or

(b) Does desist from that obstruction but subsequently obstructs that public way again, or some other public way in the same vicinity, in circumstances in which it is reasonable to deem the warning to have applied to the new obstruction as well as the original one.

(2) In this section—

Obstructs, in relation to a public way, means unreasonably impedes normal passage along that way:

Public way means every road, street, path, mall, arcade, or other way over which the public has the right to pass and repass.

...
 '[11] The first assessment and value judgment to be made on this appeal is whether, in the light of the facts found by the Justices, the appellant's actions unreasonably impeded normal passage along the footpath.

'[12] In considering what is an unreasonable impediment to normal passage, it is necessary to have regard to the rights of both the appellant, and other users of the footpath. The rights of members of the public on footpaths are not confined to a right of passage along the footpath. Other activities may lawfully take place on footpaths, (albeit that some of them may require permission under local bylaws or other regulations). Charitable collectors may stand to solicit donations, buskers may perform, businesses may display advertising placards or signs. Such activities, carried on normally and with appropriate regard for the rights of other users of a footpath, do not unreasonably impede normal passage. They are an alternate use of the footpath which may co-exist with normal passage.

...
 '[14] Counsel for the respondent submits that permission granted under a bylaw provides a reasonable excuse to the impediment of the right of passage. Without further information, I question that analysis. It seems likely that, in deciding whether to grant permission to carry on such activities, the Council would need to consider whether the proposed activity would unreasonably impede normal passage. So, the granting of permission might be a recognition by the Council that the activity did not unreasonably impede normal passage. If that is so, no issue as to reasonable excuse arises.

'[15] Another common use of public areas such as footpaths is to exercise the right to

protest. That right is well established at common law and it is expressly enshrined in the freedoms of expression, of peaceful assembly and of movement contained in ss 14, 16 and 18 of BORA [New Zealand Bill of Rights Act 1990]. Section 22 is, so far as possible, to be given a meaning consistent with those rights. I consider that in this case that is to be done by taking those rights into account in determining whether the appellant's actions constituted an unreasonable impediment to normal passage on the footpath.

‘[16] In *Oosterman* [*Oosterman v Police* [2007] NZAR 147], Harrison J approached this issue in this way:

The NZBORA assumes direct relevance because the elements of the offence constituting prohibited conduct set the scope of infringement of any relevant NZBORA right. The first step in the inquiry is to consider whether Mr Oosterman's conduct fell within the natural meaning of s 22; I have already answered that question in the affirmative. The second step is to determine whether or not the s 22 prohibition on particular conduct is *prima facie* inconsistent with the NZBORA. If it is inconsistent, is the limit justified? If not, can the section be read consistently with the NZBORA? If it can, the provision should be read in that way; if it cannot, then its natural meaning must be given effect (see *Hopkinson v Police* [2004] 3 NZLR 704, Ellen France J, at [28]).

‘[17] For my part, I adopt a slightly different approach from that two step inquiry discussed by Harrison J. I prefer a single stage inquiry of considering whether the appellant's conduct fell within the meaning of s 22, interpreting that section consistently with the BORA rights and freedoms as required by s 6 of BORA. A person, who is otherwise acting lawfully, who exercises his BORA rights on a public footpath does so as of right, not on sufferance. When that approach is adopted, I consider that normal passage, consistent with BORA, is a right of passage which accommodates the lawful use of the footpath for other purposes, including the exercise of BORA rights and freedoms.

‘[18] Interpreted in that way, normal passage does not require complete and unrestricted access without let or hindrance to the entire area of the footpath for the purpose of passage. Not every obstruction of a footpath will impede normal passage. To impede is to delay or block progress, or to obstruct or hinder. An obstruction which arises from another lawful use of the

footpath will not impede unless the ability of pedestrians to pass and repass along the footpath is delayed or hindered. That will not occur if pedestrians can readily walk around an obstacle without delaying their progress. A fortiori, normal passage will not be unreasonably impeded by such an obstacle. Normal passage is not impeded by the use of the footpath for a lawful purpose (including the legitimate exercise of a BORA right), where passage along the footpath can be made without delay or without progress being hindered.’ *Stanton v Police* [2012] NZHC 3223, [2013] NZAR 24 at [5], [11]–[12], [14]–[18], per MacKenzie J

UNSEAWORTHY

[For 43(2) Halsbury's Laws of England (4th Edn) (Reissue) paras 1605–1606 see now 7 Halsbury's Laws of England (5th Edn) (2015) para 420 et seq.]

UNTENANTABILITY

New Zealand ‘[13] On the issue of cl 26.1(a) and whether the premises had been rendered untenable, the Judge referred to a number of authorities. She set out the Black's Law Dictionary definition of “untenantable” being “not capable of being occupied or lived in; not fit for occupancy”. She referred to the Ontario Court of Appeal decision of *United Cigar Stores Ltd v Buller* [(1931) 66 OLR 593 at 598, ONCA] where that Court had approved and followed the earlier English authorities of *Proudfoot v Hart* [1890] 25 QBD 42, CA], and the classic dictum of Baron Alderson in *Belcher v McIntosh* [(1839) 3 Mood & R 186, 174 ER 257] which was that the words “must both import such a state as to repair that the premises might be used not only with safety, but with reasonable comfort, by the class of persons by whom, and for the sort of purposes for which, they were to be occupied”. She also referred to the New Zealand Court of Appeal decision, *DFC New Zealand Ltd v Samson Corporation Ltd* [(1994) 142 ANZ ConvR 216, CA] in which the Court approved a High Court dictum to the effect that the word “untenantable” meant:

Nothing more nor less than able to be used and enjoyed by tenant. Within that general catalogue of clause 26, subclause (a) involves some degree of permanence. In other words, something which is merely

transitory or temporary will not make a building untenable. However, where there is a substantial interference with the tenant's ability to enjoy, use and operate, particularly when one is talking about commercial premises, then you have "untenantability".

... [19] Mr Carey's central submission, so far as cl 26.1(a) and untenability were concerned, was that if a tenant wished to continue leasing damaged premises then the premises could not properly be described as "untenantable".

... [22] The word "tenantable" is principally considered in the context of lease covenants requiring the tenant to put or keep the demise in reasonable, habitable or tenantable repair.

[23] In *Belcher v McIntosh*, the landlord plaintiff alleged that, contrary to the terms of a three-year lease for a house and stables, the tenant had not, within a reasonable time, put the premises into habitable repair, as required by the lease. Finding for the defendant, Alderson B considered that the term "habitable repair" was equivalent to the more common expression "tenantable repair", bearing the definition given at [13] (above).

[24] It is well settled that the standard of repair required is one which, having regard to the age, character and locality of the premises, would make it reasonably fit for the occupation of a reasonably minded tenant, and also that the covenants to repair must be reasonably construed by the landlord.

[25] In *DFC New Zealand Ltd v Samson Corporation Ltd*, the purchaser learned, prior to completion, that the tenant of the principal shop in commercial premises (who was believed to have been continuing as a tenant) had in fact vacated the premises after a fire. The purchaser claimed that the landlord defendant had misrepresented the tenantable nature of the premises. Robertson J, noting that the word "tenantable" had not received reported consideration, set out the definition given at [13] (above). While accepting the meaning of the word "untenantable" as construed by Robertson J, the Court of Appeal held that the test for untenability was not satisfied (the fire damage being more than merely transitory or temporary in nature in the context of a six-year lease).

[26] On the basis of these authorities, most of which were before the Judge, I consider that, for the purposes of cl 26.1(a), the word

"untenantable" is an objective state to be determined on the specific relevant facts. Certainly the focus of the inquiry must be whether the premises are capable of being tenanted by the lessee, who in terms of a lease went into the premises for a specific purpose and for a specific term. The tenant's purpose is inextricably tied up with the permitted use of the premises.

[27] But that understandable focus on the use of leased premises by a tenant does not permit an objective assessment of the adjective "untenantable" being watered down or coloured by the subjective preferences of either landlord or tenant. The consequences of the premises being "untenantable" is that the lease terminates. If premises are untenable a landlord is not permitted to continue to assert his rights under the lease against the tenant. In addition to those rights the landlord, of course, has obligations which include curtailment (in favour of the tenant) of his freehold rights. And a tenant too has rights and obligations. Although, undoubtedly, one of the major functions of the clause is to release a tenant from lease obligations to a landlord, that is not the clause's only purpose. When objectively determined premises become untenable, the primary purpose and subject-matter of the lease comes to an end. In that situation, as a matter of contract, the lease is terminated.

[28] Against that analysis, was a supplementary submission of Mr Carey that it would be "farfical" to construe cl 26.1(a) in such a way as to prevent a willing landlord and a willing tenant continuing a lease because the premises were untenable. That submission does not persuade me my interpretation of the clause and its underlying policy is wrong. As Mr Harris submitted, there is nothing to prevent willing parties from ignoring cl 26.1(a) if they so desire and agreeing to keep a lease afoot. That was not the case here.

[29] The evidence before the Judge demonstrated graphically that the leased first floor premises had been seriously damaged by fire. Ten months of the agreed four-year lease term were needed to repair the structural and internal damage. Regardless of the appellants' desire to hold on to the premises, at the stage that the respondents terminated the lease on 8 November 2007, the premises can only be described as untenable. They were not capable of being used for the tenants' purposes or indeed the purposes of the lease.

[30] I thus conclude the Judge was correct when she held that the fire had rendered the premises untenable and that the lease was

validly terminated pursuant to cl 26.1(a) of the lease.' *Russell v Robinson* [2011] 2 NZLR 424 at [13], [19], [22]–[30], per Priestley J

USAGE

[For 12(1) Halsbury's Laws of England (4th Edn) (Reissue) para 650 see now 32 Halsbury's Laws of England (5th Edn) (2012) para 50.]

USE

See also WORK EQUIPMENT

[Provision and Use of Work Equipment Regulations 1998, SI 1998/2306. The pursuer was injured when trying to repair the closer on the door of the central control room on an oil platform and sued for breach of the regulations. Liability depended in part on whether the pursuer was 'using' the equipment within the definition in the regulations.] '[49] Precisely because, subject to certain specified exceptions, the 1998 Regulations are intended to cover all kinds of undertakings, reg 2(1) defines "work equipment" very broadly as "any machinery, appliance, apparatus, tool or installation for use at work (whether exclusively or not)". So any machinery, appliance, etc for use at work counts as "work equipment". A complication arises, however, because, in the same sub-section, "use" in relation to work equipment means "any activity involving work equipment and includes starting, stopping, programming, setting, transporting, repairing, modifying, maintaining, servicing and cleaning"' This has prompted the idea—or fear—that something, which would not otherwise be regarded as work equipment, falls to be so regarded merely because it is, say, being repaired or serviced or cleaned, and so is being "used" at work in terms of the definition of work equipment.

'[50] As is often the case, the definitions in reg 2(1) could perhaps have been drafted more clearly. But in my view they create no real difficulty in the circumstances of this case. The definition of "use" in relation to work equipment in reg 2(1) applies "unless the context otherwise requires". In the definition of "work equipment" itself, the context does indeed require otherwise.

'[51] The machinery and apparatus etc of an undertaking are there to perform a useful, practical function in relation to the purposes of that undertaking. Depending on the nature of its business, the undertaking may, for instance, have lathes for cutting metal, axes for chopping

wood, a furnace for refining ore, chalk for writing on blackboards, needles for sewing model dresses, hoists for raising loads, fork-lift trucks for carrying the loads from place to place, and, in the case of a courier business, bicycles, vans or aircraft for carrying letters and parcels. All these pieces of equipment would serve a useful function in the employer's business. So they are "for use at work" and fall within the definition of "work equipment". Indeed, many other things may be "for use at work"—for example, clocks to let the employees know the time, radios for them to listen to music while they work, kettles for them to make tea or coffee and water-coolers at which they can drink and gossip. All these will constitute work equipment—as indeed will, say, screw-drivers or radios of their own which employees are allowed to bring in and use at work.

'[52] By contrast, a business would not have machinery etc simply so that it could be programmed, transported, repaired or cleaned: if that were all that it was there for, the machinery would serve no useful, practical purpose in the undertaking. Rather, programming, transporting, repairing and cleaning are all operations which may have to be carried out on something that is "work equipment" because it serves some practical purpose, is "for use at work". These operations are included within the definition of "use" in relation to work equipment in order to ensure that the equipment poses no threat to health and safety when any of them is being carried out. In other words, as the very form of the term to be defined (" 'use' in relation to work equipment") suggests, you must first determine whether the item in question falls within the scope of the definition of "work equipment" in reg 2(1). If it does, the definition of "use" then lists some of the activities which count as "use" in relation to that item for the purposes of the 1998 Regulations.

...

'[59] If, then, the door, including the closer, was "work equipment", was the pursuer "using" it when he was injured while easing a screw, in order to detach the closer and take it to the workshop to try to repair it? The Lord Justice Clerk (Gill) thought not—since the pursuer was "using" the equipment with which he was effecting the repair, but not the equipment that he was repairing: [2007] CSIH 23 at [8], 2007 SC 469 at [8], 2007 SCLR 648. That conclusion is based on May LJ's reasoning in *Hammond v Metropolitan Police Comr* [2004] ICR 1467, which I have already rejected. Lord Johnston and Lord Marnoch went further, however. They held that, even if—contrary to

their view—the door closer was work equipment, the pursuer had not been “repairing” it, in terms of the definition of “use” in reg 2(1) of the 1998 Regulations.

[60] While recognising that “use” in reg 2(1) includes “repairing”, Lord Johnston said this, at [47]:

“However, in this context it is again important to place the context of regulation 4 against the definitions in regulation 2, since at all times the purpose I consider of the application of the phrase ‘work equipment’ is to protect the workman using such equipment. This might embrace routine maintenance or cleaning or even minor repairing while the machine is operating (cf, [*English v North Lanarkshire Council* 1999 SCLR 310]). What in my opinion it could never embrace is a situation where work is being carried out of a major repair nature designed to return the equipment to a workable and safe state. This is what I consider the word ‘suitable’ must be construed to mean in regulation 4, otherwise a circular situation is reached whereby the breakdown of machinery which requires to be repaired still renders the employer exposed to the terms of the relevant safety regulations as regards equipment being repaired. It is plain that regulation 5 is designed to embrace an obligation to maintain and repair at a time when the machine in question is not otherwise in use. By definition in seeking to remove the door closer mechanism, which is what the pursuer was doing at the time of the accident, he cannot be said to be using it for a purpose connected with work as understood by the definition of ‘use’. He is effecting an action of repair which is entirely removed from the normal working of the machine.”

Lord Marnoch explained his view in this way, at [56]:

“In my opinion, however, when the regulations are looked at in their entirety and regulation 2 is read in its overall context, it becomes clear that, while regulation 4 can certainly encompass ‘use’ by ‘repairing, modifying, maintaining, servicing and cleaning’, the intention is that this is only where such use can be seen as routine, such as where the ordinary employee is expected to do these things as ancillary or incidental to the main day-to-day use of the ‘work equipment’. That, it

seems to me, is quite distinct from the specialised repair (involving dismantling) in the present case which, on his own averments, the appellant was carrying out in his capacity as a ‘mechanical technician’. In that situation, and on the present hypothesis, I am of opinion that the first defenders, as the appellant’s employers, were doing no more and no less than attempting to comply with regulation 5(1), namely to ‘ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair’. Insofar as the appellant’s pleadings rely on regulation 4 and regulation 5(1) they are accordingly, in my opinion, on any view irrelevant.”

[61] I would respectfully reject the idea that the term “repairing” in the definition of “use” in reg 2(1) should be construed narrowly in this way. So far as the language and structure of the definition are concerned, there is absolutely nothing to indicate that “repairing” should be given anything other than its “ordinary” meaning. More importantly, the kind of distinction favoured by Lord Johnston and Lord Marnoch—between routine, minor repairs and more serious repairs—makes no sense from the standpoint of ensuring health and safety. For instance, when selecting work equipment, a person who is subject to the requirement in reg 4(2) must have regard to the working conditions and to the risks to the health and safety of persons in the premises or undertaking in which it is to be used, and to any additional risk posed by the use of that work equipment. Their Lordships apparently accepted that, when selecting work equipment, an oil platform operator, for example, would need to have regard to any risks there might be to people on the platform when minor, routine repairs to the work equipment were being carried out. But, on their approach, the platform operator would not require to have regard to the (perhaps, far greater) risks to people on the platform when a piece of work equipment had to be taken out of service in order to undergo a major repair. So, in selecting, say, a gas compressor for use on the platform, the platform operator would have to consider the risks involved in the straightforward procedure of replacing a faulty external switch, but not the risks involved in shutting the compressor down and opening it up to replace some faulty internal component—with the possibility of volatile gas escaping into the atmosphere and causing an explosion if the equipment were not constructed so that the gas

could be vented safely for the purposes of repairing the equipment. Such an interpretation would blow a hole in the protection afforded by the legislation. It simply cannot be right.

'[62] On the contrary, when selecting any item of work equipment, under reg 4(2) the platform operator would indeed have to consider whether a major repair could be carried out without imperilling the safety of the platform and everyone on it. Indeed, that is just common sense—not only for oil platforms but for any factory or workplace where major repairs to equipment may have to be carried out. In my view, the word “repairing” in reg 2(1) should therefore be given its “ordinary” meaning. In terms of that ordinary meaning, on his averments, the pursuer was engaged in “repairing”, and so “using”, the door, or door closer, when the arm of the closer sprang out and injured him.’ *Spencer-Franks v Kellogg Brown and Root Ltd* [2008] UKHL 46, [2009] 1 All ER 269 at [49]–[52], [59]–[62], per Lord Rodger of Earlsferry

Canada [The Official Languages Act, s 4(1), provides that the English and French are the official languages of Parliament, and everyone has the right to ‘use’ either of those languages in any debates and other proceedings of Parliament.] ‘[5] The appellant opines that a witness before a parliamentary committee has the right to submit documents in either official language for contemporaneous distribution to committee members as part of his or her testimony. ...

... [12] The applications Judge is of the opinion that subsection 4(1) of the Act protects an individual’s right to use the official language of his or her choice. It does not dictate the form of the individual’s interaction with the Committee:

Mr Knopf was entitled to speak to the Committee in the official language of his choice. That right was respected. Mr Knopf’s request that his documents be circulated did not fall within the parameters of the right enshrined in subsection 4(1) of the OLA. Rather, it was a challenge to the manner in which the Committee conducts its business. It was a challenge to the procedure adopted by the Committee regarding the distribution of documents. This is not, in my view, a language rights issue.

‘[13] Citing section 133 of the *Constitution Act, 1867*, she further states that [at paragraph 36]

“In the context of proceedings before Parliament, the word ‘use’ provides Mr Knopf with the right to speak in the official language of his choice,” thus concluding that Mr Knopf’s choice of addressing the House Committee in either English or French was respected.

‘[14] The appellant argues that the first Judge erred in law in failing to declare a violation of his rights under the Act, the Charter, and the *Constitution Act, 1867*. Contrary to a finding of the Federal Court, he states that his application is not the result of his disappointment because the Committee did not consider his submission sufficiently. He declares that it involves a language right, not a political right.

‘[15] In his opinion, it is an error to limit the meaning of the word “use” in subsection 4(1) of the Act to oral speech excluding the right, for a witness, to make written submissions or present written material in either official language as an integral part of his or her testimony.

...

‘[31] As mentioned earlier, the appellant submits that by referring to the verb “to speak,” Justice Layden-Stevenson limited the meaning of the word “use” in subsection 4(1) of the Act and the relevant legislation to oral speech. He suggests that it includes also the right to make written submissions or present written material in either official language as an integral part of one’s testimony.

‘[32] A careful reading of the first judgment does not warrant the appellant’s interpretation. The first judgment and the authorities cited by the applications Judge do not suggest such a restriction.

‘[33] In all fairness, one has to read Justice Layden-Stevenson’s finding entirely. She writes [at paragraph 36]:

In short, an individual has the choice of addressing the House in either English or French. In the context of proceedings before Parliament, the word “use” provides Mr Knopf with the right to speak in the official language of his choice.

‘[34] The verb “to speak” refers to more than the faculty of speech. *The Canadian Oxford Dictionary*, 2nd ed., also defines it as:

... **2. transitive** a utter (words). **b** make known or communicate (one’s opinion, the truth, etc.) in this way (*never speaks sense*).

3 intransitive a ... hold a conversation (*spoke to him for an hour, spoke with them about their work*). **b** ... mention in writing etc. (*speaks of it in his novel*). **c** ... articulate the feelings of (another person

etc.) in speech or writing (*speak for our generation*). 4 **intransitive** a ... address; converse with (a person etc.) ...

[35] Justice Layden-Stevenson does not restrict the word “speak” to oral speech. Rather, she states that subsection 4(1) of the Act provides the appellant with a right to address the House in the language of his choice. She is of the opinion that the appellant’s request that his documents be circulated does not fall within the parameters of subsection 4(1) of the Act. For the following reasons, I agree with her finding.

[36] It is trite law that language rights have to be interpreted purposively and liberally (*Doucet-Boudreau v Nova Scotia (Minister of Education)* [2003] 3 SCR 3; *Arsenault-Cameron v Prince Edward Island* [2000] 1 SCR 3; *R v Beaulac* [1999] 1 SCR 768).

[37] This purpose is to be sought by reference to the character and the larger objects of the Charter and the Act, the historical origins of the concepts enshrined, the manner in which the right is expressed and the implications to be drawn from the context in which the right is to be found, including other parts of the Charter or the Act (*R v Big M Drug Mart Ltd et al* [1985] 1 SCR 295, at page 344; *Re BC Motor Vehicle Act* [1985] 2 SCR 486, at pages 499–500; Peter W Hogg, *Constitutional Law of Canada*, 2006 Student ed (Scarborough, Ont: Thomson Carswell, 2006), at page 770; Henri Brun and Guy Tremblay, *Droit Constitutionnel*, 4th ed (Cowansville, QC: Éditions Y Blais, 2002), at page 929).

[38] Subsection 4(1) of the Act reiterates the right first recognized by section 133 of the *Constitution Act, 1867* and reaffirmed by subsection 17(1) of the Charter. These three sections recognize the right of any person participating in parliamentary proceedings “to use” (*d’employer*) English or French. Subsection 4(1) of the Act, as well as subsection 17(1) of the Charter create a scheme of unilingualism at the option of the speaker or writer, who cannot be compelled by Parliament to express himself or herself in another language than the one he or she chooses (See *MacDonald v City of Montreal et al* [1986] 1 SCR 460, at page 483).

[39] However, in some other language rights provisions, such as subsection 20(1) of the Charter and section 25 of the Act, the legislator chose the term “to communicate” (*communiquer*). In my opinion, this is not accidental.

[40] To “communicate” presupposes interactions, bilateral actions between the parties. The verb “to use” does not encompass such

interaction. The right is unilateral: one has the right to address the House of Commons in the official language of his choice. In the case at bar, Mr Knopf made his opinion known on particular topics of interest to the Committee and filed his documents. There stops his right under subsection 4(1) of the Act.

[41] I do not read into subsection 4(1) of the Act any requirement for a Committee to distribute documents to its members in one official language. Subsection 4(1) of the Act provides the appellant with a right to address the Committee in the language of his choice only. Once this right has been exercised, subsection 4(1) of the Act does not compel the Committee to act in a certain way with the oral or written information provided to it.

[42] Justice Layden-Stevenson was right in finding that the distribution of documents does not fall within the scope of subsection 4(1) of the Act. The right to use an official language of choice does not include the right to impose upon the Committee the immediate distribution and reading of documents filed to support one’s testimony. The decision on how and when to treat the information received from a witness clearly belongs to the Committee. I find, therefore, that the appellant’s language rights were not infringed upon.’ *Knopf v Canada (Speaker of the House of Commons)* [2008] 2 FCR 327, [2007] FCJ No 1474, 162 CRR (2d) 298, 2007 FCA 308 at [5], [12]–[15], [31]–[42], per Trudel JA

USE

Canada [Workplace Health, Safety and Compensation Commission Act, RSNL 1990, c W-11, s 44.1: whether an accident in which a worker was injured when a truck he was repairing rolled off its blocks and crushed him, was an accident involving the “use” of a motor vehicle.] ‘91. The key question before the IRS [Internal Review Specialist] was whether the injuries were occasioned by the “use” of a motor vehicle. In summary form, the IRS concluded that as the truck was incapable of its normal operation, it was not in “use” at the time of the accident. The Applicant was repairing the vehicle, and he found that repair and maintenance does not constitute “use”.

...

‘153. As to the decision I would impose, my findings of unreasonableness on the part of the IRS lead me to only one conclusion. The case law, overwhelmingly, points to including repair and maintenance in the definition of “use” of a

motor vehicle. Repairing a vehicle is well within the “ordinary and well-known activities to which automobiles are put ...”, as expressed in the *Reliance Petroleum* case [*Reliance Petroleum Ltd v Stevenson* [1956] SCR 93]. I also am cognisant of the New Brunswick case of *Furlong v O'Donnell's Trucking* [(1993) 139 NBR (2d) 178] which dealt with similar legislation in circumstances not dissimilar from the current case. The words used by Justice Riordon at paragraph 22, quoted above, but reproduced here for convenience, bear directly on this issue:

This is a well known activity to which tractor trailers are ordinarily put. Surely if the tractor trailer had moved from its parked position and hit a pedestrian or another vehicle it could not be argued that such an accident did not involve the use of a motor vehicle.

‘154. This is virtually identical to the situation which Mr Warford faced. The truck had moved from its position and injured him. In the words of Justice Riordon, I find it incomprehensible that “... such an accident did not involve the use of a motor vehicle”.’ *Warford v Weir's Construction Ltd* [2016] NJ No 274, 2016 NLTD(G) 141, Newfoundland and Labrador SC, at paras 91, 153–154, per A E Faour J

New Zealand [Crimes Act 1961, s 256.] ‘[45] This appeal raises the single and narrow issue of whether an offence is committed under s 256(1) of the Crimes Act 1961 by forging a document with the intention only of selling it to a purchaser who knows it to be forged, and who therefore is not deceived.

‘[46] Section 256 reads, in material part:

- (1) Every one is liable to imprisonment for a term not exceeding 10 years who makes a false document with the intention of using it to obtain any property, privilege, service, pecuniary advantage, benefit, or valuable consideration.
- (2) Every one is liable to imprisonment for a term not exceeding 3 years who makes a false document, knowing it to be false, with the intent that it in any way be used or acted upon, whether in New Zealand or elsewhere, as genuine.

‘[47] The appellant contends that, although she forged documents with the intention of selling them, the purchasers were well aware that the

documents were forged, and there was therefore no intention on her part to deceive them into thinking that the documents were genuine. Accordingly, it is submitted, an offence was committed under s 256(2), but not under s 256(1). ...

‘[50] Section 256 provides that two different types of forgery each constitute an offence. Section 256(1) requires that there be an intention to use a document “to obtain... pecuniary advantage”. In contrast, s 256(2) requires only an intention that the document “be used or acted upon... as genuine”. On the ordinary meaning of the word “use”, a document is to be “used” when (as here) it is created with the intention of selling it to a purchaser who knows it to be false. The wording of s 256(1) is clear and provides no basis for reading in the additional and unstated element that the party providing the pecuniary advantage must not have been aware the document was false.

‘[51] There is no obvious reason for reading that additional element into the section. On the contrary, a number of serious forgeries will involve a party who provides the forger with a pecuniary advantage in return for the acquisition of a document which that party knows to be forged. To take the example advanced by Mr Horsley in oral argument, payment might be made for banknotes forged to order. It seems most unlikely that this kind of forger was not meant to be liable to the higher penalty.

‘[52] Those who make a false document for gain are likely to adopt one of two methods to achieve that gain. First, they may use the false document themselves to deceive another person into parting with something of value. Alternatively, they may make their gain by selling the false document to someone who knows it is false and who intends to use it to deceive a third person. Common to both methods is the fact that the maker of the false document intends, at the time of its making, that the document be used to deceive. The difference is that in the first case the deception is to be practised by the makers themselves; in the second the deception is to be practised by someone other than the makers.

‘[53] It is difficult to discern any basis for distinguishing the culpability of the makers in the two categories to such an extent that Parliament would wish to render the makers liable in the first case to ten years’ imprisonment and in the second to only three years’ imprisonment. That, however, would be the result of accepting the appellant’s argument and

departing from the plain language of s 256(1). The appellant's argument requires the reading in of the words "as genuine" which are not present in s 256(1), namely "with the intention of using it *as genuine* to obtain" (emphasis added). We consider the provision was meant to be read as it was written, without any such interpolation. That in itself is a purposive interpretation; text and purpose coincide.

'[54] The ultimate question is what is meant by the concept of "use" of a false document. We accept that in the context of an individual case it is the falsity of the document of which use must be made or intended to be made. But the makers of a false document make use of its falsity as much when they sell it to someone who they expect will use it to deceive as when they intend to use it themselves to deceive. In each case it is the falsity of the document that matters, and in each the maker intends to make use of that falsity.

'[55] In contrast, someone who paints a copy of a famous picture with the intention of selling it as a copy to a person who wants it only as a copy does not make use of any falsity. A document made in such circumstances would not be a false document. In the context it tells no lie about itself.' *R v Li* [2008] NZSC 114, [2009] 1 NZLR 754 at [45]–[47], [50]–[55], per Tipping and Wilson JJ

No present use

Canada [Standards for the Classification of Land as a Farm Regulation, BC Reg 411/95, s 4(3.1).] '14. Mr Lowan argues issues 1 to 4 of the stated case collectively. He maintains that the Appeal Board ignored the plain meaning of s 4(3.1) of the *Farm Class Regulation*, used too broad a context and, under the guise of harmonization, effectively substituted residential for farm classification. According to Mr Lowan, the Appeal Board misinterpreted the requirement for classifying land as a farm, found in s 4(3.1)(a), that "the land has no present use" by, in effect, substituting a new requirement, "used for residential purposes". This had the effect, according to Mr Lowan, of making it impossible to meet the four requirements of s. 4(3.1). He says that the result is absurd, it offends the grammatical and ordinary sense of the provision and undermines the legislative intent. In support of his position, Mr Lowan relies largely on the same authorities setting out the principles of statutory interpretation as the Appeal Board in its decision.

'17. The essential ruling of the Appeal Board arising from its interpretation of the regulations is found at para. 12 of the stated case set out earlier in these reasons. Essentially, the Appeal Board concluded that portions of the property that are not used for primary agricultural production cannot be said, in law, to have no present use because those portions fall within residential class as legislatively defined. As a result, the lands are not wholly entitled to farm class.

...

'27. In question 4, Mr Lowan contends that the Appeal Board erred by not providing a clear definition of "no present use". Mr Lowan says that the Appeal Board altered the plain and ordinary meaning of the phrase by, in effect, replacing it with "used for residential purposes." Mr Lowan confuses actual use with classification. I reject his submission. The answer to question 4 is no.' *Lowan v British Columbia (Assessor of Area No 1 —Capital)* [2010] BCJ No 241, 2010 BCSC 194 at paras 14, 17, 27, per M D Macaulay J

Canada [Prescribed Classes of Property Regulation, BC Reg 438/81, s 1(1)(c): 'Class 1 property shall include... land which has no present use'. Whether relevant air space had 'no present use'.] '81. Once it is accepted that air space is "land" for purposes of s 1(1)(c), the heart of the dispute between the parties is whether the phrase "which has no present use" applies only where the whole of the land in question has no present use or whether s 1(1)(c) permits split classification on the basis that a single piece of land is both used and unused. To resolve that dispute it is necessary to read the words in their entire context, and in their grammatical and ordinary sense harmoniously with the purpose of the legislative scheme as a whole.

...

'93. In accordance with s 1(1)(c)(ii)(B), the zoning bylaw or other land use document must "permit a specified portion, or percentage, of the land to be used for residential purposes" (emphasis added). Considered in their ordinary grammatical sense, the words "the land" in that phrase refer to the "land which has no present use". This suggests that the land restricted to residential use by one of the specifically mentioned land use documents in paragraph (ii) of s 1(1)(c) is some portion of a greater whole which also has no present use. In other words, the grammar suggests that "land which has no present use" refers to the whole property in question and not merely a portion of it, while

subparagraph (ii)(B) is restricted in its application to circumstances where only a portion of that land is restricted to residential use. However, if that is correct, on a plain reading, if the whole property is vacant and restricted to residential use it will attract Class 1 classification under the provision only if it falls within the phrase “neither specifically zoned nor held for business purposes”. The phrase “specifically zoned” has been construed as restricted in its application to zoning bylaws such that a requirement for residential use in, for example, a restrictive covenant, would not be sufficient: *Bosa [Bosa Development Corp v Coquitlam Assessor, Area No 12]* (1996), 30 BCLR (3d) 263] at paras 40–43. In contrast, if only a portion of the same vacant property in question is restricted to residential use, that portion will qualify for Class 1 classification even if the restriction is contained in a restrictive covenant. This appears to be an anomalous result.

...
 ‘98. In conclusion, in deciding that s 1(1)(c) applied to a portion or percentage of the property in this case it was necessary for the Board to find that the relevant air space is land “which has no present use” within the meaning of that phrase in s 1(1)(c). That determination required the Board to answer two distinct questions. Do the words “land which has no present use” in s 1(1)(c), properly construed, encompass some unused portion of a greater whole where another portion of the whole is presently used? If so, does that portion (in this case the relevant air space) actually have no present use? The Board answered the first question but without providing intelligible reasons. The Board did not answer the second question because the issue was not raised. Bearing in mind the expertise of the Board and the need for deference, I have concluded that the Board should be provided with an opportunity to provide reasons for its conclusion that the relevant air space has “no present use” within the meaning of that phrase in s 1(1)(c) of the *Regulation*.’ *British Columbia (Assessor of Area No 9—Vancouver Sea to Sky) v Amacon Group* [2016] BCJ No 162, 2016 BCSC 146 at paras 81, 93, 98, per L A Warren J

Use of a trade mark

New Zealand [Whether words were being used in a manner that was likely to be taken as use of a trade mark within the meaning of the Trade Marks Act 2002, s 89; use of keywords on Google.] ‘[72] “Use of sign” and “use of trade

mark” are defined in ss 6 and 7 of the Act. There is no complexity about the concept of “use” as it appears in s 89(2). It carries the usual meaning of employing something to achieve something. There are considerable bodies of authority both in Europe and Australia on the meaning of use as a trade mark. However, the concept of “use” in both jurisdictions turns on the wording of the relevant sections, and those sections contain different words and different concepts to those in the New Zealand legislation. Article 5 of Directive 89/104, which applies to the European member states, refers to “using in the course of trade”. Section 120(1) of the Australian Trade Marks Act 1995 (Cth) refers to “... uses as a trade mark”. Neither has the phrase “likely to be taken as being used as a trade mark”. In Australia in determining whether a sign is used as a trade mark there is an objective test applied, which is by reference to what a member of the public could be expected to understand by its use. While this has similarities to the New Zealand test, it would be dangerous to apply the tests set out in the Australian cases to New Zealand, given the different statutory frameworks.

‘[73] In New Zealand the leading case on the approach to “use” is *Mainland Products Ltd v Bonlac Foods (NZ) Ltd* [[1998] 3 NZLR 341, CA]. Unsurprisingly there has until these proceedings been no New Zealand case which has examined the use of a keyword by an advertiser. However, there have been European decisions which have grappled with this issue.

...
 ‘[75] In that regard, suffice it to note that the use, by a third party, of a sign identical with, or similar to, the proprietor’s trade mark implies, at the very least, that that third party uses the sign in its own commercial communication. It was held that the relevant legislation had to be interpreted as meaning that the proprietor of a trade mark is entitled to prohibit an advertiser from advertising on the basis of a keyword identical with that trade mark which an advertiser has selected in connection with the internet, referencing goods or services identical with those for which the mark is registered without the consent of the proprietor.

‘[76] ... The approach in New Zealand turns on the concept of a notional third party taking the use as use as a trade mark. As Gault J stated in *Mainland Products Ltd v Bonlac Foods (NZ) Ltd* [at 345]:

The essential question then is whether this use of the word “Vintage” by Bonlac is likely to be taken as use as a trade mark.

Taken by whom? Plainly it is persons to whom the product is presented in the course of trade. That will include persons engaged in the relevant trade such as wholesalers and retailers as well as retail customers. To establish infringement it is now necessary to show that the use complained of will likely be taken by everyone encountering it in the course of trade as infringing use. Just as when determining whether the resemblance of marks is such as to be likely to deceive or cause confusion, it is sufficient to constitute infringement if it conveys or is likely to convey to a substantial number of prospective purchasers the significance deemed to infringe — in this case trade mark significance.

‘[77] Although *Mainland Products Ltd v Bonlac Foods (NZ) Ltd* related to the Trade Marks Act 1953, and there were some differences in the wording of that section, there was no material difference in the use of the phrase “likely to be taken” and Gault J’s remarks in that case apply.

‘[78] The likelihood of the manner of use of the mark being taken as indicating a trade connection will depend on all the circumstances of the use. The normal meaning of the words will be a primary consideration, as will the way it is used in relation to the particular services.

‘[79] Liability only extends so far as to include uses of trade marks that consumers are confronted by in the market. The consumer who determines whether the use is “likely to be taken” as use as a trade mark is the same consumer who is used to measure whether the sign is “identical” to the trade mark for the purposes of s 89(1)(a), or whether the use of the sign is “likely to deceive and confuse”.

‘[80] Obviously there cannot be only a small and insignificant group of consumers. Nor, however, does it have to be every consumer. ... It is sufficient to constitute infringement if it conveys or is likely to convey trade mark significance to a substantial number of prospective purchasers. The phrase used by Arnold J in *Interflora Inc v Marks and Spencer plc* [[2013] EWHC 1291 (Ch) at [83]] was “a significant number of consumers to whom the advertising is addressed”. This statement was made in the context of mistaken belief but is helpful as an identifying phrase.

‘[81] As to the type of consumer, I am assisted by the reference in a different context in the European cases involving Google to the “average consumer” concept. In *Google France*

v Louis Vuitton Malletier SA [Case C-236/08 *Google France SARL v Louis Vuitton Malletier SA* [2010] ECR I-2417 at [83]–[85]] the Court held in relation to the origin function of a trade mark in the context of internet users of Google that:

The function of indicating the origin of the mark is adversely affected if the ad does not enable *normally informed and reasonably attentive internet users*, or enables them only with difficulty, to ascertain whether the goods or services referred to by the ad originate from the proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party (see, to that effect, the *CÉline* case (para 27 and the case law cited)). [Emphasis added.]

The concept of the normally informed and reasonably attentive internet user was also applied by Arnold J in the High Court.

‘[82] I consider that if a significant number of normally informed and reasonably attentive internet users are likely to take the use of the sign as being used as a trade mark, that will be sufficient for the purposes of s 89(2).

‘[83] In relation to “likely to be taken as used” it was observed by Gault J in *Mainland Products Ltd v Bonlac Foods (NZ) Ltd* [at 351] that when a Court is assessing how a trade mark would appear to those encountering it in trade:

It is a matter of impression taking careful account of the considerations already reviewed and the circumstances in which the product is sold. The extent to which it is contended that purchasers will have been conditioned by trade practices are to be taken into account cumulatively.

‘[84] In that case, the trade mark VINTAGE had been registered in respect of cheese, and the respondent had introduced a cheese into the New Zealand market which bore the word “vintage” on its packaging, although in conjunction with the respondent’s registered trade mark. In the High Court, “vintage” had been found to be a bona fide description of the taste and/or flavour of the cheese. The Court of Appeal held that “vintage” would have been thought of by a consumer in all the circumstances as used as a trade mark. The use in question was the placing of the word “vintage” on the package that would be seen by the consumer as use as a trade mark.

‘[85] The position in relation to the use by Nakedbus of the keywords is entirely different

to a use on packaging or other communications to the public. The use of the keyword was by Nakedbus when it purchased that keyword prior to the placement of its advertisement, and then by Google when, through its search engine, it provided for the Nakedbus advertisement to appear when a consumer keyed “intercity” into a computer. In such a situation, the use of the keyword by Nakedbus and indeed Google was not seen by the consumer at all. As Mr Harris observed, these actions were invisible to everyone except Google and the advertiser. If the “use” could not be seen by the consumer it could not be “taken as” anything, let alone “taken as being used as a trade mark.” *Intercity Group (NZ) Ltd v Nakedbus NZ Ltd* [2014] NZHC 124, [2014] 3 NZLR 177 at [72]–[73], [75]–[85], per Asher J

USEFUL

Canada [Patent Act, RSC 1985, c P-4, s 2: definition of invention requires it to be ‘useful’.] ‘26. Section 2 of the *Patent Act* is the source of the utility requirement; it defines an invention as a “new and useful art, process, machine, manufacture or composition of matter” or a new and useful improvement thereof. The utility requirement is a necessary pre-condition to patentability (*Consolboard Inc v MacMillan Bloedel (Sask) Ltd* [1981] 1 SCR 504, at p 527). “If it is not useful, it is not an invention within the meaning of the Act” (*Apotex Inc v Wellcome Foundation Ltd* 2002 SCC 77, [2002] 4 SCR 153 (“AZT”), at para 51). In order for a patent to be valid, the invention it purports to protect must be useful (*Teva Canada Ltd v Pfizer Canada Inc* 2012 SCC 60, [2012] 3 SCR 625, at para 37).

...
‘52. The words in s 2 of the Act ground the type of utility that is pertinent by requiring that it is the *subject-matter* of an invention or improvement thereof that must be useful. For the subject-matter to function as an inventive solution to a practical problem, the invention must be capable of an actual relevant use and not be devoid of utility. As stated by Justice Binnie in *AZT*, a patent “is a method by which inventive solutions to practical problems are coaxed into the public domain by the promise of

a limited monopoly for a limited time” (para 37 (emphasis added)).

‘53. Utility will differ based on the subject-matter of the invention as identified by claims construction. Thus, the scope of potentially acceptable uses to meet the s 2 requirement is limited—not *any* use will do. By requiring the usefulness of the proposed invention to be related to the nature of the subject-matter, a proposed invention cannot be saved by an entirely unrelated use. It is not sufficient for a patentee seeking a patent for a machine to assert it is useful as a paperweight.

‘54. To determine whether a patent discloses an invention with sufficient utility under s 2, courts should undertake the following analysis. First, courts must identify the subject-matter of the invention as claimed in the patent. Second, courts must ask whether that subject-matter is useful—is it capable of a practical purpose (i.e. an actual result)?

‘55. The Act does not prescribe the degree or quantum of usefulness required, or that every potential use be realized—a scintilla of utility will do. A single use related to the nature of the subject-matter is sufficient, and the utility must be established by either demonstration or sound prediction as of the filing date (*AZT*, at para 56).

‘56. The utility requirement serves a clear purpose. To avoid granting patents prematurely, and thereby limiting potentially useful research and development by others, the case law has imposed a requirement that an invention’s usefulness be demonstrated or soundly predicted at the time of application, rather than at some later point. This ensures patents are not granted where the use of the invention is speculative. What matters is that an invention “be useful, in the sense that it carries out some useful known objective” and is not merely a “laboratory curiosity whose only possible claim to utility is as a starting material for further research” (*Re Application of Abitibi Co* (1982), 62 CPR (2d) 81 (Patent Appeal Board and Commissioner of Patents), at p 91).

‘57. The application of the utility requirement in s 2, therefore, is to be interpreted in line with its purpose—to prevent the patenting of fanciful, speculative or inoperable inventions.’ *AstraZeneca Canada Inc v Apotex Inc* [2017] SCJ No 36, 2017 SCC 36 at paras 26, 52–57, per Rowe J

V

VACANT POSSESSION

[The tenant rented commercial premises from the landlord. Under the terms of the lease the tenant was entitled to terminate the lease under a break clause, provided that it gave the landlord six months' previous written notice, and provided that it had paid all the rent up to the break date and had delivered up vacant possession of the property on that date.] [32] The judge held that NYK had failed to give vacant possession to Ibrend on 3 April because its workmen continued after then to occupy the warehouse for the purpose of finishing off some items of repair, a continued occupation which was simply for NYK's own purposes. Mr Woolgar submitted that his decision was both unjust and wrong. He said it was unjust because NYK had done all it could on 2 and 3 April to reach agreement with Ibrend's surveyors as to the basis on which it might continue in occupation for the purpose of carrying out the relatively modest remaining repair works, which would be for Ibrend's benefit, yet despite its best endeavours it received no response to its proposals. Whilst NYK could, given such lack of response, have taken the cautious approach of leaving the warehouse on 3 April and returning the keys to Ibrend, it did not do so. It was, however, unjust that the modest repairing activities in which it engaged over the following days should be held to have resulted in a failure by it to have given vacant possession on 3 April.

...
[44] I would not, with respect, regard the judge as having been wrong to explain the position in the way he did. But it does appear to me that the present case is, in principle, a straightforward one whose resolution does not require reference to an authority about cellars full of rubbish. If NYK was to satisfy the vacant possession condition in the break option, it had to give such possession to Ibrend by midnight on 3 April and by not a minute later. What, to that end, did it need to do? The concept of "vacant possession" in the present context is not, I consider, complicated. It means what it does in every domestic and commercial sale in which there is an obligation to give "vacant

possession" on completion. It means that at the moment that "vacant possession" is required to be given, the property is empty of people and that the purchaser is able to assume and enjoy immediate and exclusive possession, occupation and control of it. It must also be empty of chattels, although the obligation in this respect is likely only to be breached if any chattels left in the property substantially prevent or interfere with the enjoyment of the right of possession of a substantial part of the property.

[45] In the present case NYK did not give such possession to Ibrend on 3 April ... *Ibrend Estates BV v NYK Logistics (UK) Ltd* [2011] EWCA Civ 683, [2011] 4 All ER 539 at [32], [44]–[45], per Rimer LJ

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 123 see now 23 Halsbury's Laws of England (5th Edn) (2016) para 248.]

VALUE

Of the performance of the assigned contract

New Zealand [Contractual Remedies Act 1979, s 11(2).] [34] The limit imposed by the CRA is "the value of the performance of the assigned contract to which he is entitled by virtue of the assignment": s 11(2). The precise meaning of these words is unclear. The late Professor Richard Sutton ("Contractual Remedies Act 1979" [1980] NZ Recent Law 19 at 25) used the example of a property owner (the assignor) contracting with a builder (the non-assigning party) to install an ornamental garden on the assignor's property. The assignor then sells the property to the assignee and assigns to the assignee the benefit and burden of the contract with the non-assigning party. Professor Sutton suggested that the extent of the assignee's liability to the non-assigning party under s 11(2) could be:

- (a) what the assignee was prepared to pay the assignor for the assignment [that is, what the assignee did pay]; or
- (b) the objective value of what the assignee actually receives, or is entitled to receive, under the assigned contract [that is, the market value of the consideration promised or delivered]; or
- (c) the amount by which the assignee is enriched by the non-assigning party's performance of the contract [that is, the net increase in the assignee's assets following the assignment].

‘[35] (a), (b) and (c) may give the same result, but they may not. Professor Sutton did not offer a preference. We do not think the answer can be (a). While the payment may be some evidence of the value, the assignee may have paid more or less than the value of the assignment. (b) is the market cost of what the assignee would have to pay the non-assigning party to have the work completed. It may well exceed (c), the objective value of performance to the assignee (compare *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 (HL)). We are satisfied that (c), the value to the assignee, must be the correct test. It does justice to the assignee, who is not liable for more than he receives, and provides a suitable limitation upon the extent of the assignee’s liability. (c) also has the support of Dawson and McLauchlan *The Contractual Remedies Act 1979* (Sweet & Maxwell, Auckland, 1981) at 195–196.

...
 ‘[41] To interpret s 11(2) as allowing an independent cause of action in damages against an assignee beyond the value of the benefits actually received by him would extend the statutory cause of action further beyond the boundaries of the common law than we regard as possibly being intended by Parliament. We prefer the view, consistent with the objective of s 11 in granting SBP the remedies of damages and cancellation against Mr Holdgate (as opposed to being confined to a right of set-off), that the value of the performance of the assigned contract refers to the amount the assignee is personally enriched by performance of the contract: Sutton at 25.’ *SB Properties Ltd (in liq) v Holdgate* [2009] NZCA 327, [2011] 1 NZLR 633 at [34]–[35], [41], per Baragwanath J

VALUER

[For 4(3) Halsbury’s Laws of England (4th Edn) (Reissue) paras 283, 294 see now 6 Halsbury’s Laws of England (5th Edn) (2011) paras 489, 500.]

VARY OR OMIT

[Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 9(2): ‘the Lord Chancellor may by order... vary or omit services described in [Part 1].’] ‘[1] This appeal concerns the lawfulness of a proposal by the Lord Chancellor (then The Rt Hon Christopher Grayling MP) in September 2013 to introduce a residence test for civil legal aid by amending

Sch 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”), by means of delegated legislation, in the form of a statutory instrument, which I will refer to as “the draft order”.

...
 ‘[29] The argument that the draft order is *ultra vires* the powers granted to the Lord Chancellor is, in essence, as follows. The exclusion of a specific group of people from the right to receive civil legal services in relation to an issue, on the ground of personal circumstances or characteristics (namely those not lawfully resident in the UK, Crown Dependencies or British Overseas Territories) which have nothing to do with the nature of the issue or services involved or the individual’s need, or ability to pay, for the services, is simply not within the scope of the power accorded to the Lord Chancellor by s 9(2)(b) of LASPO, and nothing in s 41 undermines that contention.

‘[30] In my view, that argument is sound, and should be accepted. Turning to s 9(2)(b) itself, as a matter of ordinary language, the relevant parts of the draft order do not seek to “vary or omit services”: rather they seek to reduce the class of individuals who are entitled to receive those services by reference to a personal characteristic or circumstance unrelated to the services. Of course, the words of s 9(2)(b) have to be interpreted in their context, and I accept that a sufficiently clear and strong context could justify a different conclusion, in the sense that the words of s 9(2)(b) could, as a matter of language, just about extend to a regulation such as the draft order. Nonetheless, that is not their natural meaning, and, of course, the natural meaning of the words in question is an important factor in an issue of statutory interpretation, particularly when they suggest that a so-called Henry VIII power does not extend to authorise the subordinate legislation in question.

‘[31] When one turns to the wider statutory context, I consider that it supports, rather than undermines, the conclusion indicated by the natural meaning of the words of s 9(2)(b) on their own. First, s 9(2)(b) permits a variation or omission of the services set out in Pt 1 of Sch 1, by, *inter alia*, modifying that Part or Pt 2 of that Schedule. Each of the services identified in Pt 1 and Pt 2 is linked to a specific type of legal issue or claim, and has nothing to do with the personal circumstances or characteristics, and in particular the geographical residence, of the potential recipient of the services, other than those which relate to the issue or the services concerned. The point is well demonstrated by

the fact that, as mentioned in para [10] above, all the existing 18 paragraphs of Pt 2 of the Schedule are concerned with “Civil legal services provided in relation to” specified areas of litigation, whereas the new proposed para 19 will have nothing to do with any specified area of litigation at all.’ *R (on the application of the Public Law Project) v Lord Chancellor and Secretary of State for Justice* [2016] UKSC 39, [2017] 2 All ER 423 at [1], [29]–[31], per Lord Neuberger P

VEIN

[For 31 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 16 see now 76 Halsbury’s Laws of England (5th Edn) (2013) para 14.]

VERDICT

[For 26 Halsbury’s Laws of England (4th Edn) (2004 Reissue) para 545 see now 61 Halsbury’s Laws of England (5th Edn) (2010) para 847.]

VESSEL

[For 43(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 102 see now 93 Halsbury’s Laws of England (5th Edn) (2008) para 229.]

VEST

[For 50 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 696 see now 102 Halsbury’s Laws of England (5th Edn) (2010) para 423.]

VEXATIOUS

See also MANIFESTLY UNREASONABLE

[Freedom of Information Act 2000 [“FOIA”], s 14(1): power of a public authority to reject a request under the Act on the grounds that the request was ‘vexatious’.] ‘[6] In Mr Dransfield’s case, the request, taken on its own, is a precise and politely-worded request. There is nothing on the face of this request which could be termed “vexatious”. Nonetheless the UT [Upper Tribunal] held that it was vexatious because of the past history of dealings between him and the authority. So the principal issue on his appeal is whether a request can be treated as vexatious if it is not itself vexatious but previous requests have been. The FTT [First-tier Tribunal] thought that the line had to be drawn

at previous requests which “infected” the request under consideration (the current request). The UT rejected that test and held that there was no line to be drawn. Mr Dransfield seeks to uphold the test applied by the FTT. I do not accept this submission because it involves writing words into FOIA which the court may not do. The UT went on to formulate and apply guidance as to the meaning of “vexatious” which he has not challenged.

...
[18] The UT considered that to determine whether a request was vexatious it was necessary to look at all the circumstances. A request was not vexatious simply because it was annoying and irritating. It had also to be without justification ...

...
[61] As I have said, the important point about Mr Dransfield’s request is that, taken on its own, it is a precise and politely-worded request and that there is nothing on the face of this request which could be termed “vexatious”. I agree with the instinctive approach of the FTT that there must be some limits on the ability to look at past dealings in this situation. Even if the requester has made vexatious requests in the past, there must always be the possibility that, on this occasion, the requester, like Matilda’s last request in Hilaire Belloc’s poem, may be making a request that needs to be heeded, and that the request is for information that ought to be disclosed to achieve the statutory objective. The requester is after all exercising an important statutory right.

[62] Although there is no argument on this appeal as to the meaning of “vexatious” in general, it is clearly necessary to have some understanding as to what that word means in order to deal with the two submissions that were made on this appeal.

[63] In its decision on this appeal, the UT, having started its detailed discussion of vexatiousness with the observation that it was a “protean” word, did not offer a definition. However, it expressed agreement at the end of para 27 of its decision (para [18] above) with the description provided by FTT in *Lee* [*Lee v Information Comr* EA/2012/0015, 0049, 0085 (unreported), FTT], namely that “vexatious” connotes “manifestly unjustified, inappropriate or improper use of a formal procedure”.

...
[68] In my judgment, the UT was right not to attempt to provide any comprehensive or exhaustive definition. It would be better to allow the meaning of the phrase to be winnowed out in cases that arise. However, for my own

part, in the context of FOIA, I consider that the emphasis should be on an objective standard and that the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The decision-maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious. If it happens that a relevant motive can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred. If a requester pursues his rights against an authority out of vengeance for some other decision of its, it may be said that his actions were improperly motivated but it may also be that his request was without any reasonable foundation. But this could not be said, however vengeful the requester, if the request was aimed at the disclosure of important information which ought to be made publicly available. I understood Mr Cross to accept that proposition, which of course promotes the aims of FOIA.’ *Dransfield v Information Commissioner; Craven v Information Commissioner* [2015] EWCA Civ 454, [2016] 3 All ER 221 at [6], [18], [61]–[63], [68], per Arden LJ

VICAR

[For 14 Halsbury’s Laws of England (4th Edn) para 770 see now 34 Halsbury’s Laws of England (5th Edn) (2011) para 544.]

VIOLENCE

See also DOMESTIC VIOLENCE

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 577 see now 60 Halsbury’s Laws of England (5th Edn) (2011) para 553.]

[Housing Act 1996, s 177(1).] ‘[19] In *Danesh’s* case [*Danesh v Kensington and Chelsea Royal London BC* [2007] 1 WLR 69] the first, and principal, reason given was that “physical violence” is the natural meaning of the word “violence”: see [2007] 1 WLR 69 at [15]. I can readily accept that this is a natural meaning of the word. It is, for example, the first of the meanings given in the *Shorter Oxford English Dictionary*. But I do not accept that it is

the only natural meaning of the word. It is commonplace to speak of the violence of a person’s language or of a person’s feelings. Thus the revised third edition, published in 1973, also included “vehemence of personal feeling or action; great, excessive, or extreme ardour or fervour ... passion, fury”; and the fourth (1993), fifth (2002) and sixth (2007) editions all include “strength or intensity of emotion; fervour, passion”. When used as an adjective it can refer to a range of behaviours falling short of physical contact with the person: see, for example, s 8 of the Public Order Act 1986. The question is what it means in the Housing Act 1996.

‘[20] The Housing Act 1996 was originally concerned only with “domestic violence” that is violence between people who are or were connected with one another in an intimate or familial way. By that date, it is clear that both international and national governmental understanding of the term had developed beyond physical contact. ... Internationally, in 1992 the United Nations Committee, which monitors the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (New York, 18 December 1979; Misc No 15 (1996); Cm 3286) (CEDAW), adopted General Recommendation 19, which included in its definition of discrimination in relation to gender-based violence “acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty”. In 1993, the General Assembly adopted the Declaration on the Elimination of Violence against Women, defined for this purpose as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women”.

‘[21] Nationally, in 1993 the House of Commons Home Affairs Committee in its *Report on Domestic Violence* adopted the definition “any form of physical, sexual or emotional abuse which takes place within the context of a close relationship” (Session 1992–93, Third Report, HC Paper 245-I, para 5). The Home Affairs Committee report used two reports as the basis for its inquiry: the *Report on Domestic Violence of a national inter-agency working party convened by Victim Support* (1992) and the report of the Law Commission *Family Law: Domestic Violence and Occupation of the Family Home* (1992) (Law Com no 207). The Law Commission gave this explanation of domestic violence (para 2.3):

“... The term ‘violence’ itself is often used in two senses. In its narrower meaning it

describes the use [or] threat of physical force against a victim in the form of an assault or battery. But in the context of the family, there is also a wider meaning which extends to abuse beyond the more typical instances of physical assaults to include any form of physical, sexual or psychological molestation or harassment which has a serious detrimental effect upon the health and well-being of the victim ...”

The recommendations made in the Law Commission's report were embodied in the Family Homes and Domestic Violence Bill which passed through most of its parliamentary stages in the session 1994–1995 before falling at the last hurdle. The same clauses were reintroduced, with immaterial amendments, in the Family Law Bill 1995–1996 and became Pt IV of the Family Law Act 1996.

...
 ‘[24] In my view, therefore, whatever may have been the original meaning in 1977 (and, for that matter, in the Domestic Proceedings and Magistrates' Courts Act 1978), by the time of the Housing Act 1996 the understanding of domestic violence had moved on from a narrow focus upon battered wives and physical contact.

...
 ‘[25] [I]t is not for government and official bodies to interpret the meaning of the words which Parliament has used. That role lies with the courts. And the courts recognise that, where Parliament uses a word such as “violence”, the factual circumstances to which it applies can develop and change over the years. There are, as Lord Steyn pointed out in *R v Ireland, R v Burstow* [1997] 4 All ER 225 at 233, [1998] AC 147 at 158, statutes where the correct approach is to construe them “as if one were interpreting it the day after it was passed”. The House went on in that case to construe “bodily harm” in the Offences Against the Person Act 1861 in the light of our current understanding of psychological as well as physical harm. The third reason given by the Court of Appeal in *Danesh's* case was that it was impermissible to construe the meaning of one phrase by reference to the meaning of another. This I accept.

‘[26] However, as Lord Clyde observed in *Fitzpatrick v Sterling Housing Association Ltd* [1999] 4 All ER 705 at 726, [2001] 1 AC 27 at 49, which was concerned with whether same-sex partners could be members of one another's “family” for the purpose of succession to Rent Act tenancies, it is a “relatively rare category of cases where Parliament intended the language to be fixed at the time when the

original Act was passed”. ...

‘[27] “Violence” is a word very similar to the word “family”. It is not a term of art. It is capable of bearing several meanings and applying to many different types of behaviour. These can change and develop over time. There is no comprehensive definition of the kind of conduct which it involves in the Housing Act 1996: the definition is directed towards the people involved. The essential question, as it was in *Fitzpatrick's* case, is whether an updated meaning is consistent with the statutory purpose—in that case providing a secure home for those who share their lives together. In this case the purpose is to ensure that a person is not obliged to remain living in a home where she, her children or other members of her household are at risk of harm. A further purpose is that the victim of domestic violence has a real choice between remaining in her home and seeking protection from the criminal or civil law and leaving to begin a new life elsewhere.

‘[28] That being the case, it seems clear to me that, whatever may have been the position in 1977, the general understanding of the harm which intimate partners or other family members may do to one another has moved on. The purpose of the legislation would be achieved if the term “domestic violence” were interpreted in the same sense in which it is used by Sir Mark Potter P, in his *Practice Direction (Residence and Contact Orders: Domestic Violence)* (No 2) [2009] 1 FCR 223 at [2], [2009] 1 WLR 251 at [2], suitably adapted to the forward-looking context of ss 177(1) and 198(2) of the Housing Act 1996:

“... ‘domestic violence’ includes physical violence, threatening or intimidating behaviour and any other form of abuse which, directly or indirectly ... may give rise to the risk of harm”.

...

‘[31] The second reason given in *Danesh's* case for preferring a narrow construction was that, in both ss 177(1) and 198(3), violence is defined as violence or threats of violence which are likely to be carried out: see [2007] 1 WLR 69 at [16]. If the concept of violence already included conduct which puts a person in fear of physical violence there would be no need to refer to threats at all. I am not convinced of this. For one thing, there are some forms of conduct which undoubtedly put a person in fear of violence but which would not necessarily be described as threats. Silent phone calls, heavy breathing, the sorts of stalking behaviours

which were the subject matter of *Bond v Leicester City Council* [2001] EWCA Civ 1544, [2002] 1 FCR 566 and *R v Ireland, R v Burstow* [1997] 4 All ER 225, [1998] AC 147, can all put the victim in very real (and justified) fear of violence in the narrow sense. They should be covered by the concept of violence.

[32] More importantly, if the concept of violence includes other sorts of harmful or abusive behaviour, then the reference to threats is not redundant. Locking a person (including a child) within the home, or depriving a person of food or of the money to buy food, are not uncommon examples of the sort of abusive behaviour which is now recognised as domestic violence. There is nothing redundant in a provision which refers to threats of such behaviour which are likely to be carried out.

[33] In this court, Mr Drabble urged an alternative solution upon us: that if there were forms of ill-treatment falling short of physical violence which ought to be included within the passporting provision in s 177(1), the Secretary of State could use the power in s 177(3)(a) to include them. Mr Maurici, on behalf of the Secretary of State, explained that the Secretary of State has not done so because in his view the concept of “violence” already bears the wider meaning for which the appellant contends. There is the further objection to this solution, that there is no equivalent power in s 198, so that a person might be accepted as homeless under s 177(1) but could then be referred to a district where she would face exactly the same risks.

[34] There may also be a concern that an expanded definition is setting the threshold too low. The advantage of the definition adopted by Sir Mark Potter P is that it deals separately with actual physical violence, putting a person in fear of such violence, and other types of harmful behaviour. It has been recognised for a long time now that it is dangerous to ignore what may appear to some to be relatively trivial forms of physical violence. In the domestic context it is common for assaults to escalate from what seems trivial at first. Once over the hurdle of striking the first blow, apologising and making up, some people find it much easier to strike the second, and the third, and go on and on. But of course, that is not every case. Isolated or minor acts of physical violence in the past will not necessarily give rise to a probability of their happening again in the future. This is the limiting factor. Sections 177 and 198 are concerned with future risk, not with the past.

[35] The introduction in 2002 of “other” violence into a statute which was previously

concerned only with domestic violence also raises questions. They are readily answered, if I am right that the concept of domestic violence in 1996 was already wider than physical contact. As Miss Nathalie Lieven QC for the appellant points out, the introduction of “other” violence in 2002 cannot possibly have been intended to cut down the meaning which the statute already had. However, if the understanding of the conduct to which the word applies has moved on, the question of whether this also applies to “other violence” does not arise on the facts of this case, and so it is unnecessary for us to express a concluded view. Reading the statute as it now stands, there are arguments on either side. On the one hand, if “violence” has the same meaning in both “domestic violence” and “other violence”, there was no need to retain the separate concept of domestic violence, together with the complicated definition of associated persons in s 178. A person who was at risk of any violence if she stayed in or returned to the property or the locality would be protected. Retaining them as separate concepts suggests that “domestic violence” is limited by the relationship between the victim and the perpetrator, rather than by the nature of the conduct involved. “Other violence” having no such limitation and lacking the connotations of an intimate or familial relationship, might relate to a narrower set of behaviours. On the other hand, providing in ss 177(1A) and 198(3) that “violence is ‘domestic violence’” suggests that “violence” has a constant meaning. Hence, I would incline towards the view that it does. Nor would that be surprising. People who are at risk of intimidating or harmful behaviour from their near neighbours are equally worthy of protection as are those who run the same risk from their relations. But it may be less likely that they will suffer harm as a result of the abusive behaviour of their neighbours than it is in the domestic context. In practice, the threshold of seriousness may be higher.’ *Yemshaw v Hounslow London Borough Council* [2011] UKSC 3, [2011] 1 All ER 912 at [19]–[21], [24]–[28], [31]–[35], per Lady Hale SCJ

VIOLENT DISORDER

[For 11(1) Halsbury’s Laws of England (4th Edn) (2006 Reissue) para 556 see now 26 Halsbury’s Laws of England (5th Edn) (2016) para 551.]

VISITATION

[For 14 Halsbury’s Laws of England (4th Edn) para 490 see now 34 Halsbury’s Laws of

England (5th Edn) (2011) para 211.]

VOCATION

[For the Income and Corporation Taxes Act 1988, s 18 see now the Income Tax (Trading and Other Income) Act 2005, Part 2.]

VODKA

[60] The word “vodka” comes from Russian. The *Shorter Oxford English Dictionary* (5th edn, 2002) defines it as meaning: “A colourless alcoholic spirit made esp. in Russia and Poland by distillation of grain etc; a glass or drink of this”.

...
[74] Annex II [of European Parliament and Council Regulation (EC) 110/2008 of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks (the new regulation) (OJ 2008 L39 p 16)] provides inter alia:

“5. Vodka

(a) Vodka is a spirit drink produced from ethyl alcohol of agricultural origin obtained following fermentation with yeast from either:

- (i) potatoes and/or cereals, or
- (ii) other agricultural raw materials, distilled and/or rectified so that the organoleptic characteristics of the raw materials used and by-products formed in fermentation are selectively reduced.

This process may be followed by redistillation and/or treatment with appropriate processing aids, including treatment with activated charcoal, to give it special organoleptic characteristics.

Maximum levels of residue for ethyl alcohol of agricultural origin shall meet those laid down in Annex I, except that the methanol content shall not exceed 10 grams per hectolitre of 100% vol. alcohol.

- (b) The minimum alcoholic strength by volume of vodka shall be 37,5%.
- (c) The only flavourings which may be added are natural flavouring compounds present in distillate obtained from the fermented raw materials. In addition, the product may be given special organoleptic characteristics, other than a predominant flavour.
- (d) The description, presentation or labelling of vodka not produced exclusively from the raw material(s) listed in paragraph (a)(i) shall bear the indication

‘produced from ...’, supplemented by the name of the raw material(s) used to produce the ethyl alcohol of agricultural origin. Labelling shall be in accordance with Article 13(2) of Directive 2000/13/EC.”

...
[155] In my judgment the evidence clearly establishes that the alcohol-consuming public in the United Kingdom, and in particular the vodka-consuming public, have come to regard the term “vodka” as denoting a particular class of alcoholic beverage. They may not know precisely what it is, what it is made from or where it is made, but they use the term “vodka” to get what they want and to distinguish it from other similar products, and in particular from other spirits such as gin, rum and whisky. As Goulding J said of advocaat, vodka has acquired a reputation as “a drink with recognisable qualities of appearance, taste, strength and satisfaction”.’ *Diageo North America Inc v InterContinental Brands (ICB) Ltd* [2010] EWHC 17 (Ch), [2010] 3 All ER 147 at [60], [74], [155], per Arnold J; affd [2010] EWCA Civ 920, [2011] 1 All ER 242

VOLENTI NON FIT INJURIA

[For 33 Halsbury’s Laws of England (4th Edn) (Reissue) para 669 see now 78 Halsbury’s Laws of England (5th Edn) (2010) para 69; and for 45(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 375 see now 97 Halsbury’s Laws of England (5th Edn) (2015) para 465.]

VOLUNTARY AGREEMENT ... TO ... THE SEXUAL ACTIVITY IN QUESTION

Canada [Criminal Code, RSC 1985, c C-46, s 273.1(1): ‘consent’ means, for the purposes of ss 271, 272 and 273 (offence of sexual assault), the voluntary agreement of the complainant to engage in the sexual activity in question.] ‘57. In our view, “voluntary agreement ... to ... the sexual activity in question” also encompasses both the sexual nature of the activity (i.e., that the act was sexual in nature as opposed to being for a different purpose, such as a medical examination) and the identity of the partner (defined in the narrow sense of the specific identity of a partner who is personally known to the complainant). While identity and the sexual nature of the act were troublesome issues for the early cases, and while *Cuerrier* [R v *Cuerrier* [1998] 2 SCR 371], in *obiter*, suggests that they might be considered at the second stage of the

consent analysis under s. 265(3)(c), the better view is that “voluntary agreement ... to ... the sexual activity in question” will not exist under s. 273.1(1) if the complainant did not subjectively agree to the sexual nature of the act or the specific identity of the partner. As a result, a complainant’s mistaken belief about the identity of the partner or the sexual nature of the act—whether or not that mistake is the result of a deception—will result in no consent under s. 273.1(1) of the *Criminal Code*.

‘58. The sexual nature of the act is expressly included by the reference in s. 273.1(1) to the “sexual activity in question”. If one voluntarily agrees to a non-sexual activity (for example, a medical examination), one is not voluntarily agreeing to a sexual activity. Similarly, in our view, the identity of the partner, in the narrow sense, should be included in the “sexual activity in question” under s. 273.1(1); if a complainant

agrees to sexual activity with A, who is a specific individual known personally to her, she is not agreeing to sexual activity with B.’ *R v Hutchinson* 2014 SCC 19, [2014] 1 SCR 346 at paras 57–58, per McLachlin CJ and Cromwell J

VULTURE FUND

‘The appellant ... is a Cayman Island company. It is an affiliate of a New York based hedge fund of a type sometimes described as a “vulture fund”. Vulture funds feed on the debts of sovereign states that are in acute financial difficulty by purchasing sovereign debt at a discount to face value and then seeking to enforce it.’ *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31, [2011] 4 All ER 1191 at [1] per Lord Phillips P

W

WAGES

Australia [Navigation Act 1912 (Cth), ss 75, 78: requirement to pay seaman's wages on discharge.] '[69] But Teekay submitted that ss 75 and 78 do not apply to Mr Visscher because they are concerned with seamen who were paid wages and he was not, nor entitled to be. Rather, pursuant to his contract of employment and the certified agreement, he was paid an annual salary in monthly instalments by direct deposit into his bank account. For this reason alone, Teekay's case is that s 78 does not apply to him. The first question, then, is whether the Navigation Act only applies to wage, and not salary, earners.

'[70] The answer to this question depends on whether "wages" in the Act is apt to include salaries.

'[71] In my view the narrow interpretation Teekay urged is unwarranted. In the first place, the definition itself does not call for it. In the second place, in its ordinary meaning, "wages" may include salary. In the third place, there is authority against it.

'[72] There is no exhaustive definition of wages in the Navigation Act. "Wages" are merely defined in an inclusive way in s 6 as "includes emoluments".

'[73] The *Macquarie Dictionary* defines wage(s) as:

... that which is paid for work or services, as by the day or week; hire; pay.

'[74] It defines a salary as:

... a fixed periodical payment paid to a person for regular work or services, especially work other than that of a manual, mechanical, or menial kind.

'[75] The *Oxford English Dictionary* defines "wage" (in the relevant sense) as:

... a payment to a person for service rendered. Formerly used widely, eg for the salary or fee paid to persons of official or professional status. Now (exc. in rhetorical language) restricted to mean: the amount paid periodically, esp by the day or week or

month, for the labour or service of an employee, worker, or servant.

'[76] On the other hand, it contrasts "wages" and "salaries" defining "salary" as:

Fixed payment made periodically to a person as compensation for regular work: now usually restricted to payments made for non-manual or non-mechanical work (as opposed to *wages*).

'[77] In *Gurran v Tarbook Pty Ltd* [1996] IRCA 453 Lee J (who was concerned with the meaning of the term "relevant wages" in s 170CD of the Industrial Relations Act) noted:

In its ordinary meaning the word "wages" has been used to describe the regular payments made by an employer to a worker for labour provided to the employer by the worker, that is, the payments made for other than "white-collar jobs". (See: *Mutual Acceptance Co Ltd v FCT* (1944) 69 CLR 389; [1945] ALR 1 per Rich J at CLR 398; ALR 4.) It is to be distinguished from the meaning applied to the word "salary" which refers to a fixed sum or stipend paid by periodical instalments to an employee for regular work performed by the employee being work of a non-manual or non-mechanical kind.

'[78] After the passage quoted above, however, his Honour observed:

In common parlance the difference between "wages" and "salary" has become blurred in recent years and occasionally wages may be used in a generic sense to include payments received as salary. There is nothing in Div 3 of Pt VIA to indicate that the terms of the Division are restricted to employees who are workers who receive wages *stricto sensu* and that the Division does not extend to employees who receive salary. Having regard to the secondary meaning of the word wages and the apparent application of Div 3 to employees generally, the expression "relevant wages" used in s 170CD should be taken to include salary paid to an employee.

'[79] Marshall J endorsed this approach in *Hargreaves v National Safety Council of Australia* (1997) 77 FCR 272 at 277.

'[80] In my opinion, this is the sense in which "wages" is used in the Navigation Act. It is a periodic payment for work performed as an employee.' *Visscher v Teekay Shipping (Australia) Pty Ltd* (ACN 079 641 580) (No 4)

[2012] FCA 124,7 (2012) 297 ALR 674 at [69]–[79], per Katzmann J

Canada ‘1. This appeal concerns whether the protection provided to wages pursuant to the *Wage Earner Protection Program Act*, SC 2005, c 47, s 1 (the “*WEPPA*”) and s 81.3 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the “*BIA*”) extends to money withheld or payments made by an employer to third parties pursuant to a contract of employment, that is, money not payable directly to an employee.

‘2. The *WEPPA* establishes a scheme whereby employees can recover a limited amount of wages owed by a bankrupt employer.

‘3. The *BIA* provides a limited priority to wages, salaries, commissions or compensation owed by a bankrupt for services rendered in the six months before the bankruptcy.

‘4. In this case, the respondent union representing employees of a bankrupt employer contends that the protection extends to all monetary liabilities of the bankrupt arising out of the compensation package in the collective agreement between the union and the bankrupt. The union asserts that the *WEPPA* entitlement and *BIA* priority extend to compensation in the form of payments to third-parties such as union dues, contributions to a health or welfare trust, or payments to a third-party service provider such as an extended health coverage provider. The appellant, Century Services Inc., the secured creditor of the bankrupt with the highest ranking priority, asserts that the protection extends only to funds payable directly to employees and not to money paid on their behalf to third-parties.

‘7. The term “wages” is defined in the *WEPPA* as:

“wages” includes salaries, commissions, compensation for services rendered, vacation pay, severance pay, termination pay and any other amounts prescribed by regulation.

‘33. I see no principled basis for concluding benefits, whether contained in a collective agreement or personal employment contract, are not part of the compensation of employees entitled to protection under the legislation. Insofar as payments to third-parties are by way of assignment or direction, they are a transfer of the employee’s money. Insofar as payments are made jointly by employers and employees or solely by the employer, they are part of the

employer’s compensation obligation and the employee’s compensation entitlement. In any event, they are for the benefit of the employee, not the third-party.

‘34. It is not clear that the benefits listed by the union in this case are all paid from money that otherwise would be payable to employees. Some, like union dues and the humanity fund, are funded by payroll deductions; others, like health plans, involve employer and employee contributions; some, like the education trust fund, are contributed to by the employer alone; but, I am satisfied that all of the listed benefits are part of the employees’ compensation.

‘35. In my view, the judge did not err including third-party benefit payments as wages. His interpretation was consistent with the plain language of the legislation, with the legislative intent of Parliament as expressed in *Hansard* and with the reality of the workplace.’ *Ted Leroy Trucking Ltd v Century Services Inc* [2010] BCJ No 821, 2010 BCCA 223 at paras 1–4, 7, 33–35, per E C Chiasson JA

WAIFS

[For 12(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 371 see now 29 Halsbury’s Laws of England (5th Edn) (2014) para 285.]

WAIVER

[For 16(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 907 see now 47 Halsbury’s Laws of England (5th Edn) (2014) para 250.]

[For 45(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 385 see now 97 Halsbury’s Laws of England (5th Edn) (2015) para 484.]

WAR

[For 49(1) Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 406 see now 3 Halsbury’s Laws of England (5th Edn) (2011) para 6.]

WAR CRIME

Canada [On an application for judicial review of a decision of the Immigration and Refugee Board that the applicant was excluded from refugee protection under the United Nations Convention Relating to the Status of Refugees (28 July 1951, [1969] Can TS No 6) art 1F(a) because there were serious grounds to believe that he committed or was complicit in the

commission of war crimes against Peruvian guerrillas during his time in the Peruvian armed forces, one question to be decided was whether, for the purposes of exclusion under art 1F(a), war crimes could be committed during an internal conflict.] '[10] The parties agree that the question of whether the meaning of war crimes in Article 1F(a) is limited to those offences committed during an international armed conflict is a question of law to which the standard of review of correctness applies (*Bermudez v Canada (Minister of Citizenship and Immigration)* (2000) 24 Admin LR (3d) 65 (FCTD)).

'[11] Article 1F(a) of the Refugee Convention states that:

[t]he provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.

'[12] The Board referred to the *Charter of the International Military Tribunal* for the definition of war crimes. In *Bermudez*, at paragraph 12, Mr Justice MacKay noted that the London Agreement of 8 August 1945, along with its annex the *Charter of the International Military Tribunal*, are the foundation documents for the concept of "war crimes." He noted that while the definition of "war crimes" in the *Charter of the International Military Tribunal* does not specifically state that it has to take place in the course of an international armed conflict, the context in which it appears suggests this is so. He also made reference to the definition of "war crimes" in the *Criminal Code* [RSC, 1985, c C-46, s 7(3.76) (as enacted by RSC, 1985 (3rd Supp), c 30, s 1)] and concluded that "war crimes" have come to be understood internationally in the context of international conflict.

'[13] Here the Board made no reference to the interpretation of war crimes set out in *Bermudez* and simply assumed that war crimes could be committed in an internal conflict. This was an error of law. The respondent submits that the error is one of form and not substance arguing that *Bermudez* is no longer good law and that the definition of war crimes has changed so as to include acts committed during internal conflicts. The respondent bases this

argument on two grounds. First, international treaty law, specifically the *Rome Statute of the International Criminal Court* (Rome Statute), recognizes that war crimes are not limited to international armed conflicts. Second, the section of the *Criminal Code* referred to by MacKay J in *Bermudez* has since been repealed [SC 2000, c 24, s 42] and has been replaced by the *Crimes Against Humanity and War Crimes Act*, SC 2000, c 24 [s 4(3)] which defines "war crimes" more broadly as "act... committed during an armed conflict".

'[14] There is no question that the Rome Statute is an international instrument which can be used to interpret the crimes in Article 1F(a) (see *Harb v Canada (Minister of Citizenship and Immigration)* (2003) 238 FTR 194 (FCA), at paragraphs 7-8 and the UNCHR [United Nations High Commissioner for Refugees] *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, dated September 4, 2003) and the acts attributed to the applicant, namely the torture and murder of "prisoners of war" (Shining Path and/or Tupac Amaru guerrillas), fall within the list of acts considered war crimes in an internal conflict (article 8, paragraph 2(c)(i) of the Rome Statute).

'[15] The applicant acknowledges that the acts attributed to the applicant would be considered war crimes under the definitions set out in the Rome Statute but submits that the Rome Statute cannot be applied to the acts attributed to the applicant because it came into force on July 1, 2002 and the acts attributed to him took place between 1985 and 1992. In effect, the applicant submits that the definition of war crimes provided in the Rome Statute cannot be applied retroactively. The applicant notes that the Rome Statute contains a retroactivity clause. Moreover, the applicant relied on *Ramirez* for the proposition that a person must have the *mens rea* for an international crime in order to be found excluded from refugee protection (*Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306 (CA)) and submits that this principle extends such that a person cannot have the *mens rea* to commit an international crime if he is not aware that the acts in question are international crimes.

'[16] I agree with the applicant that the definitions in the Rome Statute cannot be applied retroactively. The definition of "war crime" set out in the *Crimes against Humanity and War Crimes Act* supports the applicant's argument. It provides that:

4. ...

(3) ...

“war crime” means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. [Emphasis added.]

‘[17] Since the Rome Statute was not part of international law at the time of the commission of the acts in question reference should not be made to how it defines war crimes for the purpose of determining whether the acts attributable to the applicant constitute war crimes.

‘[18] This interpretation is supported by the principle in international criminal law of non-retroactivity. This principle is described as the “second corollary of the principle of legality. It means that a person cannot be judged or punished by virtue of a law which entered into force after the occurrence of the act in question” (John R W D Jones and Steven Powles, *International Criminal Practice* (Ardsey, NY: Transnational, 2003 at 6.1.21)).

‘[19] Furthermore, I conclude that the definition of war crimes provided in the Rome Statute cannot be used to determine whether the acts in question constitute war crimes because they were committed before the Rome Statute was part of international law.

‘[20] Consequently, in assuming that war crimes could be committed during an internal conflict, the Board erred in law. This error was determinative given that the current definition of war crimes in international law cannot be applied retroactively. This application for judicial review will be allowed and the matter should be sent back to a different Board to be redetermined.’ *Ventocilla v Canada (Minister of Citizenship and Immigration)* [2008] 1 FCR 431, 2007 FC 575, [2007] FCJ No 773 at [10]–[20], per Teitelbaum DJ

WARD OF COURT

[For 5(3) Halsbury’s Laws of England (4th Edn) (Reissue) para 317 see now 9 Halsbury’s Laws of England (5th Edn) (2012) para 264.]

WARRANT

Any other warrant

[Extradition Act 2003, s 2(4)(b)]. ‘[1] Section 2 of the Extradition Act 2003 prescribes the contents of a Pt 1 warrant issued by a judicial authority of a category 1 territory. We shall refer to such a warrant as a European arrest warrant (EAW). It must contain the information referred to in sub-s (4) or sub-s (6) as the case may be. That information includes: “particulars of any other warrant issued in the category 1 territory for the person’s arrest in respect of the offence”. The issue which is common to the two appeals that are before us (which are both cases to which sub-s (4) applies) is whether the reference to “any other warrant” is a reference to any other EAW that may previously have been issued against the person in respect of the offence, or whether it is a reference to any other arrest warrant issued in the requesting state *on which the EAW is based* (a “domestic arrest warrant”). The former interpretation was favoured in some obiter dicta expressed by Dyson LJ (with which Collins J agreed) in *Jaso v Central Criminal Court No 2, Madrid* [2007] EWHC 2983 (Admin) at [26], [2008] 1 WLR 2798 at [26] which were followed by this court (Maurice Kay LJ and Penry-Davey J) in *Zakowski v Regional Court in Szczecin, Poland* [2008] EWHC 1389 (Admin) at [25], [2008] All ER (D) 228 (May). In the two appeals before us, it is submitted on behalf of the respondents that this is wrong and that the latter interpretation is correct.

...

‘[11] Where an EAW is issued with a view to the arrest and extradition of a person for the purpose of being prosecuted for an offence (an “accusation case”), s 2(4)(b) provides, as we have said, that the EAW must contain: “particulars of any other warrant issued in the category 1 territory for the person’s arrest in respect of the offence”. Where an EAW is issued with a view to the arrest and extradition of a person for the purpose of being sentenced or serving a sentence of imprisonment or other form of detention imposed in respect of the offence (a “conviction case”), s 2(6)(c) provides that the EAW must contain the like particulars. Section 2(7) provides: “[t]he designated authority may issue a certificate under this section if it believes that the authority which issued the Part 1 warrant has the function of issuing arrest warrants in the category 1 territory”. SOCA [the Serious Organised Crime Agency] is designated as an authority with the power of certifying

warrants under s 2: see the Extradition Act 2003 (Part 1 Designated Authorities) Order 2003, SI 2003/3109.

[12] In interpreting Pt 1 of the 2003 Act, it is necessary to have regard to the Framework Decision of 13 June 2002 on the European arrest warrant and surrender procedures between Member States 2002/584/JHA (the Framework Decision). The 2003 Act must be interpreted in conformity with the Framework Decision: see *Jaso's case* [2008] 1 WLR 2798 at [9] and the authorities referred to in that paragraph.

[15] Article 8 is headed "Content and form of the European arrest warrant". So far as material, it provides:

"1 The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex: ... (c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2 ..."

[16] In *Jaso's case* [2008] 1 WLR 2798, it was argued on behalf of the person to be extradited that there was a breach of s 2(4)(b) because there had been a previous EAW which was not mentioned in any of the warrants which were the subject of the appeal. The appeal proceeded on the basis that the earlier warrant had been formally issued, but had not been proceeded with on account of some defect.

[17] At [16]–[25] of *Jaso's case*, Dyson LJ explained why he considered that the reference in art 8(1)(c) of the Framework Decision to "an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect" was a reference to a currently enforceable judgment etc and not one which may have been enforceable at some time in the past, but which was no longer enforceable; and that the enforceable judgment etc had to be one on which the index EAW was based. ... :

"[16] On the face of it, section 2(4)(b) is clear. It requires particulars to be given in the EAW of any other warrant issued in the category 1 territory for the arrest of the person in respect of the offence specified in the EAW. That appears to refer to any warrant, whether domestic or EAW, regardless of whether it has been rejected as defective by the requested state or whether the requesting state has decided not to rely on it. ..."

...

"[19] *Jaso v Central Criminal Court No 2, Madrid* [2008] 1 WLR 2798 was an accusation case and *Zakowski v Regional Court in Szczecin, Poland* [2008] All ER (D) 228 (May) was a conviction case. But in view of the identity of language in s 2(4)(b) and (6)(c), the differences between the two cases are not material for present purposes. In *Zakowski's case*, it was argued that the EAW did not contain particulars of "any other warrant issued in the Category 1 territory" in that it stated that after the requested person had failed to serve his sentence, a "warrant was sent after him" but gave no further details of that warrant. Maurice Kay LJ gave three reasons for rejecting this argument. Of the third reason, he said this:

"[25] In the event, this view recedes in importance in the present case because of Miss Hill's third submission, namely that the reference to an arrest warrant in s 6(2)(c) is limited to an EAW. A similar submission was accepted by Dyson LJ, albeit obiter, with whom Collins J agreed, in [*Jaso's case* [2008] 1 WLR 2798 at [26]]. His reasoning, which I respectfully consider to be correct, is that the arrest warrant referred to in art 8(1)(c) falls to be construed by reference to the later words 'within the scope of arts 1 and 2'. An arrest warrant 'within the scope of arts 1 and 2' is self-evidently an EAW and not a purely domestic warrant. It follows that s 6(2)(c) should be construed as referring only to other EAWs issued in respect of the offence. This would include, for example, a previous EAW which has been found to be defective.

"[26] Miss Powell invites us to reject Dyson's LJ construction partly because it would lead to there being no requirement of a reference to a domestic warrant which might be of crucial importance in determining whether and when a person came to be 'unlawfully at large'. However the concept of being 'unlawfully at large' arises not in the context of the formal requirements of s 6 but in the context of the bar to extradition by reason of the passage of time as provided by s 14. That is a matter of evidence, not form."

[20] Having had the benefit of full argument on the issue, we are satisfied that the interpretation of s 2(4)(b) of the 2003 Act expressed in *Jaso's case* and the interpretation of s 2(6)(c) expressed in *Zakowski's case* is wrong. It is

necessary to have in mind the reasoning at [16]–[25] of *Jaso's* case. This has not been criticised before us. In summary, it is to this effect. The 2003 Act must be interpreted in conformity with the Framework Decision and in particular with art 8(1)(c). On its true construction, art 8(1)(c) requires the EAW to contain evidence of an enforceable judgment etc *on which the EAW is based*. This is demonstrated by the form contained in the Annex which shows that the intention of the Framework Decision is to confine the evidence that is required to be contained in the EAW to the enforceable judgment etc on which the EAW is based. The rationale for requiring the EAW to contain evidence of the judicial decision on which it is based is that “[s]uch evidence enables the authorities of the requested state to be satisfied that there is some judicial basis for the EAW”: see [22] in *Jaso's* case.

‘[21] The sole reason given in *Jaso's* and *Zakowski's* cases for interpreting art 8(1)(c) as referring to previous EAWs is that the concluding words “within the scope of Articles 1 and 2” show that the enforceable judgment etc must refer to an EAW. In our judgment, these words do not justify that interpretation.

‘[22] First, we make the obvious point that, if it had been intended that the EAW should contain evidence of any previous EAW in respect of the same offence(s), it would have been simple to say so. The term “European arrest warrant” is used throughout the Framework Decision. It would have been sufficient simply to say that the EAW should contain evidence of any previous EAW. Instead, the Framework Decision states that the EAW should contain evidence in accordance with the form contained in the Annex of an enforceable judgment etc coming within the scope of arts 1 and 2.

‘[23] Secondly, the use of the alternatives “enforceable judgment, an arrest warrant or any other enforceable judgment having the same effect” is significant. This reflects the different nature of the domestic warrant or other judicial decision which creates the justification under arts 1 and 2 for the issue of an EAW: for example, a domestic warrant of arrest, an authorisation to prosecute, an order for surrender to custody, a sentencing decision or a detention order. Whilst an EAW may properly be described as an arrest warrant or a judicial decision, it is unnecessary to describe an EAW as both in the same sentence, especially in the light of the definition of an EAW in art 1(1) as a “judicial decision issued by a Member State”

etc. Since an EAW has already been defined in these terms, there is no point in introducing a different definition in art 8 and it is unlikely that this is what was intended. Furthermore, it is a strained use of language to describe an EAW as a “judgment”.

‘[24] Thirdly, it is necessary to consider why the enforceable judgment etc is qualified in art 8(1)(c) by the words “within the scope of Articles 1 and 2”. In our judgment, these words indicate that the enforcement judgment etc of which evidence is required to be given in the EAW must be of a certain type. To come within the scope of arts 1 and 2, it must satisfy two conditions. First, it must be “for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order” in the issuing member state (art 1(1)). Secondly, it must be issued in respect of acts which are ‘punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months’ or be in respect of one of the offences specified in art 2(2) punishable in the issuing member state by a custodial sentence or detention order for a maximum of at least three years. In other words, the scope of arts 1 and 2 is concerned with the purpose for which the enforceable judgment etc was issued (art 1(1)) and the content of the law of the issuing member state (art 2). It is only an enforceable judgment etc which satisfies the two conditions specified in arts 1 and 2 that can provide a basis for the issue of an EAW. It follows that the words “within the scope of Articles 1 and 2” provide no support for the view that the enforceable judgment etc is a previous EAW. On the contrary, they indicate that the enforceable judgment etc must satisfy the two specified conditions of the domestic law of the state of the issuing judicial authority.

‘[25] Fourthly, as was stated in *Jaso's* case [2008] 1 WLR 2798, the enforceable judgment etc referred to in art 8(1)(c) must be the judgment etc on which the EAW is based. We repeat that this reasoning has not been challenged. In the paradigm case, an EAW is not based on a previous EAW. As the facts of the two cases that are before us and the facts of *Jaso's* case show, in the typical case where successive EAWs are issued in respect of the same offence(s), each EAW replaces the one before. It is difficult to think of a reason why an EAW would be issued where an earlier EAW has been issued in respect of the same offence(s), unless the earlier EAW is defective or for some other reason the issuing state no longer wishes to rely on it. As was stated in

Jaso's case, there is no purpose to be served in requiring an EAW to contain evidence of an earlier EAW which is no longer relied on and on which the later EAW is not based.

‘[26] On the other hand, there is a good reason why the EAW should contain evidence of the enforceable judgment etc on which it is based: see *Jaso's* case at [22]. It enables the executing authority to ascertain that there are criminal proceedings in the requesting state: for example, a warrant for arrest in an accusation case or a judgment in a conviction case. It assists the court in establishing that the preconditions in art 1(1) for the issue of an EAW are satisfied and that the minimum sentence requirements in art 2 are also met. Indeed, the domestic extradition laws of some EU member states may *require* an extradition request to be underpinned by a domestic warrant. For example, by s 142(2)(b) of the 2003 Act a judge of the United Kingdom can only issue an EAW if a domestic warrant has already been issued in respect of the offence. The decision on which an EAW is based will only be an EAW in jurisdictions where the EAW can be treated as the enforceable judgment etc. We understand that this is the case in Hungary. But that is not inconsistent with the interpretation that we have adopted, because even in that case the EAW is not based on a previous EAW.

‘[27] In our judgment, there is no warrant for holding that art 8(1)(c) requires an EAW to contain evidence of an earlier EAW on which it is *not* based or for holding that it does not require an EAW to contain evidence of the enforceable judgment etc on which the EAW is based.’ *Louca v Office of Public Prosecutor, Bielefeld, Germany; Kaba v Creteil Court of First Instance, France* [2008] EWHC 2907 (Admin), [2009] 2 All ER 719, DC, at [1], [11]–[12], [15]–[17], [19]–[27], per Dyson LJ; affirmed [2009] UKSC 4, [2010] 1 All ER 402

‘[15] The question certified by the Divisional Court is: “Whether the reference to ‘any other warrant’ in s 2(4)(c) of the Extradition Act 2003 properly construed is a reference to any other domestic warrant on which the European arrest warrant is based.” For the reasons given above and those given by the Divisional Court, the answer is that the reference is to any domestic warrant on which the European arrest warrant is based, and not to any other European arrest warrant which may have been issued on the basis of any such domestic warrant. Mr Louca’s appeal falls to be dismissed accordingly.’ *Louca v Office of Public Prosecutor in Bielefeld, Germany* [2009] UKSC

4, [2010] 1 All ER 402 at [15], per Lord Mance SCJ

Extradition proceedings

[For 17(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 1118 see now 47 Halsbury’s Laws of England (5th Edn) (2014) para 626 et seq.]

WARRANTY

[For 9(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 994 see now 22 Halsbury’s Laws of England (5th Edn) (2012) para 557.]

Insurance generally

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 94 see now 60 Halsbury’s Laws of England (5th Edn) (2011) para 114.]

Marine insurance

[For 25 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 235 see now 60 Halsbury’s Laws of England (5th Edn) (2011) para 114n.]

Sale of goods

[For 41 Halsbury’s Laws of England (4th Edn) (2005 Reissue) paras 63–64 see now 91 Halsbury’s Laws of England (5th Edn) (2012) paras 64–65.]

WASTE

[For 27(1) Halsbury’s Laws of England (4th Edn) (2006 Reissue) paras 431–432 see now 62 Halsbury’s Laws of England (5th Edn) (2016) paras 324–325.]

[For 42 Halsbury’s Laws of England (4th Edn) (Reissue) para 986 see now 91 Halsbury’s Laws of England (5th Edn) (2012) para 887.]

Controlled waste

[Environmental Protection Act 1990, s 33.] ‘[1] The short point in this case is whether escapes of waste water from a public sewerage system are “directive waste” within the scope of Council Directive (EEC) 75/442 (the Waste Framework Directive) (OJ 1975 L194 p 39), and thus subject to the enforcement authority of the Environment Agency (the Agency) under s 33 of the Environmental Protection Act 1990.

‘[2] In form the hearing is the renewed

hearing of an application for judicial review which first came before the court in May 2005. Thames Water Utilities Limited (TWUL) had been prosecuted by the Agency in the Havering Magistrates' Court, for alleged offences under s 33 of the 1990 Act, arising out of deposits of untreated sewage on land in the area of Elmers End, Kent, in February to April 2003. Section 33 makes it an offence to "deposit controlled waste... on any land" without a waste management licence. ... By reg 7A of the Controlled Waste Regulations 1992, SI 1992/588, waste which is not "directive waste" for the purpose of the European Waste Framework Directive is excluded from the definition of "controlled waste".

'[3] A preliminary issue was raised by TWUL whether, as a matter of law, sewage escaping from pipes maintained by a statutory undertaker was "controlled waste" as so defined. District Judge Carr decided on 16 September 2004 that he had no jurisdiction to determine that issue. TWUL applied for judicial review. On 18 May 2005, the Divisional Court held, in agreement with all parties, that the district judge had had jurisdiction to decide the issue ([2005] EWHC 1231 (Admin), [2005] All ER (D) 265 (May)). ...

'[23] As I understand the judgment of this court dated 18 May 2005, it has already quashed the district judge's order declining jurisdiction to determine preliminary point. I would therefore answer the preliminary question by holding that sewage escaping from pipes maintained by a statutory undertaker is "controlled waste" within the meaning of s 33 of the 1990 Act, and remit the matter to the magistrates' court.' *R (on the application of Thames Water Utilities Ltd) v Bromley Magistrates' Court (Water Services Regulation Authority intervening)* [2008] EWHC 1763 (Admin), [2009] 1 All ER 744 at [3], [23], per Carnwath LJ

[Environmental Protection Act 1990, ss 33, 75. Offences of knowingly permitting the deposit of controlled waste contrary to s 33(1)(a) and (6) and of disposing or keeping of controlled waste contrary to s 33(1)(b)(i) and (6).] '[34] We conclude ... that excavated soil which has to be discarded by the then "holder" is capable of being waste within the 1990 Act and, in any individual case, ordinarily will be. Having become waste it remains waste unless something happens to alter that. Whether such an event has happened is a question of fact for the jury. The possibility of re-use at some indefinite future time does not alter its status;

see *Application by Palin Granit Oy* [2003] All ER (EC) 366, [2002] 1 WLR 2644, and indeed *ARCO Chemie Nederland Ltd v Minister van Volkshuisvesting* [2003] All ER (EC) 237, [2002] QB 646. Actual re-use may do so (*Environment Agency v Inglenorth Ltd* [[2009] EWHC 670 (Admin), DC]), but only if consistent with the aims and objectives of the 1990 Act and of the 2006 Directive [Council Directive (EC) 2006/12 on waste (OJ 2006 L114 p 9)]: (cf *Department of the Environment and Heritage Service v Felix O'Hare & Co Ltd* [2007] NICA 45, [2008] NIJB 261), the principal ones of which are the avoidance of harm to persons or to the environment, as set out in the recitals to the 2006 Directive. Which of those aims and objectives are relevant to an individual case will depend on the cases presented by the parties. In this case, for example, the main concern maintained by the Crown is for the environment around the village where the respondents' farm lies (as a special area of conservation) and visual amenity in the area generally. Matters which in our judgment, are readily capable of assessment by a jury in deciding whether any material in issue is in fact "waste".' *R v W* [2010] EWCA Crim 927, [2011] 3 All ER 691 at [34], per McCombe J

Equitable waste

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 997 see now 91 Halsbury's Laws of England (5th Edn) (2012) para 898.]

Meliorating waste

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 993 see now 91 Halsbury's Laws of England (5th Edn) (2012) para 894.]

Permissive waste

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 995 see now 91 Halsbury's Laws of England (5th Edn) (2012) para 896.]

Voluntary waste

[For 42 Halsbury's Laws of England (4th Edn) (Reissue) para 987 see now 91 Halsbury's Laws of England (5th Edn) (2012) para 888.]

WASTING ASSET

[Taxation of Chargeable Gains Act 1992, s 44: whether a valuable painting by Sir Joshua

Reynolds exhibited in a house open to the public on payment of admission fees was a wasting asset for the purposes of exemption from capital gains tax.] [2] The question in this case is whether the painting was a “wasting asset” within s 44 of the Taxation of Chargeable Gains Act 1992. In the absence of any statutory elaboration of the meaning of “wasting asset” it is agreed that it would not be possible to describe such a valuable painting, in good condition (as it was), as a “wasting asset”. However, the term “wasting asset” is defined in s 44 of the 1992 Act. In particular, s 44(1)(c) of the 1992 Act provides that “plant and machinery” will be deemed to have a predictable life of less than 50 years and s 44(1) provides that an asset with a predictable life not exceeding 50 years will be a “wasting asset”. Thus, the painting will be a wasting asset if it was “plant and machinery” within s 44(1)(c) of the 1992 Act. If the painting was a wasting asset, then the disposal will fall within s 45(1) of the 1992 Act, which (subject to the potential operation of s 45(2) or (3)) produces the result that no chargeable gain arose on the disposal of the painting. It is agreed that neither s 45(2) nor (3) applies in the present case.

...
[44] The [First-tier Tribunal (Tax Chamber)] plainly resisted the conclusion that the painting was a wasting asset. I accept that there is something surprising in holding that an asset of high value, and one liable to appreciate in value, with a predicted life of more than 50 years, was a wasting asset. However, the painting was only a wasting asset for the purposes of s 44 of the 1992 Act because it satisfied the established test as to plant and therefore came within s 44(1)(c) which deems something to be a wasting asset even though it would not otherwise be thought of as a wasting asset.’ *Executors of Lord Howard of Henderskelfe v Revenue and Customs Commissioners* [2013] UKUT 129 (TCC), [2013] 3 All ER 817 at [2], [44], per Morgan J; affd [2014] EWCA Civ 278, [2014] 3 All ER 50

WATERCOURSE

[For 16(2) Halsbury’s Laws of England (4th Edn) (Reissue) paras 197–198 see now 87 Halsbury’s Laws of England (5th Edn) (2017) paras 917–918.]

[For 49(2) Halsbury’s Laws of England (4th Edn) (2004 Reissue) paras 98–107 see now 100 Halsbury’s Laws of England (5th Edn) (2009) paras 86–92.]

WAYLEAVE

[For 31 Halsbury’s Laws of England (4th Edn) (2003 Reissue) para 335 see now 76 Halsbury’s Laws of England (5th Edn) (2013) para 335.]

WEEK

[For 45(2) Halsbury’s Laws of England (4th Edn) (Reissue) para 212 see now 97 Halsbury’s Laws of England (5th Edn) (2015) para 312.]

WELFARE SERVICES

Canada [Canada Assistance Plan, RSC 1965 (repealed), s 2: ‘welfare services’ means services having as their object the lessening, removal or prevention of the causes and effects of poverty, child neglect or dependence on public assistance.] ’26. In this Court, the Attorney General of Quebec argues that SSS [social services provided in schools] were “welfare services” within the meaning of s 2 of the *CAP*. Although the services provided were universal in nature, he submits that SSS were intended to prevent poverty, since they were provided primarily to children from disadvantaged socio-economic backgrounds. The Attorney General of Quebec therefore contends that the trial judge erred in concluding that the concept of “welfare services” extended only to social services intended exclusively for persons in need (AF, at para 28). He submits that universal social programs were eligible, but that cost sharing was limited to services provided to the clientele covered by the *CAP* (AF, at para 41).

’27. In principle, the Attorney General of Quebec is correct that the definition of “welfare services” was not dependent on the target clientele of the social programs established by the provinces. It is indeed possible that not every recipient of a “welfare service” belonged to the clientele covered by the *CAP*. However, the Attorney General of Quebec’s criticism of the trial judge in this respect is groundless. The trial judge found that in such cases, the federal government and the province concerned had established the proportion of costs eligible for cost sharing by means of a complex mechanism for dividing up the clientele (para 56).

...

’30. ... [I]t must first be determined what was meant by the words “services having as their object the lessening, removal or prevention of the causes and effects of poverty”. In my opinion, these words suggest that a “welfare

service” had to have an anti-poverty *purpose*. Therefore, a service would not be considered a “welfare service” unless it had been established for the specific purpose of alleviating, eliminating or preventing poverty. In practice, this would require the existence of a *close connection* between the nature of the service and the eradication of the causes or effects of poverty. From this standpoint, if an established service contributed to the fight against poverty only incidentally, indirectly or by extension, it could not be considered a “welfare service” for the purposes of cost sharing under the *CAP*, since the close connection requirement would not be met.

‘31. In the instant case, the trial judge rejected the argument that there was a close connection between SSS and even the preventive aspect of the fight against poverty. Instead, he found that the true object of SSS was to contribute to the educational mission of schools. His finding was based on a careful examination of the testimonial and documentary evidence. He reviewed all the testimony and commented on the principal documentary evidence, which provided ample support for his finding. As a result, in my opinion, the Court has no reason to interfere with it. ...’ *Quebec (Attorney General) v Canada* 2011 SCC 11, [2011] 1 SCR 368 at paras 26–27, 30–31, per Lebel J

WELL FOUNDED

New Zealand [Refugee Convention 1951, art 1A(2): ‘well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’ giving entitlement to refugee status. ‘[15] In terms of the meaning of “well founded” in Article 1A(2), [the Immigration and Protection Tribunal] then adopted the approach in *Chan v Minister of Immigration and Ethnic Affairs* [(1989) 169 CLR 379 (HCA)] where it was held that a fear of being persecuted could be regarded as well founded when there was a “real as opposed to remote or speculative chance of it occurring”. It noted that the standard was entirely objective. That test is now summarised in the “real chance” phraseology of *Refugee Appeal No 70074/96* [Refugee Status Appeal Authority, 7 September 1996].

‘[45] Although the appellants criticise the Tribunal for saying that the “central issue to be determined is whether [the appellants’] fears are well founded”, relying on Tribunal authority that “the inquiry in New Zealand starts with the

assessment of the “being persecuted” element not the “well-founded” element, nothing in my view turns on the point, given that the Tribunal did identify as a potential form of persecution the compulsory sterilisation which the appellants claimed to fear. It then proceeded to analyse whether there was a real chance of that occurring. In practice this will inevitably give rise to a seamless inquiry into whether there is a “real chance of the claimant being persecuted” in the manner relied on, as foreshadowed in the first limb of the two step test.

...

‘[52] It is at this point which in my view the application for leave to appeal faces real difficulties because the assessment of whether something represents a “real” as opposed to “remote or speculative” chance is a question of fact (accepted as such by Ms Curtis) and one which the specialist Tribunal from which leave to appeal is sought is particularly qualified to answer. ...’ *BY (China) v Immigration and Protection Tribunal* [2016] NZHC 2244, [2016] NZAR 1595 at [15], [45], [52], per Muir J

WHEN

New Zealand [Smoke-free Environments Act 1990, s 12(1): the licensee of any licensed premises must take all reasonably practicable steps to ensure that no person smokes at any time in a part of the premises that is not an open area.] ‘[17] “Open area” is defined in s 2(1) of the Act as:

open area, in relation to any premises, means a part of the premises that is not an internal area.

‘[18] “Internal area” is defined as:

internal area, in relation to any premises or vehicle, means an area within or on the premises or vehicle that, when all its doors, windows, and other closeable openings are closed, is completely or substantially enclosed by—

- (a) a ceiling, roof, or similar overhead surface; and
- (b) walls, sides, screens, or other similar surfaces; and
- (c) those openings.

...

‘[38] A purposive approach to the definition therefore requires meaning to be driven by whether or not an area is enclosed or substantially enclosed. It is in that context that the meaning of “closeable openings” and

“when” as used in the definition is to be determined.

...
[41] The meaning attributed to the word “when” by the Judge means that the closeable openings are assumed closed for the purposes of assessment. Therefore an area is to be regarded as internal if it is capable of becoming an internal area when all its closeable openings are closed.

[42] Shearwater submits that “when” means that the closeable openings must *in fact* be closed in order for an area to be considered “internal”. But if that meaning were adopted an area would only be regarded as internal at the point in time that all its doors and windows were actually closed.

[43] That does not accord with the plain and ordinary meaning of “enclosed” or “substantially enclosed” in my view. A space which is enclosed by four walls, and a roof, may in fact be “substantially enclosed”, even if a window or door is open. Because the definition refers to “all” closeable openings being closed, an area could be taken outside the provisions of the Act by simply pushing a door or window ajar.

[44] The flaw in that approach is further demonstrated when that meaning is applied to vehicles as referred to in the “internal area” definition. The Act does not define “vehicle”, but “workplace” is defined in s 2 to include an internal area within a vehicle if the vehicle is provided by the employer and normally used by employees. Construing the word “when” as suggested by the appellant would mean that the regulation of smoking in a work vehicle would only apply when all the windows and doors were in fact closed. If a window was open, by even just a crack, the legislation would not be engaged. That cannot have been intended by Parliament.

[45] The only meaning of “when” as used in the clause which accords with purpose is that adopted by the Judge. That is, “when” means that windows, doors and other closeable openings are assumed closed for the purposes of assessment.

[46] Although “closeable openings” and the word “when” are each capable of bearing the meanings attributed to them by the Judge, the combination is problematic when a closeable opening functions as a wall (as in this case), or a roof. That combination means that a wall or roof-like structure is assumed to be in place—even when it is not.

[47] That consequence is also at odds with the scheme and purpose of the Act. An offence is only committed under s 12 if the relevant

conduct takes place in an area which is not an “open area”. That requires an assessment of the area to be made at the time of the alleged infringement. An area is either an open area or an internal area; it cannot be both at the same time. In order to be an “internal area”, the space must be “completely or substantially” enclosed by the structures listed in (a), (b) and (c) of the definition. If it is not substantially or completely enclosed, then the area will be an “open area”. There is no prohibition on smoking in open areas. An assessment of an open area as an internal area on the grounds that it *could* become an internal area would extend the reach of the Act beyond that which was intended by Parliament.’ *Shearwater Hotels Ltd v Ministry of Health* [2017] NZHC 1142, [2017] 3 NZLR 268 at [17]–[18], [38], [41]–[47], per Edwards J

WILFUL

New Zealand [Criminal Procedure Act 2011, s 365: contempt of court by wilfully interrupting proceedings.] [52] Secondly, it is submitted that what occurred was not sufficient to meet the requirement of “wilfully” interrupting proceedings. Mr McAllister says that “wilfully” embodies an intention to misbehave or to do something inconsistent, that is, something involving a level of malevolence or calculation “designed to undermine the court process or the authority of the Judge”. In developing this submission, Mr Jones contends that the issue of what is required to constitute contempt in this case is significant because of the importance of maintaining the ability of an individual to refuse to take the oath if he or she genuinely does not think impartiality is possible. Further, Mr Jones notes that there is very little case law on the meaning of “wilfully” and, to the extent that there is, that reveals some differences between the position in New Zealand from that in other, comparable, jurisdictions.

...
[76] In *Lewis* [*Lewis v Ogden* (1984) 153 CLR 682], a lawyer was found in contempt for comments made in a closing address to the jury in which the lawyer drew an analogy between the Judge and an umpire in a football match. The relevant provision reflected s 365(1)(a) of the Act and referred to “wilfully” insulting a judge. The Court said “wilfully” meant “intentionally” or “deliberately” in the sense that what was done was intended as an insult. The word “wilfully” was said to do “more than negative the notion of ‘inadvertently’ or ‘unconsciously’”. Further, “[t]he mere voluntary

utterance of words is not enough. ‘Wilfully’ imports the notion of purpose.”

[77] The approach in *Lewis* supports the argument Mr McAllister wishes to make on appeal. However, we do not consider that it is credible in the context of the New Zealand legislation to suggest that a deliberate interruption of a court proceeding or deliberate disobedience of a direction will not meet the mens rea requirement. That approach would be inconsistent with the purpose of s 365 and inconsistent with the approach to the interpretation of “wilfully” in other offence provisions.’ *McAllister v R* [2014] NZCA 175, [2014] 2 NZLR 764 at [52], [76]–[77], per Ellen France J

Wilful misconduct

Canada [Marine Insurance Act, SC 1993, c 22, s 53(2): loss excluded from insurance coverage if it is attributable to insured’s ‘wilful misconduct’.] ‘55. In the context of marine insurance, the principle that coverage was excluded for losses resulting from wilful misconduct predated, and was in effect codified by, the English *Marine Insurance Act, 1906*, 6 Edw. 7, c. 41, s. 55(2)(a): Damar [Duygu Damar, *Wilful Misconduct in International Transport Law*, Heidelberg, Germany: Springer, 2011], at pp. 35–43. The purpose of the modern-day Canadian provision is to distinguish the excluded losses from the covered losses, that is, those, attributable to the “misconduct or negligence of the master or crew”: s. 53(1) of the *Marine Insurance Act*. Most of the “wilful misconduct” cases in the marine insurance field involve deliberate scuttling of a vessel to obtain the insurance proceeds—an obvious example of wilful misconduct—and so there is relatively little jurisprudence interpreting the finer points or meaning of the phrase: Damar, at p. 41; J. Gilman et al., *Arnould’s Law of Marine Insurance and Average* (17th ed. 2008), at p. 958.

‘56. While this Court has not interpreted “wilful misconduct” in the context of a marine insurance exclusion, it has interpreted similar language in other contexts on many occasions. One statement that has been particularly influential is that of Duff C.J. in *McCulloch v. Murray*, [1942] S.C.R. 141. The Court had on appeal a jury finding that a driver was liable to a gratuitous passenger. That liability depended on whether it had been open to the jury to find that the passenger’s injury had been the result of the driver’s “gross negligence, or wilful and wanton

misconduct”: *Motor Vehicle Act*, S.N.S. 1932, c. 6, s. 183. In upholding the finding of liability made by the jury, Duff C.J. held that the terms “gross negligence”, “wilful misconduct” and “wanton misconduct” all “imply conduct in which, if there is not conscious wrong doing, there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves”: p. 145. I pause to note that, unlike the standard set by the *Convention* [Convention on limitation of liability for maritime claims, 1976], “conscious wrongdoing”—that is “intentional wrongdoing”—is not required in order for the insured’s actions to constitute wilful misconduct. While Duff C.J. did not set out an exhaustive definition of “wilful misconduct”, his comments have been repeatedly cited with approval by the Court in gratuitous passenger cases: *Studer v. Cowper*, [1951] S.C.R. 450; *Thompson v. Fraser*, [1955] S.C.R. 419; *Walker v. Coates*, [1968] S.C.R. 599; *Markling v. Ewaniuk*, [1968] S.C.R. 776; *Goulais v. Restoule*, [1975] 1 S.C.R. 365.

‘57. In other contexts, “wilful misconduct” has been defined as “doing something which is wrong knowing it to be wrong or with reckless indifference”; “recklessness” in this context means “an awareness of the duty to act or a subjective recklessness as to the existence of the duty”: *R. v. Boulanger*, 2006 SCC 32, [2006] 2 S.C.R. 49, at para. 27, citing *Attorney General’s Reference (No. 3 of 2003)*, 2004 EWCA Crim 868, [2005] Q.B. 73. Similarly, in an insightful article, Peter Cane states that “[a] person is reckless in relation to a particular consequence of their conduct if they realize that their conduct may have that consequence, but go ahead anyway. The risk must have been an unreasonable one to take”: “*Mens Rea in Tort Law*” (2000), 20 *Oxford J. Legal Stud.* 533, at p. 535.

‘58. These formulations capture the essence of wilful misconduct as including not only intentional wrongdoing but also conduct exhibiting reckless indifference in the face of a duty to know. This view is supported by two of the key authorities relied on by the appellants and they are, as I see it, sufficient to deal with the issue raised on this appeal.

‘59. The appellants’ point first to the reasons of Bramwell L.J. in *Lewis v. Great Western Railway Co.* (1877), 3 Q.B.D. 195 (C.A.). He referred to wilful misconduct (in the context of carriage by rail) as being either conduct such that “the person guilty of it should know that mischief will result” or which the person “acted under the supposition that it might be

mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not": p. 206. This formulation encompasses not only intentional wrongdoing but also reckless indifference in the face of a duty to know.

'60. The appellants also rely on the judgment of Cresswell J. in *Thomas Cook Group Ltd. v. Air Malta Co.*, [1997] 2 Lloyd's Rep. 399 (Q.B.D.), dealing with the limitation in the unamended Warsaw Convention which excluded limitation of liability for damage caused by the wilful misconduct of the carrier: art. 25(1). Cresswell J. reviewed the English jurisprudence in detail and set out six propositions concerning the meaning of wilful misconduct. He began by dealing with the word "misconduct" and holding that the inquiry is as to whether the conduct is so far outside the range of conduct expected of a person in the circumstances as to be properly regarded as a misconduct: p. 407. He then turned to the sort of misconduct that could be considered wilful. Among the sorts of conduct to which he refers is this:

A person wilfully misconducts himself if he knows and appreciates that it is misconduct on his part in the circumstances to do or to fail or omit to do something and yet... acts with reckless carelessness, not caring what the results of his carelessness may be. (A person acts with reckless carelessness if, aware of a risk that goods in his care may be lost or damaged, he deliberately goes ahead and takes the risk, when it is unreasonable in all the circumstances for him to do so.) [p. 408]

'61. Without attempting to spell out exhaustively the sorts of conduct that are covered by the term "wilful misconduct", I accept, as do the appellants, that these statements accurately, although not necessarily exhaustively, describe types of conduct that fall within that description for the purposes of the exclusion of liability under the *Marine Insurance Act*. In short, wilful misconduct includes not only intentional wrongdoing but also other misconduct committed with reckless indifference in the face of a duty to know.' *Peracomo Inc v TELUS Communications Co* 2014 SCC 29, 369 DLR (4th) 622 at paras 55–61, per Cromwell J

Wilful neglect

[Mental Capacity Act 2005, s 44.] '[9] Section 44 of the 2005 Act provides:

"(1) Subsection (2) applies if a person ('D')—(a) has the care of a person ('P') who lacks, or whom D reasonably believes to lack, capacity ...

(2) D is guilty of an offence if he ill-treats or wilfully neglects P."

Ill-treatment and wilful neglect within s 44 are distinct offences, and in effect replicate the provisions designed for the protection of children in s 1 of the Children and Young Persons Act 1933. Neglect, of itself, is not enough to establish the offence. The neglect must be indeed "wilful" (see *R v Sheppard* [1980] 3 All ER 899, [1981] AC 394), assessed in the context of an offence created in a statutory context in which "capacity" and "lack of capacity" are defined.

...
[17] We acknowledge the force of these submissions. They underline some of the difficulties facing those with caring responsibilities. Although the principles governing offences of ill-treatment and wilful neglect are identical, cases involving alleged ill-treatment do not appear to raise quite the same difficulties as cases of alleged wilful neglect, perhaps not least because evidence of ill-treatment is generally less elusive than evidence purporting to establish wilful neglect.

'[18] The purpose of s 44 of the Act is clear. Those who are in need of care are entitled to protection against ill-treatment or wilful neglect. The question whether they have been so neglected must be examined in the context of the statutory provisions which provide that, to the greatest extent possible, their autonomy should be respected. The evidential difficulties which may arise when this offence is charged do not make it legally uncertain within the principles in *R v Misra* [2004] EWCA Crim 2375, [2005] 1 Cr App R 328 and *R v Goldstein*, *R v Rimmington* [2005] UKHL 63, [2006] 2 All ER 257, [2006] 1 AC 459. On analysis, the offence created by s 44 is not vague. It makes it an offence for an individual responsible for the care of someone who lacks the capacity to care for himself to ill-treat or wilfully to neglect that person. Those in care who still enjoy some level of capacity for making their own decisions are entitled to be protected from wilful neglect which impacts on the areas of their lives over which they lack capacity. However s 44 did not create an absolute offence. Therefore, actions or omissions, or a combination of both, which reflect or are believed to reflect the protected autonomy of the individual needing care do not constitute wilful neglect. Within these clear

principles, the issue in an individual prosecution is fact specific.

...
 '[20] ... As it seems to us, if the jury were to conclude that the defendant may have been motivated by the wish or sense of obligation to respect Miss Gill's autonomy any area of apparent neglect so motivated would not be *wilful* for the purposes of this offence. ...' *R v Nursing* [2012] EWCA Crim 2521, [2013] 1 All ER 1139 at [9], [17]–[18], [20], per Lord Judge CJ

WILL

[For 50 Halsbury's Laws of England (4th Edn) (2005 Reissue) para 301 see now 102 Halsbury's Laws of England (5th Edn) (2010) para 1.]

[Note that the Supreme Court Act 1981 has been renamed the Senior Courts Act 1981.]

Informal or nuncupative will

[For 17(2) Halsbury's Laws of England (4th Edn) (Reissue) para 116 and 50 Halsbury's Laws of England (4th Edn) (2005 Reissue) para 373 see now 102 Halsbury's Laws of England (5th Edn) (2010) para 81.]

WITHIN

Within a period of 12 months

New Zealand [Harassment Act 1997, ss 3 and 4.] '[4] "Harassment" is defined in s 3 as follows:

3. **Meaning of harassment** – (1) For the purposes of this Act, a person harasses another person if he or she engages in a pattern of behaviour that is directed against that other person, being a pattern of behaviour that includes doing any specified act to the other person on at least two separate occasions within a period of 12 months.

...

'[5] The phrase "within a period of 12 months" has been the subject of conflicting judicial comment. In *Bakker v District Court HC* Hamilton CP35/99, 6 August 1999, Tompkins J said that:

Section 3(1) does not state from when the period of 12 months commences. Counsel

submitted, and I accept, that a reasonable interpretation of the section is that specified acts must occur on at least two separate occasions in the period commencing from 12 months before the filing of the application ... also I note that the requirement is not that there be at least two specified acts within that period, but that one or more specified acts must have occurred on at least two separate occasions within that period.

By way of contrast, in *Beadle v Allen* [2000] NZFLR 639 (HC), Potter J at [28] doubted that s 3(1) should be limited in the way suggested by Tompkins J:

... I doubt that s 3(1) should be limited in the way suggested by Tompkins J. Specified acts on at least two separate occasions within 12 months may be followed by a lull (perhaps as the result of a period of absence of the harasser), and then revived by a further specified act, such that the cumulative behaviour causes distress or threats to cause distress justifying a restraining order. I would consider such a pattern of behaviour capable of providing jurisdiction under section 3.

'[6] There is no reference in s 3(1) to the date of application qualifying when the period of 12 months begins or ends. The section simply says that the pattern of behaviour must include at least two specified acts within a period of 12 months, that is, within 12 months of each other. Justice Potter's reference to a "lull" being capable of reviving a pattern of behaviour nonetheless still requires there to be, in her words, a pattern of behaviour that started with "specified acts on at least two separate occasions within 12 months". Regardless of whether or not a lull then follows, the pattern of behaviour must have started with the commission of specified acts on at least two separate occasions within 12 months of each other. Justice Tompkins's distinction between two specified acts within 12 months, and one or more specified acts occurring on at least two separate occasions within that period, says nothing about when the 12-month period begins or ends. It simply notes that within the 12-month period, specified acts must have occurred at least twice: they could be the same specified act repeated twice, or two different specified acts each committed once. A pattern of behaviour does not require similarity in the specified acts that constitute it. The intention of

the Act is to catch harassers regardless of the particular, similar or different techniques of harassment they might use. The Act provides a remedy for harassment which consists of a pattern of behaviour that may be established with proof of any of the acts specified in s 4, provided they were done on at least two separate occasions within 12 months of each other.

‘[7] For the purpose of this judgment, I interpret s 3(1) to mean that specified acts must be committed on at least two occasions within 12 months of each other, that the last occasion does not need to be within 12 months of the application for a restraining order, that the pattern of behaviour evidenced by the commission of specified acts on two occasions within 12 months of each other can be revived after a “lull”, and that there need not be any similarity between the specified acts committed to establish a pattern of behaviour.’ *Mitchell v Martin* [2013] DCR 368 at [4]–[7], per Judge Hastings

WITHOUT ISSUE

[For 50 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 740 see now 102 Halsbury’s Laws of England (5th Edn) (2010) para 442.]

WITNESS

[For 17(1) Halsbury’s Laws of England (4th Edn) (Reissue) para 951 see now 12 Halsbury’s Laws of England (5th Edn) (2015) para 793.]

WITNESS ANONYMITY ORDER

In this Act a ‘witness anonymity order’ is an order made by a court that requires such specified measures to be taken in relation to a witness in criminal proceedings as the court considers appropriate to ensure that the identity of the witness is not disclosed in or in connection with the proceedings.

(Criminal Evidence (Witness Anonymity) Act 2008, s 2(1))

WORD

[For 50 Halsbury’s Laws of England (4th Edn) (2005 Reissue) para 536 see now 102 Halsbury’s Laws of England (5th Edn) (2010) para 247.]

WORK EQUIPMENT

See also USE

[Provision and Use of Work Equipment Regulations 1998, SI 1998/2306. Claimant, employed as a carer/driver by the defendant, was injured at patient’s home when pushing patient in a wheelchair down wooden ramp, which had been chosen by the defendant and installed by the National Health Service.] ‘[22] It seems to me that if the ramp was work equipment there cannot be any doubt that it was being used and thus that there are two critical questions which may in reality mould into one question—(1) was it work equipment and (2) if so, was it being used “at work”. Why I say the questions may mould into one question is that if one asks the question as the judge did—would a ramp of this kind, placed by an employer for use in a factory, be an installation and thus work equipment, there is, I believe, a danger of identifying a false starting point. It may be because of where it is installed, because of who installed it and the reason for which it was installed that provide a clear answer in the case of a ramp in a factory. It does not follow that because a ramp would be “work equipment” if it was installed at a factory, it must be “work equipment” when it is a ramp installed in Mrs Cotter’s house and used for many purposes including being used by the council when they collected her.

‘[23] I also however accept that because the ramp could be work equipment, it is not impossible that it was work equipment in this instance and, what is more, work equipment used by the claimant “at work” at least in the sense of in “the course of her employment”. Clearly, if the council had placed a wooden ramp against the door step for the specific purpose of enabling the claimant to wheel Mrs Cotter to the minibus, that ramp would be an “installation” for use at work and thus “work equipment” used at work by the claimant.

‘[24] How then is the line to be drawn? I start from this position. Clearly work equipment for which an employer is strictly liable must in some way have been selected by the employer for use by the employee before it can be work equipment for use at work under the regulations. If it were not for the fact that the 1998 Regulations clearly cover such equipment “provided for use or used by an employee” (my emphasis), there would be force in the argument that “provision” or “making available” would be the right test. But clearly if employer has allowed the use by an employee of the

employee's own equipment strict liability may attach, and thus provision or making available must include simple selection i.e. a consenting to the employee using such equipment.

'[25] The same, it seems to me, must be the position in relation to equipment supplied by a third party. If the employer has allowed the use at work of equipment supplied by a third party, again that may well have been sufficient selection by the employer and strict liability may well be imposed.

'[26] The above is reasonably easy to apply to "tools of the trade" as described by May LJ, both so far as their nature is concerned and so far as "at work" is concerned. A power saw taken to lop trees in a customer's garden would appear to be work equipment being used "at work" even if the power saw had been lent by a third party to the employee, provided the employee was acting with his employer's consent.

'[27] Something which has been "installed" on a permanent or long-term basis and which may have many uses seems to me to need different consideration. Whether or not it requires a closer territorial link, as Pill LJ has suggested it might in *Reid v PRP Architects* [2007] ICR 78 at [23], or not, I agree that one is dealing with something rather different than with "tools of the trade". Installation at a place of work by the employer may cause no difficulty, e.g. a ramp at a factory used all the time by employees. Even if more difficult, an installation which the employer allows to be used by his employees on a daily basis as a means of departing from or arriving at work and in relation to which under the lease there is a right to insist on repair, e.g. the lift in *Reid's* case is covered by the regulations. But an installation put there by some third party, not installed for the particular purpose for which an employer ultimately allows an employee to use it, used most of the time by persons other than employees of the council and in respect of which in the ordinary course of things there was no duty or indeed right to repair or maintain, seems to me to be in a different category. Which side of the line does it fall and how does one test the position?

'[28] As the judge said quoting from Neuberger LJ's judgment in *Reid's* case (at [38]) it is unhelpful to redefine what is already the subject of definitions in the regulations. My preferred route for testing the matter is to identify as a starting point what is alleged as the strict liability and ask oneself whether Parliament would have intended that liability to apply in the particular case. There is

a temptation to start from the definitions, and then analyse them as if one can do some mathematical calculation and thus provide an answer. But if the answer imposes a liability which it seems improbable that Parliament intended, one must question whether the construction by the mathematical process has got it right. The courier and the bridge example provided by Mr Preston would provide one answer by the process of starting with the definitions and working, what I have termed, mathematically. It would include a broad definition of selection, i.e. the employer instructed the courier to take that route, but I suggest the answer is so extravagant that there must be another process.

'[29] In this case, what is being alleged is that the employer, the council, is strictly liable for failing to *maintain* this ramp in an efficient state or in good repair (or possibly for failing to ensure *construction* suitable for the purpose). Strict liability should only be imposed by clear language. For someone to have the obligation to maintain something, it would normally have to be within their power to be able to do so without obtaining someone else's consent. The duty to maintain could not normally apply to something which was part of someone else's property. It could furthermore not normally apply to something in relation to which access was limited, and indeed in relation to which, if some maintenance was necessary, consent to carry out the work was necessary. It would not normally apply in a situation in which, if the employer had turned up at the premises to say "I have come to maintain your ramp", they might have got a look of some surprise from the owner who, if anybody, would have expected that person to be the NHS.

'[30] The same sort of points can be made in relation to construction. This ramp was supplied by the NHS and, certainly until it was used by the council's employees, no one could have suggested that the council had in some way been responsible for constructing it. Even once it was used by council employees, it would not naturally be said that the council had in any way constructed the ramp or adapted it for use. Indeed, as I read the judge's judgment, despite Mr Preston's suggestion, I believe the judge was not actually finding a breach of reg 4(1) of the 1998 Regulations.

'[31] My view is that Parliament would not have contemplated that either reg 4 or 5 should impose strict liability in respect of construction or maintenance on the council in relation to this ramp. To reach that result requires a sensible construction of the 1998 Regulations in the

same way as there has to be a sensible construction of the 1998 Regulations to exclude Mr Preston's courier/bridge example. It seems to me that both regs 4 and 5 contemplate some underlying relationship, from which it would be natural to contemplate *some* responsibility for construction or maintenance or at the least a right to construct or maintain, before the obligation to "ensure" suitability for performance or maintenance would apply. This seems to me to be enforced by reg 6 which requires inspection after installation or after assembly at a new site. Strict liability should not flow out of a position in which there was no right and no responsibility to do that thing or insist on the doing of that thing for which strict liability is being imposed. When one weighs up all the factors—where the ramp was installed, who installed it originally, how permanent it was, what it was usually used for, who looked after it in the ordinary way, and how it came to be used by an employee of the council—one simply does not find anything from which could be spelled out a right over, or the beginnings of a responsibility for, the construction or maintenance of this ramp outside the 1998 Regulations.

'[32] It is said in this instance that the ramp was movable and that the council chose to use the ramp and, in effect, selected it as work equipment. In my view neither mobility nor choice provides a complete answer. If, when they inspected the ramp, the council had noticed a lack of repair, their common law duty would have meant they should have asked the NHS or the house owner to allow them to remove the ramp and replace with another. No one would, I believe, have said to the council, "We need not change the ramp because you have a right and obligation to maintain it or you are responsible for its construction". Furthermore choosing the ramp does not make it work equipment anymore than choosing to run the wheelchair across the room makes the carpet, however movable, work equipment. The fact that something used is movable does not make it work equipment and, because an employer allows it to be used, it would not be natural to infer that the choice gave rise to an obligation to maintain it, which heretofore the employer had no right to do and would have no right to do thereafter.

'[33] I accept that, as I have previously indicated, true "tools of the trade" used by an employee, albeit supplied by a third party, might well give rise to strict liability, despite arguments about the right of an employer to maintain prior to use by the employee or rights to maintain after return to the third party. But

that is not the case before us and it is very different from the situation relating to an installation permanently at someone's premises and used for many purposes.

'[34] Each case will turn on its own facts and require the weighing of all factors. The most significant factors, in my view, in this case are that this ramp was installed by others, it had a permanence, it was used most of its time by people other than the council's employees, the council had no ability to "maintain" it, and in ordinary parlance the ramp was part of Mrs Cotter's premises. There was nothing from which anyone could suggest that the council had a right to maintain it or from which anyone would naturally suggest that the council might have had any responsibility for maintenance over its years of use. Even if use by their employee gave rise to a common law obligation to check it was in good repair, and even if found in bad repair, it would not naturally occur to anyone that lack of repair was because the council had failed to *maintain*.

'[35] There must, in my view, at the very least be factors from which can be spelled out some right (as there was in *Reid's* case—see Neuberger LJ's judgment at [41](e)) to carry out maintenance before it is right to impose strict liability for failure.'

...

'[39] ... If the Provision and Use of Work Equipment Regulations 1998, SI 1998/2306, were expressly confined to "work equipment" in the factory, office, hospital, shop, school or like workplaces there would in principle be no difficulty with their operation. The employer would know what "work equipment" he was providing, or was being used, and he would be in a position to discharge his obligations as to its suitability, maintenance and inspection under regs 4–6. But many employees do not work exclusively on site; and the ordinary course of work of a peripatetic employee will commonly require him to take his chance with items of machinery etc which he can fairly be regarding as "using" at work (see reg 3(2)) but which has not been provided for him by his employer and of the use of which the employer will often be unaware. The difficulty raised by the 1998 Regulations lies in the fact that, considered on its own, the definition of "work equipment" in regs 2(1) and 3(2) is capable of extending to such items of equipment.

'[40] Take the case of the employee accountant sent by his London firm to audit the accounts of a Yorkshire client. His work is estimated to take a week during which he is given a free run of the client's facilities. By way

of a deserved break from the sales ledger he uses the coffee machine which, as a consequence of defective maintenance, ejects scalding water on to him causing him injury. He may well have a claim against the client. But the proposition—one that Mr Berrisford was, if necessary, willing to espouse—that in circumstances such as this the coffee machine is “work equipment” within the meaning of the 1998 Regulations, with the consequence that the accountant’s employer is treated as liable for breaching his own absolute obligations in relation to the suitability, maintenance and inspection of it appears to me to be absurd. Leaving aside the question of the extent to which the 1998 Regulations may be said to impute to the employer knowledge of all putative items of “work equipment” used by his peripatetic employees in the course of their travels, in my view the answer to such an absurd consequence is that it is implicit in the 1998 Regulations that an item will ordinarily only be capable of constituting “work equipment” if it is one in respect of which the employer has a right of control sufficient to enable him to discharge those obligations. The purpose of the 1998 Regulations is to impose on employers the practical task of ensuring that equipment that the employee will be using at work will be safe. The 1998 Regulations are directed at prevention of injury and should be interpreted in a practical way. An employer can only be expected to discharge the obligations they impose in relation to equipment which he is, or should be, aware his employee will be using and over which he has the necessary control to enable him to perform them. If he does not have such control, then in my view the equipment will not be “work equipment” for the purposes of the 1998 Regulations at all.

[41] There will always be cases which fall into a grey area. If, for example, an employee prefers to use his own personal tool kit rather than the one provided by the employer, he would be “using” that equipment at work but it might be said that his tool kit would not strictly be in the control of the employer so as to enable the employer to discharge any safety obligations in respect of it. But I doubt that that would be right. If the employer were aware that the employee was using his own tool kit, I doubt that he could simply allow such use to continue and regard himself as exempt from the 1998 Regulations in relation to that tool kit. He would, in principle, be entitled to direct the employee how to perform his work, which would extend to a requirement that the employee should either use the firm’s tool kit or

else allow the employer to treat the personal tool kit as the employer’s for the purposes of the 1998 Regulations. I would consider that in such a case the employer would have sufficient control over the personal toolkit for those purposes.

[42] Other cases will be more difficult, but I do not regard it as helpful to speculate as to the problems that could arise. The facts of the present case are less extreme than my auditing example. But for the reasons given by Waller and Richards LJ, I agree that Northamptonshire County Council had no control over the ramp sufficient to enable them to perform the obligations imposed by the 1998 Regulations in respect of it. It follows that it was not “work equipment” at all.’ *Smith v Northamptonshire County Council* [2008] EWCA Civ 181, [2008] 3 All ER 1054 at [22]–[35], per Waller LJ, and at [39]–[42], per Rimer LJ

[Provision and Use of Work Equipment Regulations 1998, SI 1998/2306. The pursuer was injured when trying to repair the closer on the door of the central control room on an oil platform and sued for breach of the regulations.] [5] The pursuer says, first, that the door closer was “work equipment”. This is defined by reg 2(1) as—“any machinery, appliance, apparatus, tool or installation for use at work (whether exclusively or not)”. The pursuer says that the door closer was a piece of machinery or apparatus for use at work. People working on the platform were using it every time they entered or left the control room. Secondly, the pursuer says that the duties imposed on his employer by reg 3(2) apply to the door closer because it was “used” by an employee at work. Regulation 2(1) defines “use” to include any activity involving work equipment, including “repairing ... maintaining, servicing”. So it was being used by the pursuer as repairer and by any other KBR employees who went through the door in the course of their work.

...

[10] My Lords, let us first consider the question of whether the door closer was work equipment. The 1998 Regulations were intended, as I have said, to implement the equipment directive (EC Council Directive 89/655 concerning the minimum safety and health requirements for the use of work equipment by workers at work (OJ L393, 30.12.1989, p 13)), although, as the explanatory note points out, the provisions of reg 3(3)–(5), which place duties upon non-employers having control of work equipment, go beyond what the directive requires. The definition of work equipment in the directive is “any machine,

apparatus, tool or installation used at work". The definition in the 1998 Regulations, which I have already quoted, uses the words "for use at work". I imagine the change was made to forestall literalist arguments that a defective machine which caused injury while it was not actually being used was not work equipment. The domestic definition requires one to ascertain the purpose of the apparatus etc. What is it for? If it is for use at work, then it is work equipment.

[11] If one takes this simple approach, then the answer seems to me to be clear. Everyone using the control room was using it for the purposes of their work. They used the door to enter or leave the control room. And in doing so, they used the closer. Its purpose was for use at work. Giving the definition its ordinary meaning, the closer was work equipment. The question is whether it can be excluded by some implied qualification.

[12] One possibility is that the 1998 Regulations impliedly exclude apparatus which forms part of the premises upon which the work takes place. The state of premises is treated separately from equipment by the Workplace (Health, Safety and Welfare) Regulations 1992, SI 1992/3004. In the case of ordinary work premises on land, this might be a good argument. But I do not think it applies to equipment which is attached to an offshore platform. Regulation 5(1) of the Offshore Installations (Operational Safety, Health and Welfare) Regulations 1976, SI 1976/1019 provided in general terms that "All parts of every offshore installation and its equipment shall be so maintained as to ensure the safety of the installation and the safety and health of the persons thereon".

[13] This made no distinction between the fabric of the installation and the equipment. The duty applied equally to both. And the liability which it creates is strict: *Breslin v Britoil plc* 1992 SLT 414n. After the equipment directive came into force, the duties of the owners or operators of offshore installations were divided between two regulations. One is the Offshore Installations and Wells (Design and Construction, etc) Regulations 1996, SI 1996/913, which deals principally with the duty to maintain the "integrity" (defined as "structural soundness and strength, stability and ... buoyancy" of the installation) but also has certain "additional requirements" similar to those applicable to workplaces on shore. None of these duties deal with equipment. The other source of duty is the equipment regulations.

[14] This seems to me to point to an

intention that the equipment regulations were to apply to all equipment on an offshore installation. In the nature of things, a lot of such equipment is going to be bolted or otherwise attached to the platform, but I do not think that this prevents it from being work equipment if it is for use at work. The same may be said of the lift which was (rightly, I think) held to be work equipment in *Reid v PRP Architects* [2006] EWCA Civ 1119, [2007] ICR 78. The Council Directive (EEC) 89/391 (on the introduction of measures to encourage improvements in the safety and health of workers at work) (OJ 1989 L183 p 1) (the framework directive), which gave rise to individual directives such as the equipment directive, said that the directives were needed "to guarantee a better level of protection of the safety and health of workers". It went on to say: "this Directive does not justify any reduction in levels of protection already achieved in individual Member States, the Member States being committed, under the Treaty, to encouraging improvements in conditions in this area".

[15] Thus the framework directive imposed a European ratchet upon levels of protection for workers and it would in my opinion be wrong to construe the 1996 Regulations and the 1998 Regulations as giving workers on offshore installations any less protection than they had under the 1976 Regulations. It is not suggested that a mechanical defect in the door closer falls within the Offshore Installations regulations and I therefore see no need to limit the ordinary language of the definition of work equipment in the equipment regulations in order to exclude it.

[16] An alternative argument, which found favour in the Court of Session, was based upon the decision of the Court of Appeal in *Hammond v Metropolitan Police Comr* [2004] EWCA Civ 830, [2004] ICR 1467. In that case the claimant was a mechanic employed by the Commissioner of Police. He was working on the wheel of a police dog van when the shearing of a wheel bolt caused him to suffer injury. The question was whether the van was "work equipment" within the meaning of the 1992 Regulations, which had its own definition of "work equipment": "any machinery, appliance, apparatus or tool and any assembly of components which, in order to achieve a common end, are arranged and controlled so that they function as a whole".

[17] The scope of the duty was defined by reg 4(1), which was in similar terms to reg 3(2) of the 1998 Regulations: "The requirements imposed by these Regulations on an employer shall apply in respect of work equipment

provided for use or used by any of his employees who is at work”.

‘[18] Giving the leading judgment, May LJ said, at [24]:

“Although the definition of what may be work equipment is to be found in Regulation 2, the ambit of the expression ‘work equipment’ in these Regulations is determined by Regulation 4... This indicates... that the Regulations are concerned with what may loosely be described as the tools of the trade provided by an employer to an employee to enable the employee to carry out his work... The van might well be work equipment of a policeman driving it, but not of the police mechanic repairing it...”

‘[19] I must respectfully differ. Regulation 2 defines work equipment. Regulation 4(1) tells you which work equipment the regulations apply to. The requirements imposed by the regulations do not apply to all work equipment but only in respect of work equipment “provided for use or used by any of his employees who is at work”. But that does not mean that “the ambit of the expression ‘work equipment’ in these Regulations is determined by Regulation 4”. The effect of reg 4 is that the regulations apply only to a subset of the category work equipment as defined in reg 2. You first decide whether some apparatus is work equipment or not, and then you decide whether the regulations apply in respect of it.

‘[20] It follows that I cannot accept that something can be work equipment in relation to one person but not to another. If the dog van was “machinery, appliance [or] apparatus” (which I should have thought it was) under the 1992 definition and “for use at work” under the 1998 definition (which I also think it was), then in my opinion it was work equipment.

‘[21] The Court of Appeal was greatly exercised by the possibility that if a car brought to a garage for repair was regarded as work equipment in relation to a mechanic employed by the garage, his employer would be strictly liable for defects in the car over which he could have no possible control. That would certainly be a strange result. But in my opinion the solution to the difficulty must be found in the provision which delimits the area of the employer’s responsibility (reg 4(1) of the 1992 Regulations and 3(2) of the 1998 Regulations) rather than by giving an artificial and relativist meaning to the definition of work equipment.

‘[22] If one were simply applying the

equipment directive, the garage case posed by the Court of Appeal would cause no difficulty. Article 3.1 says that the general duty of the employer is to—

“take the measures necessary to ensure that the work equipment made available to workers in the undertaking and/or establishment is suitable for the work to be carried out or properly adapted for that purpose and may be used by workers without impairment to their safety or health.

In selecting the work equipment which he proposes to use, the employer shall pay attention to the specific working conditions and characteristics and to the hazards which exist in the undertaking and/or establishment, in particular at the workplace, for the safety and health of the workers, and/or any additional hazards posed by the use of work equipment in question.”

‘[23] In the garage case, it seems to me that although the car brought in for repair may be work equipment, it has not been “made available to workers in the undertaking and/or establishment”. The notion of “selection” of the work equipment by the employer does not apply to equipment which his customers bring to be repaired. It is therefore outside the scope of the duty created by the directive.

‘[24] But the directive does not say that work equipment must have been made available to the particular employee who has been injured. It speaks of the equipment being made available to

“workers in the undertaking”. That, in my view, means all or any of the workers in the undertaking. When one is considering the persons to whom the equipment has been made available, the relevant unit is the undertaking and not the particular worker. So, for example, if an undertaking carrying on a delivery business provides vans for its employees, they will be work equipment made available to workers in the undertaking. If a van driver repairs a puncture and is injured by a defect in the wheel, he will have been using the work equipment. It cannot in my opinion make any difference if the repair is done by a different worker in the same undertaking—for example, a specialised mechanic like Mr Hammond.

‘[25] I therefore think that in *Hammond v Metropolitan Police Comr* [2004] ICR 1467, the question which should have been asked was not whether the van was work equipment (it clearly

was) but whether Mr Hammond was a worker in the undertaking to which it had been supplied. I should have thought he was—the policemen who drove the dog van and Mr Hammond were all employed (or deemed to be employed) by the Commissioner in a single undertaking, the Metropolitan Police. The fact that the van belonged to a separate legal entity, the Metropolitan Police Authority, does not seem to me to be relevant. On the other hand, if a van used by the Royal Mail is taken for repair to an independent garage, the garage mechanic is not a worker in the undertaking, to whose workers the van has been supplied. That undertaking is the Royal Mail and not the garage.

[26] The 1998 Regulations should in my opinion be interpreted to accord with the principle stated in the directive. It should therefore have covered Mr Hammond repairing a defective police car but not a mechanic repairing a third party's car which had not been provided as equipment to the undertaking for which he worked. There is in my opinion no difficulty about construing the regulations to include Mr Hammond. But, if they are read literally, there may be a difficulty about excluding the worker repairing a third party's equipment. That is because, instead of using the term "made available to workers in the undertaking", the 1998 Regulations (3(2)) say "provided for use or used by an employee of his at work". Do the words "or used" create liability for injury caused by any actual use (including repair) of any work equipment, whether provided by the employer or not? This would go far beyond the requirements of the directive. I doubt whether they were intended to have such a wide meaning, especially in view of the imposition of liability by reg 3(3)(b) on a person who is not the employer but has control of work equipment. That might, in an appropriate case, make the Royal Mail liable for injury caused to a garage employee by its defective vehicle. But it is hard to see why the garage owner should be liable as well. It may be that the words "or used" were inserted to cover a situation in which, with the employer's consent, the employee uses some work equipment which one would ordinarily expect to have been provided by the employer: say, his own saw or screwdriver. This may be another case in which the draftsman thought he could clarify the meaning of a directive but would have done better to leave its language alone. But for reasons I shall explain, it is not necessary in this case to decide the precise limits of reg 3(2).

[27] In holding that the door closer was not

work equipment, the Division followed *Hammond v Metropolitan Police Comr* [2004] ICR 1467. It led the judges to the conclusion that the door closer was not work equipment and for the reasons I have given, I think that was wrong. The door closer was apparatus for use at work. ...' *Spencer-Franks v Kellogg Brown and Root Ltd* [2008] UKHL 46, [2009] 1 All ER 269 at [5], [10]–[27], per Lord Hoffmann

WORKER

See also EMPLOYEE

[1] The appellant (Autoclenz) provides car-cleaning services to motor retailers and auctioneers. It has contracts with British Car Auctions (BCA) for cleaning vehicles at a number of different places. The respondents (the claimants) are 20 individual valeters who at the relevant time provided car-cleaning services at BCA's Measham site in Derbyshire. In these proceedings the claimants say that they were workers within the meaning of the National Minimum Wage Regulations 1999, SI 1999/584 and of the Working Time Regulations 1998, SI 1998/1833 and that, as workers, they were entitled to be paid in accordance with the 1999 Regulations and to receive statutory paid leave under the 1998 Regulations. Their case is that they were paid neither.

[2] The question is whether the claimants were workers within reg 2(1) of the 1999 Regulations, which adopted the definition in s 54(3) of the National Minimum Wage Act 1998, and in reg 2(1) of the 1998 Regulations. The definition of worker is in materially identical terms in both sets of regulations as follows:

"... 'worker' ... means an individual who has entered into or works under ... (a) a contract of employment; or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual ..."

Materially identical definitions of employee and worker appear in various other statutes and regulations concerning employment rights and protection against unlawful discrimination in the employment field.

...

‘[38] ... I also agree with [the Court of Appeal] that the ET [Employment Tribunal] was entitled to hold that the documents did not reflect the true agreement between the parties and that, on the basis of the ET’s findings, four essential contractual terms were agreed: (1) that the valeters would perform the services defined in the contract for Autoclenz within a reasonable time and in a good and workmanlike manner; (2) that the valeters would be paid for that work; (3) that the valeters were obliged to carry out the work offered to them and Autoclenz undertook to offer work; and (4) that the valeters must personally do the work and could not provide a substitute to do so.... It follows that, applying the principles identified above, the Court of Appeal was correct to hold that those were the true terms of the contract and that the ET was entitled to disregard the terms of the written documents, in so far as they were inconsistent with them.

‘[39] For the reasons given above, I agree with the Court of Appeal that the ET was entitled to hold that the claimants were workers because they were working under contracts of employment within the meaning of reg 2(1) of each of the 1999 Regulations and the 1998 Regulations. They were within limb (a) of the definitions set out in para [2], above. Since the question whether the claimants were workers within limb (b) would only arise if the claimants had not entered into a contract of employment, that question does not arise, although, like the ET, I would have held that they were in any event working under contracts within limb (b). ...’ *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] 4 All ER 745 at [1]–[2], [38]–[39], per Lord Clarke SCJ

[Whether a barrister who held part-time judicial office as a recorder, paid on the basis of a daily fee, was a ‘worker’ for the purposes of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, SI 2000/1551. Regulation 1(2) defines a ‘worker’ as ‘an individual who has entered into or works under ... (a) a contract of employment; or (b) any other contract... whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contact that of a client or customer of any profession or business undertaking carried on by the individual. Regulation 17 provides that they do not apply to any individual in his capacity as the holder of a judicial office if he is remunerated on a daily fee-paid basis.] ‘[30] The Court of Justice stated in its judgment

([2012] All ER (EC) 757 at 779 (para 43)):

“It is ultimately for the referring court to examine to what extent the relationship between judges and the Ministry of Justice is, by its nature, substantially different from an employment relationship between an employer and a worker. The court may, however, mention to the referring court a number of principles and criteria which it *must* take into account in the course of its examination.” (Emphasis added.)

The principles and criteria which it then set out include the following. (1) The term “worker” is used in the definition of the scope of the Framework Agreement [the Framework Agreement on part-time work, which appears in the Annex to Council Directive (EC) 97/81 as amended by Council Directive (EC) 98/23] to draw a distinction from a self-employed person, and the court will have to bear in mind that this distinction is part of the spirit of the Framework Agreement on part-time work: para 44, referring to para 48 of the opinion of the Advocate General. (2) The rules for appointing and removing judges must be considered, and also the way their work is organised. The fact that judges are expected to work during defined times and periods, albeit with a greater degree of flexibility than members of other professions, and that they are entitled to benefits such as sick pay are also relevant: paras 45 and 46. (3) The fact that judges are subject to terms of service and that they might be regarded as workers within the meaning of the Framework Agreement on part-time work would not undermine the principle of the independence of the judiciary, or respect for the national identities of member states. It merely aims to extend to those judges the scope of the principle of equal treatment and to protect them against discrimination as compared with full-time workers: paras 47 to 49.

...

‘[37] ... Following the guidance that the Court of Justice provided in para 43 of its judgment (see [30], above), account in arriving at this decision was taken of the following matters mentioned in paras 44–46: (i) the fact that the character of the work that a recorder does in the public service differs from that of a self-employed person; (ii) the rules for their appointment and removal, to which no self-employed person would subject himself; (iii) the way their work is organised for them, bearing in mind that recorders, in common with all other part-time judges, are expected to work

during defined times and periods; and (iv) their entitlement to the same benefits during service, as appropriate, as full-time judges.

[38] The court does not accept that the terms and conditions laid down by the Lord Chancellor for recorders do not give a true picture of the reality of the work that is done by a recorder. On the contrary, Mr O'Brien's evidence shows that he was on one occasion required to explain why he had in two successive years failed to achieve the required number of sittings, and Mr O'Brien had to explain and apologise. The reality is that recorders are expected to observe the terms and conditions of their appointment, and that they may be disciplined if they fail to do so. The very fact that most recorders are self-employed barristers or solicitors merely serves to underline the different character of their commitment to the public service when they undertake the office of recorder.

[39] As the Court of Justice made clear in para 44, the spirit and purpose of the Framework Agreement requires that a distinction must be made between the category of "worker" and that of self-employed persons. The matters referred to in the previous paragraph, taken together, really speak for themselves. The self-employed person has the comparative luxury of independence. He can make his own choices as to the work he does and when and where he does it. He works for himself. He is not subject to the direction or control of others. Of course, he must adhere to the standards of his trade or profession. He must face the reality that, if he is to succeed, he must satisfy the needs and requirements of those who engage his services. They may be quite demanding, and the room for manoeuvre may be small. But the choices that must be made are for him, and him alone, to take.

...
[42] For these reasons the court holds recorders are in an employment relationship within the meaning of cl 2.1 of the Framework Agreement on part-time work and that, as the result to be achieved by the PTWD is binding on the United Kingdom, they must be treated as "workers" for the purposes of the 2000 Regulations.' *O'Brien v Ministry of Justice (Council of Immigration Judges intervening)* [2013] UKSC 6, [2013] 2 All ER 1 at [30], [37]–[39], [42], per Lord Hope DP

[Employment Rights Act 1996, s 230(3); Limited Liability Partnerships Act 2000, s 4(4): whether a member or a partner of a limited liability partnership is a 'worker' for the purposes of protection under the Employment

Rights Act 1996 for 'whistle-blowing'.] [1] Can a member of a limited liability partnership (LLP) be a "worker" within the meaning of s 230(3) of the Employment Rights Act 1996 ("the 1996 Act")? If she is, she may claim the benefit of the protection given to "whistle-blowers" in ss 43A–43L of that Act, inserted by the Public Interest Disclosure Act 1998. There are also potentially other rights involved if the member is a "worker".

[2] Section 230(3) of the 1996 Act defines two sorts of worker for the purpose of that Act. Limb (a) covers an individual who has entered into, works under or has worked under "a contract of employment". No one has suggested that the contract between the member and the LLP in this case was a contract of employment. The question is whether the member falls within limb (b) of s 230(3), which covers an individual who has entered into or works under or worked under—

"any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual ..."

[3] Section 230(5) is also relevant:

"In this Act 'employment' ... (b) in relation to a worker, means employment under his contract; and 'employed' shall be construed accordingly."

Section 230(4) provides that in the Act, "employer" means the person by whom the worker is employed.

...
[16] The immediately striking thing about this case is how much hard work has to be done in order to find that a member of an LLP is *not* a worker within the meaning of s 230(3)(b) of the 1996 Act. It is common ground that the appellant worked "under a contract personally to perform any work or services". It is now common ground that she provided those services "for" the LLP. It is also now common ground that the LLP was not her "client or customer". The Court of Appeal accepted ([2012] EWCA Civ 1207, [2013] 1 All ER 844) at para [69] that there was a "powerful case" that the definition was satisfied. How then can it be said that she was not a "worker" for this purpose?

...
 '[20] We cannot know what prompted the inclusion of s 4(4) in the 2000 Act (and intriguingly, the Law Commissions do not refer to it either in their Consultation Paper or in their Report). We do know that s 4(4) has caused some bewilderment among English lawyers. In *Tiffin v Lester Aldridge LLP* [2012] EWCA Civ 35, [2012] 2 All ER 1113, [2012] ICR 647 (at [31]), Rimer LJ commented that—

"[t]he drafting of s 4(4) raises problems ... That is because in law an individual cannot be an employee of himself. Nor can a partner in a partnership be an employee of the partnership, because it is equally not possible for an individual to be an employee of himself and his co-partners (see *Cowell v Quilter Goodison Co Ltd* [1989] IRLR 392). Unfortunately, the authors of s 4(4) were apparently unaware of this."

He went on to conclude that what s 4(4) must have been getting at is not what it says that it is getting at, which is whether the member "would be regarded ... as employed by the partnership" if the members of the LLP were "partners in a partnership"; instead, in his view, it must have been getting at whether the LLP member would be regarded as a *partner* had the LLP been a partnership.

'[21] But once it is recognised that the 2000 Act is a UK-wide statute, and that there is doubt about whether partners in a Scottish partnership can also be employed by the partnership, then there is no need to give such a strained construction to s 4(4). All that it is saying is that, whatever the position would be were the LLP members to be partners in a traditional partnership, then that position is the same in an LLP. I would hold, therefore, that that is how s 4(4) is to be construed.

'[22] The issue in *Tiffin* was whether a member of an LLP could make a claim for unfair dismissal against the LLP. That, of course, depends, not upon whether she is a "worker" in the wider sense used in s 230(3)(b) of the 1996 Act, but upon whether she is an employee under a contract of employment. On any view, "employed by" in s 4(4) would cover a person employed under a contract of service.

'[23] The question for us is whether "employed by" in s 4(4) bears a wider meaning than that and also covers those who "undertake to do or perform personally any work or services for another party to the contract". In my view, it does not.

'[24] First, the natural and ordinary meaning of "employed by" is employed under a contract of service. Our law draws a clear distinction between those who are so employed and those who are self-employed but enter into contracts to perform work or services for others.

'[25] Second, within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them. The arbitrators in *Hashwani v Jivraj* [2011] UKSC 40, [2012] 1 All ER 629, [2011] 1 WLR 1872 were people of that kind. The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by someone else. The general medical practitioner in *Hospital Medical Group Ltd v Westwood* [2012] EWCA Civ 1005, [2012] IRLR 834, [2013] ICR 415, who also provided his services as a hair restoration surgeon to a company offering hair restoration services to the public, was a person of that kind and thus a "worker" within the meaning of s 230(3)(b) of the 1996 Act.

Had Parliament wished to include this "worker" class of self-employed people within the meaning of s 4(4), it could have done so expressly but it did not.

'[26] Thirdly, however, doing so would have raised the question of whether partners in a traditional partnership can also be workers for that partnership in this wider sense. That would be a very different question from whether they can be employees. If Parliament had indeed wished to exclude that possibility, which might have been a change in the law, it could be expected to do so directly and expressly, but it did not.

'[27] Fourthly, and perhaps most importantly, there are the provisions of s 230 of the 1996 Act itself. Section 230(1) defines an "employee" as an individual who has entered into, works, or has worked under a contract of employment. Section 230(2) defines a contract of employment as "a contract of service or apprenticeship". Section 230(5) expressly provides that, in the 1996 Act, "employment" means both the employment of an employee under a contract of employment and the employment of a worker under his contract. "Employed" is to be construed accordingly. Thus, in order to be able to use the words "employed" and "employment" in a wider sense than they would normally carry, so as to cover the employment of class (b) "workers" and

those for whom they work, Parliament expressly enacted an extension to what would otherwise be the natural and ordinary meaning of those words. Such an extension is conspicuously lacking in the 2000 Act. With the greatest of respect to Lord Clarke, I do not consider it possible to construe the wording of the 2000 Act, the conventional meaning of which is quite clear, by reference to an extended definition in an earlier Act which was restricted to that Act. “[F]or any purpose” in s 4(4) of the 2000 Act refers to all the purposes for which employment under a contract of service is relevant.

‘[28] For all those reasons, I conclude that s 4(4) of the 2000 Act does not mean that members of an LLP can only be “workers” within the meaning of s 230(3) of the 1996 Act if they would also have been “workers” had the members of the LLP been partners in a traditional partnership.’

...
‘[30] Having reached the conclusion that s 4(4) of the 2000 Act does not operate so as to exclude the appellant from being a “worker” within the meaning of s 230(3)(b) of the 1996 Act, it is necessary to consider the “more subtle” analysis addressed in the Court of Appeal, that “underlying the statutory definition of worker is the notion that one party has to be in a subordinate relationship to the other” (at para [71]). Elias LJ would have been “minded to hold that the member of an LLP would not by virtue of that status alone constitute either an employee or a worker” (at para [73]). If by that he meant only that there are some members of an LLP who are purely investors and do not undertake personally to work for the LLP, then of course I would agree. But if by that he meant that those members who do so undertake (whether by virtue of the membership agreement or otherwise) cannot be workers, then I respectfully disagree.’

...
‘[40] It is accepted that the appellant falls within the express words of s 230(3)(b). Judge Peter Clark held that she was a worker for essentially the same reasons that he held Dr Westwood to be a worker, that she could not market her services as a solicitor to anyone other than the LLP and was an integral part of their business. They were in no sense her client or customer. I agree.’

...
‘[46] In my view, the appellant clearly is a “worker” within the meaning of s 230(3)(b) of the Employment Rights Act 1996 and entitled to claim the protection of its whistle-blowing provisions. That conclusion is to my mind

entirely consistent with the underlying policy of those provisions, which some might think is particularly applicable to businesses and professions operating within the tightly regulated fields of financial and legal services. ... *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, [2014] 3 All ER 225 at [1]–[3], [16], [20]–[28], [30], [40], [46], per Lady Hale DP

WORSHIP

Place of worship

[Note that the Pastoral Measure 1983 is repealed as from 1 July 2012 by the Mission and Pastoral Measure 2011, s 111, Sch 9. The definition of ‘place of worship’, in the same terms as before, is now contained in the 2011 Measure, s 58(6).]

Religious worship

[Places of Worship Registration Act 1855, s 2; whether Church of Scientology was a ‘place of meeting for religious worship’.] ‘[60] On the approach which I have taken to the meaning of religion, the evidence is amply sufficient to show that Scientology is within it; but there remains the question whether the chapel at 146 Victoria Street is ‘a place of meeting for religious worship’.

‘[61] In my view the meaning given to worship in *Ex p Segerdal* [*R v Registrar General, ex p Segerdal* [1970] 2 QB 697, [1970] 3 All ER 886, CA] was unduly narrow, but even if it was not unduly narrow in 1970, it is unduly narrow now.

‘[62] I interpret the expression “religious worship” as wide enough to include religious services, whether or not the form of service falls within the narrower definition adopted in *Ex p Segerdal*. This broader interpretation accords with standard dictionary definitions. The *Chambers Dictionary* (12th edn, 2011) defines the noun “worship” as including both “adoration paid to a deity, etc” and “religious service”, and it defines “worship” as an intransitive verb as “to perform acts of adoration; to take part in religious service”. Similarly, the *Concise Oxford English Dictionary* (12th edn, 2011), defines “worship” as including both “the feeling or expression of reverence and adoration of a deity” and “religious rites and ceremonies”.

...
‘[64] There is a further significant point. If, as I have held, Scientology comes within the meaning of a religion, but its chapel cannot be

registered under the 1855 Act because its services do not involve the kind of veneration which the Court of Appeal in *Ex p Segerdal* considered essential, the result would be to prevent Scientologists from being married anywhere in a form which involved use of their marriage service. They could have a service in their chapel, but it would not be a legal marriage, and they could have a civil marriage on other “approved premises” under s 26(1)(bb) of the [Marriage Act 1949], but they could not incorporate any form of religious service because of the prohibition in s 46B(4). They would therefore be under a double disability, not shared by atheists, agnostics or most religious groups. This would be illogical, discriminatory and unjust. When Parliament prohibited the use of any “religious service” on approved premises in s 46B(4), it can only have been on the assumption that any religious service of marriage could lawfully be held at a meeting place for religious services by registration under the 1855 Act.

‘[65] I would overrule the decision in *Ex p Segerdal*; allow the appeal; declare that the chapel at 146 Queen Victoria Street is a place of meeting for religious worship within s 2 of the 1855 Act; and order the Registrar General to register the chapel under s 3 of the 1855 Act and as a place for the solemnisation of marriages under s 41(1) of the 1949 Act. ...’ *R (on the application of Hodkin) v Registrar General of Births, Deaths and Marriages* [2013] UKSC 77, [2014] 1 All ER 737 at [60]–[62], [64]–[65], per Lord Toulson SCJ.

WOULD

Would be a breach

[Availability of legal aid in immigration cases under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 10. Civil legal aid can be granted in ‘exceptional’ cases where (for the purposes of s 10(3)(a)) failure to provide legal aid would be a breach of an individual’s rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) or a breach of an individual’s enforceable EU rights.] ‘[30] Section 10(3) carefully describes the scope of the exceptional cases by reference to an individual’s Convention or EU rights. Unsurprisingly, s 10(3)(a) obliges the Director to make an exceptional case determination if he is of the opinion that it is necessary to make the

services available because failure to do so would be a breach of the individual’s Convention or EU rights. Section 10(3)(b) gives him a discretion to make a determination if he considers it “appropriate” to do so having regard to the risk that failure to do so would be a breach. Whether the denial of legal aid would be a breach of Convention or EU rights can only be judged by reference to the principles enunciated by the ECtHR and the CJEU to which we shall come shortly.

‘[31] We see no warrant for construing s 10(3)(a) as imposing a condition that an ECF determination should only be made where it can *definitely* be said (Coulson J’s formulation) that refusal would be a breach; or where there is a “*high level of probability*” that refusal would be a breach (Collins J’s test). There is no need to add a gloss to the wording of the statute “*would be a breach*”. In deciding whether there would be a breach, the Director should apply the principles to be derived from the case law (some of which is mentioned at para 27 of the Guidance). There is no need for elaboration. When determining whether a complaint of a breach of Convention rights has been established, the ECtHR does not ask itself whether there has definitely been a breach or whether there has been a breach to a high level of probability. It simply asks whether there has been a breach. In our view, this approach should inform the meaning of the words “would be a breach” in s 10(3)(a). We do not consider that the word “clearly” in the explanatory notes (see para [9], above) takes the argument any further. We should add that we accept the submission of Mr Chamberlain that the “*real risk of a breach*” is a concept which has no part to play in the exercise envisaged by s 10(3). Section 10(3)(a) speaks of the situation where a failure to make civil legal services available would be a breach, not where there would be a real risk of a breach. The concept of real risk has no part to play in the question whether the denial of legal aid would amount to a breach of an individual’s procedural rights under the Convention or under art 47 of the Charter.

‘[32] In short, therefore, if the Director concludes that a denial of ECF would be a breach of an individual’s Convention or EU rights, he must make an exceptional funding determination. But as we shall see, the application of the ECtHR and CJEU case law is not hard-edged. It requires an assessment of the likely shape of the proposed litigation and the individual’s ability to have effective access to justice in relation to it. The Director may conclude that he cannot decide whether there

would be a breach of the individual's Convention or EU rights. In that event, he is not required by s 10(3)(a) to make a determination. He must then go on to consider whether it is appropriate to make a determination under s 10(3)(b). In making that decision, he should have regard to *any* risk that failure to make a determination would be a breach. These words mean exactly what they say. The greater he assesses the risk to be, the more likely it is that he will consider it to be appropriate to make a determination. That is because, if the risk eventuates, there will be a breach. But the seriousness of the risk is only one of the factors that the Director may take into account in deciding whether it is appropriate to make a determination. He should have regard to all the circumstances of the case.' *R (on the application of Gudanaviciene) v Director of Legal Aid Casework (British Red Cross Society intervening)* [2014] EWCA Civ 1622, [2015] 3 All ER 827 at [30]–[32], per Lord Dyson MR, Richards and Sullivan LJ

WRECK

[For 43(1) Halsbury's Laws of England (4th Edn) (Reissue) para 1031 see now 94 Halsbury's Laws of England (5th Edn) (2008) para 987.]

WRITTEN MATERIAL

[Public Order Act 1986, s 29: 'written material' includes any sign or other visible representation; claim that publication of racially inflammatory material on the internet had not been of 'written material'.] '[29] For our part we think

that the meaning of "written material" as interpreted by s 29 is sufficiently clear to cover the present case without recourse to Hansard. The word "includes" in s 29 is plainly intended to widen the scope of the expression. We reject Mrs Turnbull's submission that the written material has to be in visible, comprehensible form with some degree of permanence. We also reject the submission that any assistance is to be obtained from the Obscene Publications Act 1959 which, as originally drafted, was not wide enough to embrace electronic publication.

...

'[36] The appellants' third ground of appeal contends that even if there was publication and the English court has jurisdiction, any publication was not of written material. We have covered most of the appellants' arguments on this point when dealing with the issue of jurisdiction and explained why in our view the contention is misconceived. For completeness we should say that we are not persuaded by Mr Davies's *eiusdem generis* argument which is that "written material" should be limited to something akin to a sign. What s 29 says is that "written material" *includes* any sign or other visible representation and in our view those words are sufficiently wide to include articles in electronic form.' *R v Sheppard* [2010] EWCA Crim 65, [2010] 2 All ER 850 at [29], [36], per Scott Baker LJ

WOUND

[For 11(1) Halsbury's Laws of England (4th Edn) (2006 Reissue) para 119 see now 25 Halsbury's Laws of England (5th Edn) (2016) para 142.]

Y

YEAR

[For 45(2) Halsbury's Laws of England (4th Edn) (Reissue) paras 203–205 see now 97 Halsbury's Laws of England (5th Edn) (2015) paras 303–305.]

[Note that the Income and Corporation Taxes Act 1988, s 832(1) has been repealed.]

YOUTH SENTENCE

Canada '55. To begin with, it is important to note that the definition of "sentence" found in subsection 2(1) of the *CCRA* [Corrections and Conditional Release Act, SC 1992, c 20] says that it "means a sentence of imprisonment and includes ... a youth sentence imposed under the *Youth Criminal Justice Act*". The appellant argues that the reference to a youth sentence imposed under the *YCJA* can mean nothing but

the entire sentence, ie the custodial and supervision components of the youth sentence. The respondent, on the other hand, says that such reference can only be to the custodial portion of the youth sentence.

...

'64. I note that subsection 2(1) of the *YCJA* defines the expression "custodial portion" of a youth sentence imposed under paragraphs 42(2)(n), (o), (q) or (r) as "the period of time, or the portion of the young person's youth sentence that must be served in custody before he or she begins to serve the remainder under supervision in the community ...".

'65. Thus, when subsection 89(3) of the *YCJA* and the definition of "sentence" found at subsection 2(1) of the *CCRA*, which incorporates a youth sentence within its meaning, are read together, it is my opinion that a youth sentence within the meaning of the definition can only be the custody period thereof. Hence, the reference to "youth sentence" in subsection 2(1) of the *CCRA* can only be directed to that portion of the youth sentence to which subsections 89(1) and 89(3) of the *YCJA* find application, ie a young person's period of custody.' *J P v Canada (Attorney-General)* [2010] FCJ No 430, 2010 FCA 90, 401 NR 73, FCA, at paras 55, 64–65, per Nadon JA

a risk to the health of humans through the consumption of, or contact with, food. (Food Standards Act 1999, s 28(5)).

Z

ZOONOSIS

'Food-borne zoonosis' means any disease of, or organism carried by, animals which constitutes